NORTH CAROLINA REPORTS

VOLUME 230

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NORTH CAROLINA REPORTS
VOL. 230

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1949

FALL TERM, 1949

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1950

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

Inasmuch as all the Reports prior to the 63rd 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:

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1 Murphey	"	5	"
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8 " "	"	30	"
9 Iredell Law	as	31	N. C.
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1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
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Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

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, 1949—FALL TERM, 1949.

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,
JOHN HILL PAYLOR.*

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

ADRIAN J. NEWTON.

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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*Appointed July 1, 1949.

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[1]	Morehead City.
PAUL B. EDMUNDSON[3]	Goldsboro.
WILLIAM I. HALSTEAD[4]	South Mills.
WILLIAM T. HATCH[4]	Raleigh.
WILKINS P. HORTON[4]	Pittsboro.

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.
J. C. RUDISILL[2]	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[3]	Salisbury
GEORGE A. SHUFORD[3]	Asheville
PEYTON MCSWAIN[3]	Shelby.
A. R. CRISP	Lenoir.
HAROLD K. BENNETT	Asheville.
SUSIE SHARP[4]	Reidsville.

EMERGENCY JUDGES

HENRY A. GRADY	New Bern.
FELIX E. ALLEY, SR.	Waynesville.
LUTHER HAMILTON[1]	Morehead City.

[1]Appointed Emergency Judge 12 July, 1949.
[2]Appointed 7 May, 1949.
[3]Term of office expired 30 June, 1949.
[4]Appointed 1 July, 1949.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER W. COHOON	First	Elizabeth City.
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.
MALCOLM B. SEAWELL	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. FARTHING	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.

SUPERIOR COURTS, SPRING TERM, 1949

The numbers 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 Carr

Beaufort—Jan. 17* (2); Feb. 21† (2); Mar. 21* (A); Apr. 11†; May 9† (2); June 27.
Camden—Mar. 14.
Chowan—Apr. 4; May 2†.
Currituck—Mar. 7.
Dare—May 30.
Gates—Mar. 28.
Hyde—May 23.
Pasquotank—Jan. 10†; Feb. 14†; Feb. 21* (A); Mar. 21†; May 9† (A) (2); June 6*; June 13† (2).
Perquimans—Jan. 17† (A); Apr. 18.
Tyrrell—Feb. 7†; Apr. 25.

SECOND JUDICIAL DISTRICT
Judge Morris

Edgecombe—Jan. 24; Mar. 7; Apr. 4† (2); June 6 (2).
Martin—Mar. 21 (2); Apr. 18† (A) (2); June 20.
Nash—Jan. 31; Feb. 21† (2); Mar. 14; Apr. 25† (2); May 30.
Washington—Jan. 10 (2); Apr. 18†.
Wilson—Feb. 7†; Feb. 14*; May 16*; May 23†; June 27†.

THIRD JUDICIAL DISTRICT
Judge Bone

Bertie—Feb. 14 (2); May 9 (2).
Halifax—Jan. 31 (2); Mar. 21† (2); May 2; June 6† (2).
Hertford—Feb. 28; Apr. 18 (2).
Northampton—Apr. 4 (2).
Vance—Jan. 10*; Mar. 7*; Mar. 14†; June 20*; June 27†.
Warren—Jan. 17*; Jan. 24†; May 23*; May 30†.

FOURTH JUDICIAL DISTRICT
Judge Parker

Chatham—Jan. 17; Mar. 7†; Mar. 21†; May. 16.
Harnett—Jan. 10*; Feb. 7† (2); Mar. 21* (A); Apr. 4† (A) (2); May 9†; May 23*; June 13† (2).
Johnston—Jan. 10† (A) (2); Feb. 14 (A); Feb. 21† (2); Mar. 7 (A); Mar. 14; Apr. 18 (A); Apr. 25† (2); June 27*.
Lee—Jan. 31† (A) (2); Mar. 28*; Apr. 4†; June 20† (A).
Wayne—Jan. 24; Jan. 31†; Feb. 7† (A); Mar. 7† (A) (2); Apr. 11; Apr. 18†; Apr. 25† (A); May 30; June 6†; June 13† (A).

FIFTH JUDICIAL DISTRICT
Judge Williams

Carteret—Mar. 14; June 13 (2).
Craven—Jan. 10*; Jan. 31† (2); Feb. 14; Apr. 11; May. 16†; June 6*.
Greene—Feb. 28 (2); June 27.
Jones—Apr. 4.
Pamlico—May 2 (2).
Pitt—Jan. 17†; Jan. 24; Feb. 21†; Mar. 21†; Mar. 28; Apr. 18 (2); May 9† (A); May 23† (2).

SIXTH JUDICIAL DISTRICT
Judge Frizzelle

Duplin—Jan. 10† (2); Jan. 31*; Mar. 14† (2); Apr. 11; Apr. 18†.
Lenoir—Jan. 24*; Feb. 21† (2); Apr. 25; May 16† (2); June 13† (2); June 27*.
Onslow—Mar. 7; May 30 (2).
Sampson—Feb. 7 (2); Mar. 28† (2); May 2; May 9†; June 13† (A) (2).

SEVENTH JUDICIAL DISTRICT
Judge Stevens

Franklin—Jan. 24† (2); Feb. 14*; Apr. 18*; May 2† (2).
Wake—Jan. 10*; Jan. 17†; Jan. 24† (A) (2); Feb. 21† (2); Mar. 7* (2); Mar. 21† (2); Apr. 4*; Apr. 18† (A); Apr. 25†; May 2† (A); May 9* (A); May 16† (3); June 6* (2); June 20† (2).

EIGHTH JUDICIAL DISTRICT
Judge Harris

Brunswick—Jan. 24; Apr. 4†; May 23.
Columbus—Jan. 31* (2); Feb. 21† (2); May 9*; June 20 (2).
New Hanover—Jan. 17*; Feb. 7† (A); Feb. 14†; Mar. 14 (2); Apr. 11† (2); May 16*; May 30† (2); June 13*.
Pender—Jan. 10; Mar. 28†; May 2.

NINTH JUDICIAL DISTRICT
Judge Burney

Bladen—Jan. 10; Mar. 21*; May 2†.
Cumberland—Jan. 17*; Feb. 14† (2); Mar. 7* (A); Mar. 14*; Mar. 28† (2); May 2* (A); May 9† (2); June 6*.
Hoke—Jan. 24; Apr. 25.
Robeson—Jan. 17† (A) (2); Jan. 31* (2); Feb. 28† (2); Mar. 21* (A); Apr. 11* (2); Apr. 25† (A); May 9* (A) (2); May 23† (2); June 13†; June 20*.

TENTH JUDICIAL DISTRICT
Judge Nimocks

Alamance—Jan. 31† (A); Feb. 28*; Apr. 4†; May 16* (A); May 30† (2).
Durham—Jan. 10*; Jan. 17† (2); Jan. 31† (A); Feb. 21*; Feb. 28† (A); Mar. 7† (2); Mar. 21† (A); Mar. 28*; Apr. 4* (A); Apr. 11† (A) (3); May 2† (2); May 23*; May 30† (A) (3); June 27*.
Granville—Feb. 7 (2); Apr. 11 (2).
Orange—Mar. 21; May 16†; June 13. June 20†.
Person—Jan. 31; Feb. 7† (A); Apr. 25.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Judge Phillips

Ashe—Apr. 18*; May 30† (2).
Alleghany—May 2.
Forsyth—Jan. 10* (2); Jan. 17† (A); Jan. 24† (2); Feb. 7* (2); Feb. 14† (A); Feb. 21† (2); Mar. 7* (2); Mar. 14† (A); Mar. 21† (2); Apr. 4* (2); Apr. 18 (A); Apr. 25; May 2 (A); May 16* (2); May 30† (A) (2); June 13* (2); June 20† (A) (2).

TWELFTH JUDICIAL DISTRICT

Judge Gwyn

Davidson—Jan. 31; Feb. 21† (2); Apr. 11† (A) (2); May 9; May 30† (A) (2); June 27.
Guilford—Greensboro Division—Jan. 10*; Jan. 17† (2); Feb. 7* (2)♦ Feb. 21† (A) (2); Mar. 7*; Mar. 28* (A); Apr. 4† (2); Apr. 18† (2); Apr. 25* (A); May 23*; June 6† (2); June 20*.
Guilford—High Point Division—Jan. 17* (A); Feb. 14† (A); Mar. 14*; Mar. 21† (2); May 2*; May 16† (A) (2); May 30*.

THIRTEENTH JUDICIAL DISTRICT

Judge Bobbitt

Anson—Jan. 17*; Mar. 7†; Apr. 18 (2); June 13†.
Moore—Jan. 24*; Feb. 14†; May 23*; May 30†.
Richmond—Jan. 10*; Feb. 7† (A); Mar. 21†; Apr. 11*; May 30† (A); June 20†.
Scotland—Mar. 14; May 2†.
Stanly—Feb. 7†; Feb. 14† (A); Apr. 4; May 16†.
Union—Feb. 21 (2); May 9.

FOURTEENTH JUDICIAL DISTRICT

Judge Armstrong

Gaston—Jan. 17*; Jan. 24† (2); Mar. 14* (A); Mar. 21† (2); Apr. 25*; May 23† (A) (2); June 6*.
Mecklenburg—Jan. 10*; Jan. 10† (A) (2); Jan. 24* (A) (2); Jan. 24† (A) (2); Feb. 7† (3); Feb. 7† (A) (2); Feb. 21† (A) (2); Feb. 28*; Mar. 7† (2); Mar. 7† (A) (2); Mar. 21† (A) (2); Mar. 21* (A) (2); Apr. 4† (2); Apr. 4† (A) (2); Apr. 18†; Apr. 18* (A); Apr. 25† (A); May 2† (2); May 2† (A) (2); May 16*; May 16† (A) (2); May 23† (2); May 30† (A) (2); June 13*; June 13† (A) (2); June 20†; June 27* (2).

FIFTEENTH JUDICIAL DISTRICT

Judge Warlick

Alexander—Feb. 7 (A) (2).
Cabarrus—Jan. 10 (2); Feb. 28†; Mar. 7† (A); Apr. 25 (2); June 13† (2).
Iredell—Jan. 31 (2); Mar. 14†; May 23 (2).
Montgomery—Jan. 24*; Apr. 11† (2).
Randolph—Jan. 31† (A) (2); Mar. 21† (2); Apr. 4*; June 27*.
Rowan—Feb. 14 (2); Mar. 7†; Mar. 14† (A); May 9 (2).

SIXTEENTH JUDICIAL DISTRICT

Judge Rousseau

Burke—Feb. 21; Mar. 14 (2); June 6 (3).
Caldwell—Jan. 10† (A) (2); Feb. 28 (2); May 9 (A); May 23† (2).
Catawba—Jan. 17† (2); Feb. 7 (2); Apr. 11† (2); May 9† (2).
Cleveland—Jan. 10; Mar. 28 (2); May 23† (A) (2).
Lincoln—Jan. 24 (A); Jan. 31†.
Watauga—Apr. 25 (2); June 13† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Judge Pless

Avery—Apr. 18 (2).
Davie—Mar. 28; May 30†.
Mitchell—Apr. 4 (2).
Wilkes—Jan. 17† (3); Mar. 7 (3); May 2† (2); June 6 (2).
Yadkin—Feb. 7 (3).

EIGHTEENTH JUDICIAL DISTRICT

Judge Nettles

Henderson—Jan. 10† (2); Mar. 7 (2); May 2† (2); May 30† (2).
McDowell—Jan. 17* (A); Feb. 14† (2); June 13 (2).
Polk—Jan. 31 (2).
Rutherford—Feb. 28†; Apr. 18† (2); May 16 (2); June 27† (2).
Transylvania—Apr. 4 (2).
Yancey—Jan. 24†; Mar. 21 (2).

NINETEENTH JUDICIAL DISTRICT

Judge Moore

Buncombe—Jan. 10† (2); Jan. 17 (A) (2); Jan. 24*; Jan. 31; Feb. 7† (2); Feb. 21*; Feb. 21 (A) (2); Mar. 7† (2); Mar. 21*; Mar. 21 (A) (2); Apr. 4† (2); Apr. 18*; Apr. 18 (A) (2); May 2; May 9† (2); May 23*; May 23 (A) (2); June 6† (2); June 20*; June 20 (A) (2).
Madison—Jan. 31† (A); Feb. 28; Mar. 28; Apr. 25; May 30; June 27.

TWENTIETH JUDICIAL DISTRICT

Judge Clement

Cherokee—Jan. 24† (2); Apr. 4 (2); June 20† (2).
Clay—May 2.
Graham—Jan. 10† (A) (2); Mar. 21 (2); June 6† (2).
Haywood—Jan. 10† (2); Feb. 7 (2); May 9† (2).
Jackson—Feb. 21 (2); May 23 (2); June 13† (A).
Macon—Apr. 18 (2).
Swain—Jan. 17† (A) (2); Mar. 7 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Judge Sink

Caswell—Mar. 21 (2).
Rockingham—Jan. 24* (2); Mar. 7†; Mar. 14*; Apr. 18†; May 9† (2); May 23* (2); June 13† (2).
Stokes—Jan. 3*; Apr. 4*; Apr. 11†; June 27*.
Surry—Jan. 10; Jan. 17; Feb. 14; Feb. 21 (2); Apr. 25; May 2; June 6.

*For criminal cases.
†For 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. T. L. HON, 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, eighth 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.
HOWARD H. HUBBARD, Clinton, LOGAN D. HOWELL, Raleigh, N. C., 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.
WILLIAM D. KIZZIAH, United States Marshal, Greensboro, N. C.
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, Third Monday in March and September. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, Third Monday in April and third Monday in October. OSCAR L. MCLURD, Clerk.

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, Asheville.
JACOB C. BOWMAN, 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 the examinations of the Board of Law Examiners as of the 18th day of March, 1949:

ALEXANDER, JAY WILSON, JR.	Charlotte.
BENCINI, ROBERT EMERY, JR.	High Point.
BLACKBURN, CHARLES FRANKLIN	Henderson.
BLACKBURN, GEORGE TEMPLETON	Henderson.
BRINKLEY, WALTER FOIL	Lexington.
BROGDEN, EUPHA ODIS, JR.	Raleigh.
BROWN, MAURICE WALDON	Chapel Hill.
BROWNE, ROBERT EDWARD, III	Wilmington.
BUCHANAN, MARCELLUS, III	Sylva.
BURGESS, CALE KIGHT, JR.	Raleigh.
CALDWELL, FRANK LEONARD	Durham.
CARPENTER, WALTER TRESSELL, JR.	Lenoir.
CARR, MICHAEL LEMUEL, JR.	Rocky Mount.
CHESNUTT, JAMES FLETCHER	Clinton.
COBLE, WARREN LEE	Oakboro.
ECKHOFF, PAUL SHEPPARD	Durham.
FERREE, MAX FULTON	Winston-Salem.
FRAZIER, RAWLS HARRELL	Wake Forest.
GORDON, CHARLES WILBURN, JR.	Spencer.
GREEN, PHILIP PALMER, JR.	Thomasville.
HEDRICK, ROBERT ALFRED	Statesville.
HENDERSON, DAVID NEWTON	Wallace.
HICKS, CLAUDE THOMAS	Pinnacle.
HORTON, HARRY PERRYMAN	Pittsboro.
JAMES, JOHN ALFRED	Elkin.
JOHNSTON, JOHN WILLIAM	Charlotte.
KORNEGAY, HORACE ROBINSON	Greensboro.
LACEY, ROBERT HOWARD	Newland.
LEE, CATHERINE SIMMONS POWELL	Whiteville.
LITTLE, ROBERT DICKSON	Raleigh.
LUCK, JAMES HARVEY	Cedar Falls.
MCDERMOTT, GEORGE MARTIN, JR.	Vass.
MACHEN, ERNEST WILLIAM, JR.	Chapel Hill.
*MAY, ROBERT LEE, JR.	Brevard.
MOORE, JOSEPH CALHOUN, JR.	Raleigh.
PAYNE, THOMAS ROBERT	Charlotte.
PEEL, ELBERT SIDNEY, JR.	Williamston.
PERSON, NORMAN HUGH	Fayetteville.
PREYER, LUNSFORD RICHARDSON	Greensboro.
REED, WESTON OLIN	Kinston.
RIDGE, PAUL HAROLD	Gibsonville.
ROBINSON, JOHN MOSELEY, JR.	Charlotte.
SANDERS, ROBERT GREGG	Charlotte.
SIGMON, JESSE CALEB, JR.	Newton.

*License not issued unless residence rule complied with.

SMITH, GENE COLLINSON	Chapel Hill.
SMITH, WILLIAM LESTER	Chapel Hill.
SWAIN, ROBERT STRINGFIELD	Asheville.
TAYLOR, NELSON FEREBEE	Oxford.
THOMPSON, WILLIAM REID	Pittsboro.
VANCE, CHARLES FOGLE, JR.	Winston-Salem.
WALLACE, FITZHUGH ELLSWORTH, JR.	Kinston.
WEYHER, HARRY FREDERICK	Kinston.
WHITE, WALTER PRESTON, JR.	Winston-Salem.
WILLIAMS, RICHARD ALEXANDER	Maiden.
WILMOTH, WENDELL ROY	High Point.
WILSON, THOMAS JOHNSTON	Winston-Salem.
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S. v. Reid. Petition for *certiorari* denied 7 November, 1949.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1949

CLYDE R. POTTER v. THE NATIONAL SUPPLY COMPANY.

(Filed 2 March, 1949.)

1. Trial §§ 22a, 28—

Upon defendant's motion to nonsuit and prayer for a directed verdict, the evidence tending to support plaintiff's claim will be taken as true and all conflict resolved in plaintiff's favor.

2. Sales § 14—

An express warranty is any affirmation or promise by the seller which has the natural tendency to induce the buyer to purchase the goods and upon which the buyer relies in making the purchase.

3. Sales § 17—Evidence that manufacturer sold marine engine to plaintiff rather than to shipbuilder who installed it, held sufficient.

Evidence in this case disclosing that defendant manufacturer's sales agent contacted plaintiff buyer directly in negotiations for the sale of a marine engine, that a few days thereafter the manufacturer made an offer in writing to sell plaintiff an engine of certain specifications to be installed in a specified hull which plaintiff was contemplating purchasing from a shipbuilder, and that the shipbuilder thereafter gave the order for the engine at the gross purchase price less commission accompanied by letter stating that plaintiff had decided to purchase for cash and not on a deferred payment basis, together with other evidence, *is held* sufficient in plaintiff's action for breach of warranty to overrule defendant manufacturer's motion to nonsuit on the ground that the evidence showed that the contract of sale was made with the shipbuilder and not with plaintiff.

4. Sales § 14—Evidence that seller expressly warranted engine would turn specified propeller 600 r.p.m. held sufficient for jury.

Evidence that defendant manufacturer's sales agent contacted plaintiff directly in negotiating for the sale of a marine engine for a particular hull plaintiff was contemplating purchasing, represented that he would guarantee the proposed engine would turn a 50" propeller with a 34" pitch 600 r.p.m., that the manufacturer made a written offer to sell a specified engine which would develop 260 h.p. at 600 r.p.m. for the specified hull, with evidence that the order for the engine for the specified hull was given and that the manufacturer invoiced the engine as one developing "260 b.h.p. at 600 r.p.m.," together with other evidence, *is held* sufficient to be submitted to the jury on the question of the manufacturer's express warranty that the engine would turn a 50 x 34 propeller 600 r.p.m. and that at such speed would develop 260 h.p., notwithstanding conflicting evidence of negotiations at other times for an engine of less power.

5. Sales § 18—

A buyer does not waive his right to sue his seller for damages for breach of warranty by mere acceptance and retention of goods not fullfilling the warranty.

6. Evidence § 39—

Parol testimony as to conversations or declarations of the parties at or before the execution of a written contract is incompetent to alter, add to, or contradict the writing in an action on the contract between the parties or persons claiming under them.

7. Same—Contract between purchaser and shipbuilder held not to preclude parol evidence of different specifications for engine sold directly by manufacturer to plaintiff.

The evidence tended to show that plaintiff entered into a contract with a shipbuilder for a boat equipped with an engine of certain specifications, but that plaintiff negotiated directly with the manufacturer for the engine and entered into a contract with the manufacturer for an engine of different specifications. *Held:* The manufacturer was not a party to the contract betweeen plaintiff and the shipbuilder, and therefore the parol evidence rule does not preclude plaintiff from introducing evidence of verbal negotiations with the manufacturer for an engine of greater power. Further, the contract between plaintiff and the manufacturer for the engine became effective subsequent to the effective date of plaintiff's contract with the shipbuilder although the negotiations with the manufacturer antedated such contract.

APPEAL by defendant from *Morris, J.*, and a jury, at the December Term, 1948, of BEAUFORT.

Briefly stated, the complaint declared that plaintiff, a fisherman of Belhaven, North Carolina, bought a Diesel engine from defendant, a corporation engaged in manufacturing engines at Springfield, Ohio, through the Barbour Boat Works, a shipbuilding firm at New Bern, North Carolina, for installation in the plaintiff's fishing trawler then in

process of completion by the Barbour Boat Works; that as part of the transaction defendant warranted to plaintiff that the engine when installed in the trawler would turn a "50 x 34 propeller" 600 revolutions per minute and at such speed develop 260 horsepower; that the warranty was breached in specified particulars; and that the breach proximately resulted in substantial damage to plaintiff. The answer contained a categorical denial of the material allegations of the complaint. The plaintiff presented testimony tending to establish the matters set out in the six next succeeding paragraphs.

Before the events recited below, Barbour Boat Works contracted to construct a fishing trawler for the Hatteras Development Company in accordance with written plans and specifications prepared for the latter by Weaver Associates Corporation bearing date 8 January, 1945. These plans and specifications provided, among other things, that Barbour Boat Works should furnish "all labor and material" and deliver the complete vessel afloat at its plant to the Hatteras Development Company; that the engine horsepower should be "200 H. P. at 450 R.P.M."; that the propulsion engine should be "a Superior Marine Diesel Engine Standard Model, 6 cylinder, 9 inch bore, 12 inch stroke, rated 200 H.P. at 450 R.P.M."; and that the propeller should be "3-bladed bronze, of about 50 inches diameter and a pitch of about 34 inches." After the Barbour Boat Works had constructed the frame or body of the proposed trawler and designated it as "Hull No. 15," it discovered that Hatteras Development Company had become unable to carry out the remainder of the contract on its part. Thereupon Barbour Boat Works and Hatteras Development Company entered into an agreement in writing in which Barbour Boat Works released Hatteras Development Company from any further liability in the premises and in which Hatteras Development Company surrendered all rights in the incomplete vessel to Barbour Boat Works.

Plaintiff owned several trawlers which he used in fishing in the ocean along the Atlantic Coast. His operations frequently extended to the Newfoundland banks, some 800 miles from Belhaven. Barbour Boat Works was anxious to complete "Hull No. 15," and defendant was desirous of furnishing an engine for it. Plaintiff saw the incomplete trawler at the shipyards in New Bern. A few days later, to wit, about 20 January, 1946, R. E. Hoffman, sales agent of defendant, and R. R. Rivenbark, a representative of Barbour Boat Works, visited plaintiff at his home in Belhaven, where the three men engaged in conversation concerning the incomplete vessel and a Diesel engine to propel it. They had before them the plans and specifications of Weaver Associates Corporation relating to "Hull No. 15."

Plaintiff advised Hoffman and Rivenbark that he would buy the "boat" for use in his fishing business if he could obtain an engine for it which "would do his work"; that he did not "know too much about Diesel engines"; and that the only way he could figure what power he needed was "the amount of revolutions" of the propeller an engine would turn. Plaintiff and Hoffman then discussed the engine described in the plans and specifications, "going into details of the engine" and the "amount of revolutions it would turn." The plaintiff asked Hoffman if such engine would turn a propeller of the diameter of 50 inches and of a pitch of 34 inches 600 revolutions per minute and declared that he would buy "that engine . . . if it would do that." Hoffman replied that he "would guarantee it to turn 600 because he had a tug in Jacksonville with the same engine that would do the same thing, 34 propeller, 50 inch diameter." Relying on "the guaranty," plaintiff agreed to "buy the engine and take the boat also . . . The engine was to cost $12,000." A few days thereafter, namely, on 28 January, 1946, defendant, "The National Supply Company (Seller)," offered in writing to sell to plaintiff, "Clyde R. Potter (Buyer) . . . f.o.b. its plant Springfield, Ohio . . . one Superior Diesel Marine Engine Type 50 M 6 - 9 inches x 12 inches, which shall develop 260 brake H.P. at 600 R.P.M. . . . for use in the vessel . . . being built as Hull No. 15 by Barbour Boat Works, New Bern, N. C." for the price of $12,316.72 to be paid partly in cash and partly in specified future monthly installments.

On 2 February, 1946, Barbour Boat Works and plaintiff entered into a contract in writing whereby Barbour Boat Works sold and conveyed to plaintiff "the trawler designated as Hull No. 15" and agreed "to build and complete said vessel, equipping her in accordance with the plans and specifications designed for the Hatteras Development Company by Weaver Associates Corporation January 8th, 1945, as said specifications have this day been modified in writing and agreed to by the parties." There was no modification of the description of the engine which was to propel the trawler. The contract expressly stipulated, among other things, that the price of "said completed and equipped vessel" should be $55,000.00 payable in particularized installments of varying amounts at specified times; that $12,000.00 of the price was to be paid "upon arrival of the engine at New Bern, N. C., for delivery and installation in the boat"; that the Barbour Boat Works should make good at its own expense all defects due to faulty materials or workmanship that developed within a period of ninety days after the acceptance by plaintiff, except as to defects in workmanship or materials in engine or equipment purchased by the Barbour Boat Works for installation and as to such parts the guarantee of the furnisher should be applicable; and that modifications or changes could be made in the plans and specifications subsequent to

the execution of the contract by mutual consent of the parties. On the same day, Barbour Boat Works issued a purchase order to defendant, requesting it to ship "one 6-cyl. 9 x 12 Direct Rev. Marine Diesel Engine" for "Hull 15" for $10,301.00, which represented the gross purchase price of $12,051.00 "less commis." of $1,750.00. This order was accompanied by the check of Barbour Boat Works for $1,650.00 "as deposit with order," and was mailed to defendant in a letter in which Barbour Boat Works advised defendant that the plaintiff had "decided that he would not purchase this unit on a deferred payment basis," and requested the defendant to deduct its "discount" from the sale price in making the "shipment and billing" and to ship the engine immediately to "New Bern, sight draft, First Citizens Bank and Trust Company, of New Bern, for the balance of the sale price."

On 6 February, 1946, defendant shipped the engine by rail to its own order at New Bern with direction to the carrier to notify Barbour Boat Works of the arrival of the shipment at destination. It forwarded the "order notify" bill of lading with a sight draft for $10,301.00 attached to a bank at New Bern. When it delivered the shipment to the carrier, the defendant prepared and forwarded to Barbour Boat Works an invoice in which it described the engine as a "6 cylinder, 9 inch base x 12 inch stroke, direct reversible manual reversing Starboard Marine Superior Diesel engine, developing 260 B H P at 600 RPM." Upon the arrival of the consignment at New Bern, plaintiff paid $12,000.00 to Barbour Boat Works, and the latter took up the draft and installed the engine in "Hull No. 15." The defendant issued an instruction book with the engine stating, in substance, that the engine had a speed of "600 R.P.M." and would produce "260 H.P." when operated at such speed.

When the trawler was completed, it was ascertained that the engine would not turn the propeller 600 revolutions per minute or generate 260 horsepower. Efforts to produce such results raised the temperature of the engine to heights which threatened the destruction of the engine itself. Nevertheless, the plaintiff paid Barbour Boat Works the remainder of the price specified in their contract and used the trawler in his business. But he advised both the defendant and Barbour Boat Works of the unsatisfactory operation of the engine and threatened to sue them unless satisfying results were obtained. Letters passed between the managing officers of the defendant and Barbour Boat Works conceding that "this engine was sold to develop 260 brake horse power at 600 revolutions per minute" and discussing possible remedial action to effect this result. On several occasions, defendant sent its engineers and service men to Belhaven to inspect the engine and determine what could be done to enable the engine to "develop its rated speed and horse power." Although the pitch and size of the propeller were reduced on their advice, no substantial improvement

in the operation of the engine was achieved. It was impossible to turn the propeller more than 440 revolutions per minute without elevating the temperature of the engine to dangerous levels. In consequence, the trawler's speed was limited to seven and a half or eight miles an hour, whereas it would have traveled ten and a half miles in such period if the engine had been capable of revolving the propeller in its original state 600 times a minute. This seriously impaired both the utility and the market value of the vessel. Moreover, the plaintiff expended substantial sums in altering the propeller under the direction of the defendant's engineers and in replacing parts damaged by the undue heat of the engine.

The defendant presented testimony tending to show that all of its transactions in respect to the engine were with Barbour Boat Works and not with the plaintiff; that it did not make any promise or representation of any character concerning the engine to plaintiff; that the engine was capable of developing "260 B.H.P. at 600 R.P.M." when employed with some propellers, but would not turn a propeller of the diameter of 50 inches and of the pitch of 34 inches 600 revolutions per minute or generate 260 horsepower when attached to such a propeller; and that, consequently, the defendant did not make any promise or representation to the plaintiff, or the Barbour Boat Works, or any other person at any time that the engine could produce 600 revolutions a minute or develop 260 horsepower in conjunction with a "50 x 34 propeller."

The court submitted to the jury the four issues arising on the pleadings. These issues and the answers of the jury thereto were as follows:

1. Did plaintiff order from defendant through Barbour Boat Works and did defendant deliver to plaintiff through Barbour Boat Works a six-cylinder type VD MB Diesel engine for installation in plaintiff's vessel, as alleged in the complaint? Answer: Yes.

2. If so, did defendant warrant and guarantee to plaintiff that said engine when properly installed in plaintiff's vessel would turn a 50 x 34 propeller 600 R.P.M., and at such speed would develop 260 H.P., as alleged in the complaint? Answer: Yes.

3. If so, was there a breach of such warranty, as alleged in the complaint? Answer: Yes.

4. What damages is plaintiff entitled to recover? Answer: $3,000.00 and interest.

Judgment was entered on the verdict, and the defendant appealed, assigning as errors the denial of its motion for a compulsory nonsuit, the refusal to give its prayers for a directed verdict on the first and second issues, the admission of testimony offered by plaintiff, and certain excerpts from the charge.

Rodman & Rodman for plaintiff, appellee.
Carter & Carter for defendant, appellant.

ERVIN, J. It is axiomatic that a plaintiff in a civil action must both allege and prove every material fact essential to the establishment of a cause of action in his favor against the defendant in order to obtain the judgment which he seeks. In the case at bar, the defendant concedes that the plaintiff has stated enough facts in his complaint to constitute a good cause of action against it for damages for breach of an express warranty made by it to plaintiff. By its motion for a compulsory nonsuit under G.S. 1-183 and its prayers for a directed verdict on the first and second issues, however, the defendant challenges the sufficiency of the evidence to support the cause of action alleged. In determining whether or not the trial court erred in denying the defendant's motion for an involuntary nonsuit or in refusing to direct a verdict for the defendant upon the first and second issues in conformity to its requests for instructions, we must take it for granted that the evidence tending to support the plaintiff's claim is true and must resolve all conflicts of testimony in his favor. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307.

The Uniform Sales Act provides that "any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Williston on Sales (Revised Edition), section 194. Our Legislature has not incorporated the Uniform Sales Act in our statutory law, but the accuracy of the lucid and succinct definition of an express warranty embodied in the Act is fully supported by repeated decisions of this Court. *Walston v. Whitley & Co.,* 226 N.C. 537, 39 S.E. 2d 375; *Simpson v. Oil Co.,* 217 N.C. 542, 8 S.E. 2d 813; *Dallas v. Wagner,* 204 N.C. 517, 168 S.E. 833; *Swift v. Meekins,* 179 N.C. 173, 102 S.E. 138; *Tomlinson v. Morgan,* 166 N.C. 557, 82 S.E. 953; *Hodges v. Smith,* 159 N.C. 525; 75 S.E. 726; *Wrenn v. Morgan,* 148 N.C. 101, 61 S.E. 641; *Reiger v. Worth,* 130 N.C. 268, 41 S.E. 377, 89 Am. S.R. 865; *Foggart v. Blackweller,* 26 N.C. 238; *Thompson v. Tate,* 5 N.C. 97, 3 Am. D. 678.

The defendant bases its claim to a compulsory nonsuit or directed verdict initially upon the theory that the evidence compels the single deduction that its contract of sale was with Barbour Boat Works and not with the plaintiff. This position is unsupportable. It ignores the testimony relating to the conversation between plaintiff and the defendant's sales agent, Hoffman. It likewise refuses to take notice of the offer of the defendant to sell the engine to "Clyde R. Potter (Buyer)" for a price to be paid partly in cash and partly in future installments, and the statements in the letter and purchase order sent to defendant by Barbour Boat

Works that the purchase was to be for cash because "Mr. Potter (had) decided that he would not purchase this unit on a deferred payment basis." Moreover, it leaves out of consideration the purchase order of 2 February, 1946, and the invoice of 6 February, 1946, which justify the inference that the Barbour Boat Works, in effect, received a commission of $1,750.00 for aiding defendant to consummate the sale of the engine to plaintiff. The defendant asserts secondarily that the trial court erred in refusing to nonsuit the action or to direct a verdict for it therein upon the ground that there is no evidence in the record to sustain the proposition that the defendant ever affirmed or promised that the engine would have a speed of 600 revolutions per minute or would develop 260 horsepower when used in conjunction with a propeller of a diameter of 50 inches and a pitch of 34 inches. This position is untenable. It conflicts directly with the evidence of the conversation between plaintiff and Hoffman. Furthermore, it runs counter to the fact that all transactions looked to the installation of an engine in "Hull No. 15," whose plans and specifications called for a 3-bladed bronze propeller "of about 50 inch diameter and a pitch of about 34 inches."

When the evidence tending to support the plaintiff's claim is accepted as true and the conflicts of testimony are resolved in his favor, it becomes manifest that the trial court properly refused to nonsuit the action or to direct a verdict for defendant therein. This is true because the testimony adduced at the trial was sufficient to justify the inferences that defendant sold the engine to plaintiff and that as a part of the sale the defendant expressly warranted that the engine "would turn a 50 x 34 propeller 600 r.p.m. and at such speed would develop 260 h. p." when installed in the trawler designated as "Hull No. 15."

While the question is not mooted on the appeal, it is not altogether amiss to note, in passing, that a buyer does not waive his right to sue his seller for damages for a breach of warranty by the mere acceptance and retention of goods not fulfilling the warranty. *Manufacturing Co. v. Gray,* 124 N.C. 322, 32 S.E. 718; *Alpha Mills v. Engine Co.,* 116 N.C. 797, 21 S.E. 917; *Love v. Miller,* 104 N.C. 582, 10 S.E. 685; *Lewis v. Rountree,* 78 N.C. 323.

The defendant reserved exceptions to the admission of certain testimony offered by plaintiff on the theory that its reception contravened the parol evidence rule. In this connection, the defendant asserts that the conversation between plaintiff and the defendant's sales agent, Hoffman, antedated the written contract of 2 February, 1946, between plaintiff and Barbour Boat Works; that such written contract specified that the trawler to be completed thereunder was to be driven by a "Superior Marine Diesel Engine, Standard Model, 6 cylinder, nine inch base x 12 inch stroke, rated 200 H. P. at 450 R.P.M."; that such written provision was controlling

as to the character of the engine to be installed in the trawler; that the alleged prior oral agreement between plaintiff and Hoffman, and the other testimony concerning an engine which "would turn a 50 x 34 propeller 600 R.P.M. and at such speed . . . develop 260 H. P." was at variance with the written contract between plaintiff and Barbour Boat Works; and that by reason thereof the testimony in question was inadmissible under the parol evidence rule.

It is a well established principle, which is known as the parol evidence rule, that when any contract has been reduced to writing, and is evidenced by a document or series of documents, parol evidence cannot be admitted to alter, add to, or contradict the writing in actions between parties to the contract or persons claiming under them where claims or rights created by the contract are the subject matter of the litigation. *Jones v. Chevrolet Co.*, 217 N.C. 693, 9 S.E. 2d 395; *Holloman v. R. R.*, 172 N.C. 372, 90 S.E. 292, L.R.A. 1917C 416, Ann. Cas. 1917E 1069; *King v. McRackan*, 168 N.C. 621, 84 S.E. 1027; *Ledford v. Emerson*, 138 N.C. 502, 51 S.E. 42; *Carden v. McConnell*, 116 N. C. 875, 21 S.E. 923; *Reynolds v. Magness*, 24 N. C. 26. Under this rule, parol testimony as to conversations or declarations of the parties at or before the execution of a written contract will not be received for the purpose of substituting a different agreement for the one expressed in the writing. *Whitehurst v. FCX Fruit and Vegetable Service*, 224 N.C. 628, 32 S.E. 2d 34; *Insurance Co. v. Morehead*, 209 N.C. 174, 183 S.E. 606; *Bank v. Sternberger*, 207 N.C. 811, 178 S.E. 595, 97 A.L.R. 720; *Oliver v. Hecht*, 207 N.C. 481, 177 S.E. 399; *Winstead v. Manufacturing Co.*, 207 N.C. 110, 176 S.E. 304.

The record on this appeal makes it plain, however, that the trial court did not err in admitting the testimony now under consideration. The defendant is precluded from invoking the parol evidence rule on the basis of the contract of 2 February, 1946, between plaintiff and the Barbour Boat Works. It is not a party to that contract, and that contract does not undertake to govern any contractual relations between it and the plaintiff. Besides, the plaintiff does not seek to enforce against the defendant any claim or right created by his contract of 2 February, 1946, with Barbour Boat Works. Indeed, he bases his cause of action upon a different contract made between him and the defendant and resting partly in parol and partly in writing. Furthermore, it might well be noted that the agreement between plaintiff and defendant covering an engine "to develop 260 H. P. at 600 R.P.M." became legally effective subsequent to the contract of 2 February, 1946.

We have given painstaking study to the remaining exceptions addressed to the admission of testimony and to the assignments of error based on excerpts from the charge and have found no error prejudicial to any substantial right of the defendant.

For the reasons given, the trial and judgment in the Superior Court will be upheld.

No error.

ROY INGRAM v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 2 March, 1949)

Insurance § 34d—

The evidence in this case *is held* sufficient to be submitted to the jury upon the question of whether plaintiff, by reason of silicosis, became totally and permanently disabled within the terms of a disability clause in a group insurance policy prior to the date the disability provisions of the policy were terminated.

APPEAL by plaintiff from *Sink, J.*, at August Term, 1948, of CHEROKEE. Civil action to recover on policy of insurance benefits for total and permanent disability.

The record on this appeal discloses that upon the trial in Superior Court these facts are uncontroverted:

In 1928 defendant issued a group life insurance policy, Number 2764, under the terms of which it (1) insured the lives of all the employees of the Tennessee Copper Company, called the Employer, and (2) provided for benefits for total and permanent disability as therein set forth,—agreeing to issue to the employer for delivery to each employee whose life is insured under the group policy an individual certificate setting forth a statement as to the insurance protection to which such employee is entitled under the terms thereof, and as to whom payable, and as to how terminable. The premiums on the policy were paid by the employer.

Plaintiff entered the employment of the employer in 1941, and received an individual certificate Number 2764-3014. This certificate, in respect to Total and Permanent Disability Provision, provides the following: "In the event that any employee while insured under the aforesaid policy and before attaining age 60 becomes totally and permanently disabled by bodily injury or disease and will thereby presumably be continuously prevented for life from engaging in any occupation or performing any work for compensation of financial value, upon receipt of due proof of such disability before the expiration of one year from the date of its commencement, the Society will, in termination of all insurance of such employee under the policy, pay equal monthly disability instalments, etc."

The parties stipulate (1) that the group policy of insurance issued by defendant to Tennessee Copper Company on the lives of its employees and

containing total and permanent disability provisions was in full force and effect on 31 December, 1945; (2) that effective 1 January, 1946, defendant, with consent and approval of Tennessee Copper Company, attached a rider to said policy, dated New York, October 15, 1945, executed by defendant and accepted by Tennessee Copper Company,—the effect of which was to stop premium payments and undertake to eliminate the total and permanent disability provisions; and (3) that after 1 January, 1946, Tennessee Copper Company did not pay premiums to keep the total and permanent disability provisions in effect after 31 December, 1945.

And plaintiff, Roy Ingram, as witness for himself, testified:

That he is 37 years old; that he was employed by Tennessee Copper Company on 6 January, 1941, to do labor; that during his employment he worked a little while in the copper mine and then went to the flotation plant and also did some work there in the plant where they were loading iron and concentrated copper; that in the plant was where they crushed ore by machinery, and there was dust from that; that during the last year that he worked for the Tennessee Copper Company he was on mill clean-up, that is washing with the hose, sweeping and such as that; that when he went to work his health was good as far as he knew; that he was thirty years old at that time; that in 1945 he noticed his health was failing; that he was getting short of breath all the time and had a lot of soreness in his breast; that when he had to do heavy physical labor or exercise, it just about put him in the bed; that his breast was sore, his wind was gone and hard work and labor would make it worse; that he didn't have much strength,—just gave out; that along about October, 1945, he consulted a physician about this,—Dr. T. J. Hicks at Copperhill, Tennessee; that smothering was his trouble; that after he went to see the doctor he went back to work and worked until 21 December, 1945; that on the 21st of December he went in to work and tried to work and botched around the place for about two hours, and about 10:30 had to quit and go home because he wasn't able to work,—did not have the wind or the strength; that he went to bed and stayed in bed about a week, and went to see Dr. Hicks again; that after he had consulted him it was about a couple of weeks before he tried to work any more; that he tried to work again; that he was out for three weeks; that he was sick with silicosis,—the same trouble he had been having; that it was in October when it got bad enough to cause trouble; that in December he had to quit; that he did not work the three weeks from 21 December up into January, he was not able to hold his job; that he went back to work on 14 January, and worked six days; that he "just botched around and got by," but "wasn't able to work"; that after that, he consulted Dr. A. J. Ayers of Atlanta, Georgia; that Dr. Ayers examined him and made X-ray pictures of his chest; that

when he returned from Atlanta, he tried to work again on Monday and Tuesday, 28th and 29th of January, 1946; that he never did undertake to work for Tennessee Copper Company or anyone else after that because he wasn't able; that since then and since 21 December, 1945, he has not been physically able to do any kind of regular work; that he doesn't really know how to do anything but labor; that that is the only thing he is qualified to do; that he finished the sixth grade in school; that he has not held any job for compensation or profit since 21 December, 1945; that he had not been able to perform the substantial duties of any job since 21 December, 1945; that he tried to work; that after he quit the company, he bought a truck and tried trucking three or four different times, and after he got to working at that he "got to coughing up blood and had to quit"; that since 31 December, 1945, about two hours of chopping wood, or anything he usually does, puts him in bed; that he doesn't do any physical labor,—it cuts off his breath, and exhausts him; and that he requested his attorney to write the letter that has been described and admitted in the pleadings stating that he was disabled.

Then, on cross-examination, plaintiff further testified: That his work before he went to the Tennessee Copper Company was mainly farming; that he worked on, and owned a farm,—three acres in 1941; that he worked on this and some at the old home-place, his mother's place, about 115 acres; that he did farm work and cut wood on that; that he began feeling bad but did work practically regularly during 1945; that he worked 139½ hours from 1 December, 1945, to 21 December, 1945; that on 30 December he was on vacation and got paid for that; that he was paid for the week up to 6 January, 1946; that he was on vacation, and was paid for six days; that he wasn't paid for the first 14 days in January; that that wasn't vacation; that he was sick; that he was paid from the 14th on; that he worked on the 28th and 29th of January, and was paid for these two days; that he bought a little place, 25 acres, about half a mile from his mother's place, and moved there; that there are six or seven acres of it under cultivation; that he is not living as a farmer like he did before he went to the Tennessee Copper Company; that in 1948 he had 1½ acres in cultivation; and that he has been renting his place.

Plaintiff, continuing on cross-examination, testified: "I filed a former suit in this same case . . . I swore to the complaint,—to its correctness. I stated in that complaint that I worked for Tennessee Copper Company and about ore and crushing machinery and in silicon dust for more than four years and from January 6, 1941, until January 29, 1946. I was still in their employment for that long. I swore in paragraph 10 that on January 29, 1946, and while the said insurance was in full force and while I was in the employ of said Tennessee Copper Company, and

before I had reached the age of sixty years, I became totally and permanently disabled . . . I opened that paragraph by stating that I became totally and permanently disabled on January 29, 1946; that was the last day I worked . . . I had Mr. Gray write a letter to the company stating that I was totally disabled."

Plaintiff then offered in evidence copy of letter of 18 July, 1946, from his attorney to defendant, in which the subject stated is: "*Re:* Roy Ingram, Employee and Assured, formerly of Copperhill, Tennessee, now Suit, North Carolina. Employer: Tennessee Copper Company. Policy No. 2764-3014," and in which it is further stated: "Mr. Ingram was employed by Tennessee Copper Company on January 6, 1941, and continued in that employment until January 29, 1946, at which time he was forced to quit work because of total and permanent disability resulting from silicosis contracted while working in silicon dust for Tennessee Copper Company. In behalf of Mr. Ingram I am hereby making application for the total and permanent disability provided under the terms of the policy and in support of this hand you herewith copy of the statement of Dr. Thomas J. Hicks, of McCaysville, Georgia, and of Dr. A. J. Ayers of Atlanta, Georgia . . . Please let us have proper blanks on which to make formal claim for this as Mr. Ingram is wholly unable to work, suffers pain in his chest with acute shortness of breath."

Plaintiff then offered in evidence copies of the statements of Dr. Hicks and Dr. Ayers referred to in the letter from which the above quotation is taken. The Dr. Hicks statement addressed "To whom it may concern," is dated 16 February, 1946, and relates to examination and diagnosis on 1 February, 1946,—concluding with this: "Impression: From the correlation of history, chief complaint and X-ray finding I am of the unbiased professional opinion this now has well developed disabling first stage Silicosis." The Dr. Ayers statement, in form of letter to Dr. Hicks, dated 23 January, 1946, relates to X-ray made on plaintiff 22 January, 1946, and concludes with this: "Impression: Chronic bronchitis, moderately advanced silicosis."

Plaintiff further alleges in his complaint, and defendant admits in its answer that plaintiff, through his counsel, under date 18 July, 1946, wrote defendant claiming to be disabled and requesting blanks on which to make formal claim for disability; and that defendant, under date of 31 July, 1946, acknowledged receipt of plaintiff's claim, but did not furnish any blanks, as requested, on which plaintiff might make any additional proof, and defendant did not request any additional proof. And, on the trial plaintiff offered in evidence letter from assistant superintendent of defendant to plaintiff's attorney, reading in part: "We regret to inform you that we can see no basis for a claim under the terms and conditions of the policy."

Plaintiff next offered the deposition of Dr. A. J. Ayers, specialist in primary clinical pathology and radiology, in respect to X-rays of plaintiff taken 22 January, 1946, and 15 July, 1947. Referring to the X-ray taken on the first date, the doctor testified: "My interpretation of the film on that date was chronic bronchitis, moderately advanced silicosis. I call attention to the indications upon the film of the silcosis and the areas, etc. . . . I do mention that it is the peripheral lung structure. Also there is marked thickening of the lung markings . . . there are some few calcified areas in and around . . . the lung roots . . . I feel like I am familiar with the disease of silicosis . . . In any real dusty place you get a substance that would remain in your lung tissue and produce silicosis . . . The effect of this silicotic condition I have mentioned on the patient is that it makes him shorter winded, so to speak, or makes it more difficult for him to get the amount of oxygen into his circulation . . . The effect of silicosis on a person's ability to perform manual labor is it will make him very short-winded . . . The development of silicosis is a relatively slow process; it would require a great many months or years to develop."

The witness, in answer to hypothetical questions, based on the X-ray taken on 22 January, 1946, and on evidence as to plaintiff's working conditions, and his physical condition, gave it as his opinion that plaintiff had moderately advanced first stage silicosis to substantially the same extent on 31 December, 1945, as on 22 January, 1946. Then the witness interpreted the X-ray of 15 July, 1947, as showing second stage silicosis, —that silicosis is largely classified as first stage, second stage, and third stage; that it is hard to say whether the disease of silicosis ever improves; but that in his opinion, as a medical expert, it is generally a progressive disease, and usually there is an increase in the silicotic condition, even though the patient is removed from the dust.

Then after further examination, both cross and re-direct, the witness concludes his testimony by saying in substance that it is the opinion of most radiologists that where a man has silicosis and leaves that particular kind of work where he is exposed to it, that there is possibly some progression for a short while and thereafter progresses no more; and that in his opinion he would place Roy Ingram outside where he wouldn't be in the dust.

Dr. Thomas J. Hicks, as witness for plaintiff, held by the court to be a medical expert, and expert radiologist, testified in pertinent part: "I know Roy Ingram. He first came to my office for examination on October 12, 1945 . . . I examined Mr. Ingram physically and made a fluoroscopic examination of his chest which revealed the characteristic marks I find in men who have silicosis from two to five years in the mining area. I don't recall seeing Mr. Ingram any more until early in 1946. The second

time he visited my office I found that his condition had not improved and his symptoms were coming from a lung condition and I referred him to Dr. Ayers . . . His condition had progressed,—a mild progression,—most cases of silicosis progress slowly from the time the first particles of dust . . . enter the lung . . . they become embedded in the lung cells and diminish or decrease the lung space. The other way silicosis affects . . . it makes the patient short of wind or short of breath and he tires easily on physical exertion and he has pain in his chest and a cough and many times he expectorates blood. I did not make an X-ray film of Mr. Ingram. I studied the X-ray film Dr. Ayers sent . . . In comparing the film of January 22, 1946, with that taken by Dr. Ayers on July 15, 1947, my interpretation would be that there is a visible and noticeable progression of the fibrosis and extension of this fibroid condition in the lung on both sides of the heart . . . Here in the United States, we ordinarily classify silicosis into three stages: First, second, and third, but many times people die before they go into the third stage of silicosis. Second stage silicosis clearly cuts down on the patient's ability to do manual labor."

Plaintiff offered two other witnesses, one of whom testified that he had seen plaintiff try to work on his farm since 1 January, 1946, and when he did, he had difficulty getting his breath, seemed like; and the other, who testified that he has had occasion to see and observe plaintiff since 1945,—that he had seen him try to work, the first time was in the Spring of 1946. He was working then, he was trying to plough. He wasn't getting along with it,—that he breathed very short and seemed to be out of breath; that he had to stop; and that as he, the witness, passed back and forth he could see plaintiff nearly every day, and during the period since January, 1946, he has not seen plaintiff doing any work.

Motion of defendant for judgment as of nonsuit at close of plaintiff's evidence was allowed, and from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

J. B. Gray and H. L. McKeever for plaintiff, appellant.

Fred P. Christopher and Williams & Frierson for defendant, appellee.

WINBORNE, J. It is conceded on all hands that the total and permanent disability provisions of the policy of insurance sued on in this action terminated 31 December, 1945. Hence this is the question for decision: Is the evidence offered by plaintiff on the trial below, taken in the light most favorable to plaintiff, sufficient to support a finding by the jury that in December, 1945, he was totally and permanently disabled by bodily disease, within the meaning of the provisions of the policy of insurance on which the action is based? We are of opinion, and hold, that it is

sufficient. It would seem that the evidence brings the case within the principle applied in *Bulluck v. Ins. Co.*, 200 N.C. 642, 158 S.E. 185; *Smith v. Assurance Society*, 205 N.C. 387, 171 S.E. 346; *Fore v. Assurance Society*, 209 N.C. 548, 184 S.E. 1; *Blankenship v. Assurance Society*, 210 N.C. 471, 187 S.E. 590; *Edwards v. Junior Order*, 220 N.C. 41, 16 S.E. 2d 466.

The present case is distinguishable in factual situation from the line of cases of which *Thigpen v. Ins. Co.*, 204 N.C. 551, 168 S.E. 845; *Boozer v. Assurance Co.*, 206 N.C. 848, 175 S.E. 175; *Hill v. Ins. Co.*, 207 N.C. 166, 176 S.E. 269; *Carter v. Ins. Co.*, 208 N.C. 665, 182 S.E. 106; *Lee v. Assurance Co.*, 211 N.C. 182, 189 S.E. 626; *Medlin v. Ins. Co.*, 220 N.C. 334, 17 S.E. 2d 463; *Jenkins v. Ins. Co.*, 222 N.C. 83, 21 S.E. 2d 832; and *Ford v. Ins. Co.*, 222 N.C. 154, 22 S.E. 2d 235, are representative.

However, since there must be a new trial in the case, we refrain from discussion of the evidence.

The judgment of nonsuit is

Reversed.

ADA V. WHITEHURST, FLOSSIE NOSAY AND SOPHIA MORGAN, v. C. L. HINTON, JOHN L. HINTON, SOPHIA HINTON ASHBURN AND MRS. RUTH HINTON ALLEY.

(Filed 2 March, 1949.)

1. Judgments § 32—

A former decision specifically adjudicating that minors had been properly made parties and were properly represented by guardian *ad litem*, affirmed on appeal, is *res judicata* and precludes the raising of the identical question in a subsequent action between the parties involving the efficacy and effect of the former judgment.

2. Infants § 12—

Where the appointment of a general guardian for infants is so incomplete and irregular that it is doubtful that such guardian had authority to represent the minors, the subsequent appointment of a guardian *ad litem* for the minors is not so defective as to render the appointment of the guardian *ad litem* invalid.

3. Adverse Possession § 4a—

Where less than twenty years has elapsed between the rendition of judgment declaring the parties to be tenants in common and the institution of the action by some of the tenants against the others for waste, defendants in the action for waste may not claim title by adverse possession, since as between tenants in common title by adverse possession cannot be acquired in less than twenty years.

4. Abatement and Revival § 9—

The pendency of a proceeding for partition, even though there are general allegations of waste, will not support a plea in abatement in a subsequent action between the tenants alleging particular acts of waste subsequently committe by specified defendants upon a particular tract of land, and seeking injunctive relief against future waste, since the causes are not identical and judgment in the former action would not support a plea of *res judicata* in the second.

DEVIN, J., took no part in consideration or decision of this appeal.

APPEAL by defendants from *Morris, J.,* in Chambers, 18 December, 1948, of PASQUOTANK.

Civil action to restrain defendants from committing waste, cutting timber, and to recover for waste committed by them on that certain tract of land in Newland Township, Pasquotank County, North Carolina, known as the John Louis Hinton home place.

Plaintiffs allege in their complaint in brief these facts:

That they, owning not less than an undivided one-sixth interest, and defendants, with others, are the owners in fee as tenants in common of said tract of land, which together with other lands, is embraced within and is a part of the subject matter of that certain action or proceeding for partition and other relief, heretofore instituted by plaintiffs herein against defendants herein and others, and still at issue upon the docket of the court; that defendants, either in person or through their agents, servants and employees, have wrongfully and unlawfully committed waste, etc.; and that defendants are threatening to continue said waste, and if not restrained plaintiffs will be irreparably damaged.

Defendants, answering, deny title of plaintiffs and plead sole seizin. They admit, however, the pendency of a special proceeding instituted 4 February, 1922, entitled "Mrs. A. V. Whitehurst, and others, *vs.* R. L. Hinton, and others," to which defendants here as widow and minor children of C. L. Hinton, deceased, were named among others as defendants there, but they aver that said minors were not properly and legally parties to said proceeding. And they further admit that they have cut and removed timber from said lands, for which they stand ready to account if the court shall hold they are accountable therefor, etc.

And defendants, for further answer and defense, pleaded the three-year statute of limitation as to timber cut more than three years prior to institution of the action, and twenty years adverse possession, under known and visible lines and boundaries, and seven years adverse possession under color of title, in bar of this action and of any recovery by the plaintiffs herein, etc.

Plaintiffs, replying, allege that their ownership of an undivided interest in said land and premises is *res judicata* by virtue of the judgment ren-

dered by Honorable W. A. Devin, Judge presiding at June Term, 1934, of Pasquotank Superior Court, and of the opinion of the Supreme Court in *Whitehurst v. R. L. Hinton,* reported in 209 N.C. 392, 184 S.E. 66, the judgment roll in the case, including Supreme Court opinion, being by reference made a part thereof, and plead in bar of and as *res judicata* of any and all affirmative allegation in defendants' answer to the effect that they are the sole owners of the land and premises described in the complaint herein, or that they or some of them were not and are not properly before the court in the aforesaid former suit or action, etc.

Thereafter the parties waived a jury trial and agreed to submit the cause to the resident and presiding judge of the First Judicial District, upon case agreed, for his consideration and determination of the controversy, either in or out of the county and in or out of term and render a judgment as to him may seem proper, to which either or both parties may except and appeal to the Supreme Court as they may be advised.

Former decisions of this Court relating to matters pertinent to this appeal are these: *In re Will of Hinton,* 180 N.C. 206, 104 S.E. 341; *Whitehurst v. Hinton,* 209 N.C. 392, 184 S.E. 66; and *Whitehurst v. Hinton,* 222 N.C. 85, 21 S.E. 2d 874. The records and opinions in these cases are referred to in statement of agreed facts, upon which the judgment below is predicated.

These, and the statement of agreed case, briefly stated, persent these pertinent facts:

1. John L. Hinton, at the time of his death in January, 1910, was seized in fee of the land the subject of this action.

2. That on 1 June, 1910, Mary L. Hinton, daughter of John L. Hinton, and one of the devisees named in a paper writing propounded as his will, together with the other persons therein named as such devisees, other than C. L. Hinton, executed and delivered to C. L. Hinton a deed for "their entire rights and interests heired from their father John L. Hinton" in certain lands, including the John Louis Hinton home place.

3. Thereafter the paper writing, probated in common form and recorded as the last will and testament of John L. Hinton, deceased, upon caveat filed, was set aside. See *In re Will of Hinton, supra.*

4. Plaintiffs in the present action, children and heirs at law of John C. Hinton, son of John L. Hinton, who predeceased his father, were the *feme* caveators filing the caveat aforesaid, and C. L. Hinton, son of John L. Hinton, and one of executors named in the purported will, and father and husband of defendants in the present action, was a party to, and died pending the said caveat proceeding.

5. On 4 February, 1922, after the purported will of John L. Hinton was set aside, the plaintiffs in the present action, joined by their respective spouses, instituted a proceeding in Pasquotank County for the parti-

tion of all the lands of which John L. Hinton died seized, including the John Louis Hinton home place, and for accountings for rents and profits. The record of this proceeding shows: (a) Among the defendants named in the title of the action or proceedings were "Mrs. Ruth Morgan Hinton and Sophia, Charles L. and John L. Hinton, minors, and Mrs. Ruth Morgan Hinton, guardian *ad litem* of Sophia, Charles L. and John L. Hinton, minors."

(b) The pertinent portion of the return of the sheriff as to service of summons is that it was "Served Feb. 6, 1922 by reading to and leaving a copy with . . . Mrs. Ruth Morgan Hinton, Charles L. Hinton, Sophia Hinton, John L. Hinton, Mrs. Ruth Morgan Hinton, guardian *ad litem* of her children."

(c) The appointment of Mrs. Ruth Morgan Hinton as guardian *ad litem* of her infant children, Sophia, Charles L. and John L. Hinton; and

(d) Answers and demurrers filed by defendants.

The action was referred. The report of the referee is set out in full in *Whitehurst v. Hinton,* 209 N.C. 392, *supra.* Among the findings of fact of the referee is this:

"(9) The plaintiffs and the defendants, who are the only heirs at law of John L. Hinton, deceased, living at the date of the commencement of this action, are as tenants in common seized in fee, and in the possession of all the lands owned by John L. Hinton at the date of his death" (exception not pertinent here).

And in his conclusions of law the referee declared the interests owned by the plaintiffs therein and by Ruth Morgan Hinton (now Alley), and her said minor children—defendants herein.

The record on appeal in the proceeding shows Mrs. Ruth Morgan Alley filed exceptions to the report of the referee, among which is exception "to so much . . . as finds that this defendant and her children, Sophia, Charles L. and John L. Hinton, were parties to the caveat proceeding or have been made, or have become parties in this action or proceeding and that pleadings were filed herein on behalf of all defendants and that the heirs at law of C. L. Hinton are properly before the court in this proceeding," for that "said findings are not supported by any competent or proper evidence, are contrary to the evidence, and are erroneous."

When the cause came on for hearing before judge holding the June Term, 1934, of Pasquotank County Superior Court, on exceptions to report of referee, the Judge, W. A. Devin, entered judgment which is shown in full in the report of *Whitehurst v. Hinton,* 209 N.C. 392, *supra.* This judgment has these pertinent findings and rulings: "And it appearing that the parties are properly before the court and represented by counsel, and that all the defendants have been made parties by proper service of process, and that any irregularity of service as to some of the

defendants has been later cured, and that other defendants whose rights have accrued since the institution of this proceeding have been made parties by proper orders and have adopted the pleadings and exceptions filed by the other defendants . . . Now, therefore, after considering the pleadings, the evidence reported by the referee, the referee's report, defendants' exceptions thereto, and argument of counsel, it is now ordered, adjudged, and decreed that each and all the findings of fact and conclusions of law of the referee, as hereinafter modified, are found and adopted by the court, and the said report as hereinafter modified is in all respects approved and affirmed. That each and all of the defendants' exceptions to the referee's report be and the same are hereby overruled." (The modifications referred to are not material to the appeal in present action).

And the appellants, in grouping their exceptions and assignments of error in record on appeal, include exceptions to the above portions of the judgment entered by Judge Devin, and also an exception to the overruling of Mrs. Alley's exception to the report of the referee as hereinabove set out.

On such appeal this Court, in opinion by *Connor, J.*, while ruling error in other respects, held that "there is no error in the judgment in this action that plaintiffs, as heirs at law of John L. Hinton . . . are now the owners of an undivided one-sixth interest, and that defendants, who are the remaining heirs at law of the said John L. Hinton . . . are now the owners of an undivided five-sixths interest, in all the lands of which the said John L. Hinton died seized and possessed, except . . .," (the exception not being pertinent to present action).

In addition to the foregoing, the case agreed sets forth: (a) The facts in respect to which defendants base their claim of title by adverse possession; (b) that within three years next preceding the institution of this action timber was cut from the land in question by or for defendants as set forth, and that the cutting by some of defendants was started just before this action was begun and continued until stopped by the temporary order issued herein; and (c) that on or about 3 December, 1919, a guardianship proceeding was instituted concerning the children of C. L. Hinton, deceased, which is of record in office of Clerk of Superior Court of Pasquotank County. The entire record in said proceedings is referred to and such parts as either party may desire to be included may be copied and submitted for consideration in connection with the instant case.

The cause coming on for hearing upon the agreed statement of facts, and being heard, and the court being of opinion and so finding and holding that plaintiffs and defendants are tenants in common of the land in controversy, the plaintiffs together owning an undivided one-seventh interest in fee in said lands, and the defendants together owning the remaining six-sevenths interest in fee in said lands, so adjudged, and

permanently restrained defendants from further acts of waste, etc. And from judgment in accordance therewith defendants appeal to Supreme Court, and assign error.

Ehringhaus & Ehringhaus, McMullan & Aydlett, and John H. Hall for plaintiffs, appellees.

Wilson & Wilson for defendants, appellants.

WINBORNE, J. The assignments of error brought forward by appellants on this appeal are pivoted, in the main, upon the question as to whether defendants, other than Mrs. Alley, were parties to the former action or proceeding of *Whitehurst v. Hinton,* 209 N.C. 392, 184 S.E. 66, in which the judgment of Devin, Judge presiding, was entered at June Term, 1934, of Superior Court of Pasquotank County. As to this it appears from the record in that action or proceeding that this very question was presented to the court, and decided adversely to the contention now made by appellants that they were not such parties. And the decision so made was challenged, but not reversed on appeal to this Court. Hence the fact that defendants were parties to that action or proceeding is now *res judicata.*

However, in this connection it is not inappropriate to state that the record of the attempted appointment of a bank as general guardian of defendants here, then minors, prior to the institution of the former action or proceeding, is so incomplete and irregular that it might well have been doubted that either the cashier of the bank, or the bank itself, was vested with authority to represent the minors. Under such circumstances, the appointment of a guardian *ad litem* for the minors to represent them in the former action or proceeding, was not so defective as to render it invalid. Indeed, their mother was appointed guardian *ad litem* for them, and the record fails to show that the minors were disadvantaged by the judgment in the action or proceeding. The Court held that they and their codefendants, and the plaintiffs, as the only heirs at law of John L. Hinton, deceased, living at the date of the commencement of that action or proceeding as tenants in common, were then seized in fee, and in the possession of all the lands owned by John L. Hinton at the date of his death. And the land here involved was owned by John L. Hinton at his death.

Therefore, since as between tenants in common, title to real property may not be ripened by adverse possession in less than twenty years, *Parham v. Henley,* 224 N.C. 405, 30 S.E. 2d 372, sufficient time between the date of the judgment of June, 1934, and the date of the institution of the present action, has not elapsed to avail defendants any advantage by any adverse possession they may have had during that period of time.

It is further contended by appellants that the present action abates by reason of the pendency of the former action of *Whitehurst v. Hinton,* 209 N.C. 392, and *S. c.,* 222 N.C. 85. On the other hand, appellees say the question is not properly presented on this record. But be that as it may, the point is not well taken. It must be borne in mind that abatement of an action because of the pendency of another action takes place only when there is identity of parties and of subject matter in the two actions. See *Taylor v. Schaub,* 225 N.C. 134, 33 S.E. 2d 658.

Tested by this principle of law, it is true that in the present case the tract of land on which the waste is alleged to have been committed, is one of the vast number of tracts of land sought to be partitioned in the former action, *supra.* It is also true that the plaintiffs in the present action are the petitioners or plaintiffs in the former action, and that the defendants in the present action are some of the defendants in the former action. And it is true that in the complaint in the former action there are general allegations of waste,—without specifying any particular tract of land on which waste was committed, and without charging any particular defendant with acts of waste. Moreover, in the former action injunction against further waste was not sought. On the other hand, the present action relates to acts of waste subsequent in time and entirely independent of those alleged in the "petition and complaint" in the former action. And here injunction against waste then being committed, and against further acts of waste is sought. The causes of action are different in the two actions, and the results sought are dissimilar. Indeed, a final judgment in the former action would not support a plea of *res judicata* in the present action. This, it is held, is one of the tests of identity. *Bank v. Broadhurst,* 197 N.C. 365, 148 S.E. 452; *Brown v. Polk,* 201 N.C. 375, 160 S.E. 357; *Taylor v. Schaub, supra.*

Thus after full consideration of all assignments of error, and arguments of counsel, in brief filed and orally before the Court, presented by appellants in support thereof, no error is made to appear, and the judgment below is

Affirmed.

DEVIN, J., took no part in consideration or decision of this appeal.

HARRY'S CADILLAC-PONTIAC COMPANY, INC. v. DR. CHARLES S. NORBURN.

(Filed 2 March, 1949.)

1. Vendor and Purchaser § 5b—

After the purchaser had signed the contract, the seller made material changes therein in the purchaser's presence, and signed it. *Held:* The fact that the purchaser did not re-sign the agreement after the alterations does not change the instrument from a contract of sale to a mere option, since the purchaser's acceptance of the agreement as changed with knowledge that it was to be notarized and recorded, is a ratification and adoption of his signature without affixing another.

2. Frauds, Statute of, § 10—

The fact that the assignment by the purchaser of a contract to convey is by parol is no defense to an action on the contract by the assignee against the vendor, since the statute of frauds is a personal defense which may be set up only *inter partes*.

3. Assignments § 1: Vendor and Purchaser § 5a—

A contract to convey is assignable, and the assignee may maintain an action thereon against the seller for specific performance.

4. Corporations § 20: Principal and Agent § 7e—

Where the president of a corporation executes a contract to purchase realty in his own name, but acts throughout the transaction as undisclosed agent of the corporation, the corporation has the right to sue thereon in its own name.

5. Assignments § 1: Vendor and Purchaser § 5a—

The contract to convey in suit stipulated that one-half the purchase price should be paid in cash and the remainder thereof secured by purchase money deed of trust securing two notes of equal amount payable one and two years after execution of the instrument. *Held:* The contention that the contract was executed in reliance upon the personal credit of the purchaser and therefore was unassignable, is untenable in the absence of some provision in the instrument against assignment or some circumstance judicially recognizable *dehors* the agreement.

6. Vendor and Purchaser § 18—

Ordinarily, a mere provision in a contract to convey that it should be completed by a specified date is insufficient to constitute time the essence of the contract, and evidence in this case disclosing that the failure of the purchaser to make payment within the time stipulated was due to the fact that the seller made himself inaccessible, and, further, that the seller's attorney advised that a later date would serve, *is held* insufficient to sustain the seller's motion to nonsuit on the ground that the contract was not completed on the day specified.

PLAINTIFF'S appeal from *Shuford, Special Judge,* October "A" Term, 1948, BUNCOMBE Superior Court.

The plaintiff sued for specific performance of a contract for the purchase and sale of real estate reading as follows:

"State of North Carolina
County of Buncombe

"This agreement made and entered into, this the 19th day of October, A. D. 1945, by and between Dr. Charles Norburn, the seller, of the County of Buncombe, State of North Carolina, and Harry Blomberg, the purchaser, of the County of Buncombe, State of North Carolina, Witnesseth:

"That the seller hereby agrees to sell, and the purchaser hereby agrees to purchase, at the price, and upon the terms hereinafter set out.

"All of that certain tract or parcel of land, situate, lying and being in the City of Asheville, County of Buncombe, State of North Carolina, and being described as follows:

"Being lot 167¾, sheet 1, ward 3, as shown on the city tax map of Asheville. Said lot being located on the East side of Page Avenue, Battery Park Hill, the size being approximately 25 feet frontage by 70 feet on the North line and 83 feet on the South line.

"With all the rights and easements appertaining thereto, but subject to restrictions, reservations and conditions of record.

"The purchaser agrees to pay for said land the sum of Eight Thousand Dollars ($8,000.00); of which Two hundred Fifty Dollars ($250.00) has been paid upon the execution and delivery of this contract, and the balance of said purchase money to be paid as follows: ½ Cash—1 & 2 years, additional cash to be paid upon delivery of deed and the remaining to be secured by a first deed of trust to be given back on said lot supported by two notes of equal amount due and payable on or before one and two years after date of said deed of trust. These notes to bear 5% interest.

"It is agreed that the deposit of $250.00 is to be held by R. P. Booth & Company, Realtor, until the completion of the terms of this contract; upon failure of execution by the seller within 3 days, the deposit shall be returned to the purchaser.

"That the seller agrees and binds himself, his heirs, executors or administrators, upon the payment of the purchase price, as hereinbefore provided, to execute and deliver to the purchaser, or assignee, a good and sufficient deed, in fee simple, conveying said land and premises, free from all liens and encumbrances, except restrictions of record, except as herein provided and taxes for the year of 1945 to be prorated to date of sale, and all prior taxes paid.

"It is agreed that settlement under this contract shall be completed on or before November, 20, A. D. 1945.

"In testimony, the said parties have hereto set their hands and seals, this the day and year first above written.

HARRY BLOMBERG (Seal)
CHARLES S. NORBURN (Seal)"

The plaintiff alleged that the interest of Harry Blomberg in the contract had been assigned to it, and that it had fully performed the contract as it related to it, and that the defendant wrongfully refuses to comply with its provisions and convey the land.

The defendant especially denies that there is any contract between himself and the plaintiff, and avers that the alleged assignment of the rights under it to the plaintiff was not in writing. He further sets up as a defense that if plaintiff had any right under the contract sued upon, it became extinguished by failure of the plaintiff to comply with the contract, or complete the settlement on or before November 20, 1945, as stipulated.

The plaintiff put the contract in evidence and proceeded with testimony. Roy Booth testified that he was the broker or selling agent who handled the transaction and that he saw Harry Blomberg and Dr. Norburn sign the document. That Norburn signed the contract after certain changes appearing on the face of the document had been made, and that Blomberg accepted the contract as so amended. He explained that the change had been made because Dr. Norburn had meantime raised his price from $6,250. Parts of the alterations were made in witness' handwriting and part in Dr. Norburn's. Witness notified Dr. Norburn of Blomberg's acceptance, and went ahead to prepare the papers to complete the transaction.

Booth prepared the notes and deeds of trust on November 17, and these were marked as identified by him.

The witness went to the Norburn Hospital on the 20th day of November, 1945. He was unable to contact Dr. Norburn on his first trip, being informed he was in the operating room. He went back at 3:00 o'clock the same day and made an effort to contact him. He went back at 5:00 o'clock the same day and made an effort to see him, but was unable to do so. The secretary told him he was still in the operating room. He made other efforts to contact Dr. Norburn. He went on the morning of the 21st, and was told by the secretary to see Mr. Pangle. Mr. Pangle was a lawyer, then a patient in the hospital. Mr. Pangle took the papers, looked them over, and said he was not instructed to deliver the deed at that time, witness might see him next day—that he would see Dr. Norburn, and witness might see him next day. When witness went back Mr. Pangle had been discharged from the hospital. He contacted Dr. Norburn by telephone. He left the deed of trust notes and check with the secretary, and on December 4, 1945, received the papers including check, in a letter

from Dr. Norburn. The letter was identified and introduced in evidence. It is as follows:

> "I am returning by registered mail the deed in trust made by Harry's Cadillac and Pontiac Company, together with two notes of $2,000 each, dated November 17, 1945, and payable on or before one and two years after date respectively. Also the check for $4,017.50, drawn by this company in my favor, their number 386.
>
> "The man with whom I was trying to deal in this transaction has refused to trade, and I therefore have no reason to make the deal now.
>
> "Kindly acknowledge receipt of the above listed enclosures.
>
> Yours very truly,
> C. S. NORBURN."

Witness stated:

> "Had I made contact and gotten the deed and checked the description and all, I could have closed that evening, but not doing that I made no further effort to do that until the next morning. I know the Register of Deeds has a record of deeds. I could have gone there and gotten the description. I did not do that. I could have made delivery of the deed of trust and the two notes and the check on the 20th, but I did not. When I went there I went there preparatory to getting ready."

After that he went to see Dr. Norburn, and was told by him he did not care to close the sale and would rather not go through with it.

He further testified that he did not go to the hospital on Thanksgiving Day. He went before Thanksgiving Day and the day after. "That was the day after I was not able to deliver the deed of trust properly executed and the notes and check." Dr. Norburn had said he wanted the sale closed by the 20th because he wanted to buy some blooded stock that were to be sold that day.

Harry Blomberg testified that he signed the contract offered in evidence. At that time he was President of Harry's Cadillac Co., Inc.; that he bought the lot in his own name and turned it over to the corporation. It was needed as a place to get in and out.

The minutes of the directors' meeting (Harry's Cadillac-Pontiac Company) of November 15, 1945, were introduced showing taking over the interest acquired by Blomberg in the contract of sale above set out and assuming all of its obligations, and authorizing the officers of the concern to consummate the transaction.

The notes, two each in the sum of $2,000, deed of trust, dated November 17, 1945, and check dated November 20, in the sum of $4,017.50, were put in evidence.

The witness stated that the contract, with the interlineations, signed by Dr. Norburn, had been exhibited to him, and accepted by him; that he was buying the property for the corporation and assigned the contract to it. A meeting was called and the minutes drawn up.

The minutes were put in evidence.

On cross-examination witness stated that he did not sign a separate assignment of the sales contract to the corporation but did sign the minutes when it was taken over by the Cadillac-Pontiac Co. He did not re-sign the contract of sale after the changes made in it, but accepted it. He executed the various papers relating to the deed of trust, and the deed of trust itself, November 17.

On re-direct examination he stated that he had never been tendered a deed at all.

Roy Booth testified that neither Dr. Norburn or any other person had tendered to him a deed for the property.

Witness stated he left the deed of trust, notes and checks with Dr. Norburn's secretary, at his office. At that time they were not signed. When he took them to Mr. Pangle on the 21st they had been signed and acknowledged.

At the conclusion of plaintiff's evidence the defendant demurred and moved for judgment of nonsuit. The motion was allowed, and plaintiff excepted and appealed.

James S. Howell and Oscar Stanton for plaintiff, appellant.
Smathers & Meekins for defendant, appellee.

SEAWELL, J. We need consider here only one exception taken by the plaintiff on the trial; the exception to the judgment of nonsuit on the demurrer to the evidence. The trial judge did not state on what theory the nonsuit was granted. He did not need to do so if the judgment could be sustained on any legal ground. But under the noted exception we may deal with the attack on plaintiff's position on the theory that one or more of the objections discussed in the brief and oral argument prevailed.

The theory that the contract of sale on which plaintiff sues was a mere option or unilateral offer on the part of Dr. Norburn because it was not re-signed by Blomberg after certain changes in it were called to his attention, is not sound. Blomberg's acceptance of the agreement as changed, with the knowledge that it was to be so notarized and recorded, was a ratification and adoption of the signature without affixation of another.

The fact that assignment of the rights under the contract by Blomberg to the corporation was in parol, if it was, and, therefore, within the statute of frauds, is not an available defense to the seller, in this action. Under the evidence the assignment was an executed transaction which, from the

defendant's angle in the controversy, concerns the parties to that transaction alone.

"This defense is a personal one like the defense of infancy, the statute of limitations, usury and similar defenses." 49 Am. Jur., sec. 588, p. 896. It is, therefore, a matter *inter partes* to the transaction.

"The purpose of the statute is to prevent fraud upon individuals charged with participation in transactions coming within this purview and not upon the public at large." *Allison v. Steele,* 220 N.C. 318, 17 S.E. 2d 339. Moreover on cross-examination Blomberg was permitted to testify without objection that he signed the minutes of the meeting in which the assignment was completely set forth.

There is no question that such a contract is assignable and that it puts the seller under its stipulated obligations to the purchaser of the contract and entitles the assignees to specific performance. Bispham's Equity, 9th Ed., 592; *Casket Co. v. Wheeler,* 182 N.C. 459, 109 S.E. 378; G.S. 1-57.

The plaintiff's evidence, too, is sufficient to generate the inference that in the transaction Blomberg acted as the agent for the corporation, bought the property for it, "was buying for it all the time," and, if this is believed, the corporation would have the right to sue in its own name. "The right of a principal to maintain an action to enforce a contract made by his agent in his own name without disclosing the name of the principal is well settled." *Williams v. Honeycutt,* 176 N.C. 102, 96 S.E. 730; *Nicholson v. Dover,* 145 N.C. 18, 58 S.E. 444.

The contract sets out the manner in which the purchase price of $8,000 shall be paid, acknowledges the payment of $250 for execution and delivery of the contract and requires payment of the balance, one-half cash in one and two years, "additional cash to be paid upon delivery of deed, and the remaining to be secured by a first deed of trust to be given back on said lot supported by two notes of equal amount due and payable on or before one and two years after date of said deed of trust." The objection that such a contract necessarily imports that credit is given alone to the person with whom the transaction is personally carried out and that no other person or concern can be substituted for it because of the changes in the person to whom credit is given would, *ipso facto,* defeat the assignability of such a property right at the arbitrary pleasure of the seller. We think that unless adequately expressed in the instrument itself, or in some circumstance of judicially recognizable nature *dehors* the agreement, it cannot be raised as a defense. Nothing of the sort appears here; and since the contract calls for payment of half the purchase price in cash with balance secured on the premises, the suggestion seems pointless.

In this contract it does not appear that time was the essence of the agreement as it often is in a mere option. "It is agreed that settlement

under this contract shall be completed on or before November 20, A. D. 1945." The agreement itself is not worded to avoid the contract altogether or expressly vitiate it, if settlement is not made at that time.

However, if we concede it to be of the essence of the contract, the evidence of the plaintiff is still to be considered as to whether the plaintiff or the plaintiff's agent was prevented from complying with this provision through the non-co-operation of the seller, or whether, under the circumstances, its strict compliance had been waived; whether the inability to "settle," if it required tender in the strict sense, was not due to the fault of the defendant by rendering himself inaccessible in the first place, and later by his attorney, and presumably his agent, Mr. Pangle, who advised a later date would serve. 62 C.J., p. 657, sec. 5.

We cannot say that there are no inferences from the evidence which tend to support plaintiff's contentions. In withdrawing it from the jury there was error. The judgment of nonsuit is reversed.

Reversed.

CHESTER R. MORRIS, RAY T. ADAMS, R. P. MIDGETTE AND JEANNETTE F. SIMPSON v. W. J. TATE, IRENE SEVERN, PAULINE T. WOODARD, ELIJAH W. TATE AND LOUIS J. TATE.

(Filed 2 March, 1949.)

1. Quieting Title § 2—

In this action to quiet title, the evidence *is held* not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor.

2. Trial § 31b—

Ordinarily the trial court is required by G.S. 1-180 to state the evidence to which he applies the law, and while this requirement may be dispensed with when the facts are simple, yet, even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury and therefore a recapitulation of the evidence may be necessary.

3. Trial § 28—

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. G.S. 1-180.

DEFENDANTS' appeal from *Edmundson, Special Judge,* October 1948 Term of DARE Superior Court.

Martin Kellogg, Jr., John H. Hall, and McMullan & Aydlett for plaintiffs, appellees.

Worth & Horner for defendants, appellants.

SEAWELL, J. The plaintiffs brought this action to remove a cloud upon the title to a small tract of land near Kitty Hawk, in Dare County, alleging that defendants wrongfully claim to be the owners.

The complaint sets up by metes and bounds the land in controversy, averring ownership and possession, and refers to a purported conveyance under which defendants claim. The defendants, answering, admit and reaffirm their claim to the tract of land described, and refer to the deed mentioned in the complaint as constituting the basis of the claim. Plaintiffs, replying, set up a deed executed prior to this conveyance, allegedly from a common source, under which they claim, alleging that it includes the *locus* in controversy, and, by *mesne* conveyance, puts title in them.

On the trial these deeds appear in plaintiffs' evidence in efforts to show this common source of title; and the gravamen of the controversy in the lower court lay in the validity of this document and the character and effectiveness of the evidence introduced to locate its boundaries in relation to the disputed tract.

The defendants attacked the deed directed to this purpose as void for want of sufficient description, and contend that the oral evidence was not sufficient to establish the boundaries of the purported conveyance even if such defect did not exist, or to justify an inference that the disputed tract lay within its boundaries.

The evidence, both documentary and oral, was extensive, although not voluminous, and was not free from the complications usually met with in cases of this kind.

At the conclusion of plaintiffs' evidence and again at the conclusion of all the evidence, the defendants demurred thereto and moved for judgment of nonsuit. The demurrer was overruled and defendants excepted.

The following issues were submitted:

> "1. Is the 8.58 acre, more or less, tract of land described in section first of the complaint included in the 52 acre, more or less, tract of land described in the deed from W. J. Tate and wife to Frank Stick, being plaintiffs' Exhibit 1?
>
> "2. Are the plaintiffs the owners of and entitled to the possession of the lands described in section 1 of the complaint?"

The judge, in his charge to the jury, announced that he was "of the opinion that the plaintiffs are entitled to a directed verdict," and that he would not, in this instance recapitulate the evidence or contentions of the parties, "because upon all the evidence and the law as the court under-

stands its application to the evidence in this case, the plaintiffs are entitled to a directed verdict."

Thereupon the court instructed the jury as follows:

> "If you believe all of the evidence in this case and believe it to be true by its greater weight, you will answer the issue yes, and it would then follow upon that issue that as a matter of law the Court would answer the second issue." Adding, "You may retire and make up your answer to that issue as directed."

The court recalled the jury and gave the additional instruction:

> "I had this to say to the jury: That in connection with this case the Court has directed a verdict, that is to say, I have instructed you that if you believe all the evidence and believe it to be true by the greater weight of the evidence, you will answer the first issue yes. I did not know whether that instruction was clear to you, and I called you back to again repeat and reiterate that instruction, which is termed a directed verdict. The Court directs you, the jury, in your verdict or answer to the issue. You may retire."

The jury was again recalled by the court and the following instruction given:

> "I made my instruction as simple as I could and as clear as I could and if the jury has not reached a unanimous verdict, you may retire and consider it further."

To each of the instructions noted the defendants made exception.

The court again recalled the jury and in response to inquiry by the court, the jury announced that it had agreed. The jury answered the first issue "yes," and the court answered the second issue "yes," declined to set the verdict aside for errors committed, to which defendants excepted, and over defendants' objection and exception, entered judgment upon the verdict. Defendants appealed.

Upon this record the defendant appellants stress these challenges to the trial, covered by their exceptions: (a) The refusal of the court to sustain their demurrer to the evidence; the failure of the judge "to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon"; and the exceptive instructions to the jury above noted.

1. The Court at this juncture is not prepared to say that there are no inferences to be drawn from the evidence in support of plaintiffs' case, or to pass adversely on its submission to the jury.

2. G.S. 1-180, so intimate in its prescription for the conduct of the trial judge, is, perhaps, the most often cited statute on either criminal

or civil appeals. It was intended, of course, to keep inviolate the line between the functions of court and jury,—the one as dispenser of the law, the other as triers of the facts,—and thus to preserve the integrity of trial by jury. But it does more. It provides a co-operative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. The statute, therefore, sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law. It is true that our decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple; *Duckworth v. Orr,* 126 N.C. 674, 677, 36 S.E. 150; *S. v. Reynolds,* 87 N.C. 544; *S. v. Grady,* 83 N.C. 643; thus leaving the court another troublesome penumbra to deal with in its line-fixing burdens.

But we do not find the evidence in the present case such as to justify a disregard of this requirement of the statute; nor do we think that the fact that the trial judge thought it incumbent upon him to give an instructed verdict was sufficient to change the rule,—since the evidence, notwithstanding, must be dealt with by the jury; and the fact that they are to deal alone with its credibility under such an instruction does not entirely obviate the error. Credibility may depend on many things not connected with veracity;—amongst them, as applicable to the present situation, the opportunity with which the witness may have had to observe the facts to which he testifies and the physical conditions about which he is speaking. The submission of the evidence to the jury was not merely *pro forma,* and even under such instruction their finding, when honestly made, is entitled to respect. The information promised them by the statute, therefore, cannot ordinarily be withheld.

The defendants object to the language in which the instructions were given and the reiterations by the court when the jury was recalled several times *ex mero motu* and insistence placed on compliance with these instructions. The language used in one of above instructions seems to lend the force of judicial compulsion to the requirement that the verdict should be rendered "as directed" in contravention to this rule.

We need not consider these objections minutely since, in our opinion, the evidence upon the trial was not so univocal or so clear in its inferences and tendencies as to justify the instruction and it must be held for error. *Perry v. Trust Co.,* 226 N.C. 667, 40 S.E. 2d 116; *Armour Fertilizer Works v. Cox,* 187 N.C. 654, 122 S.E. 479.

It is proper to say that the formula adopted by the judge when giving the questioned instruction, while sometimes passed by the appellate court when it appears no prejudice has followed, is not approved. *S. v. Loftin,* 186 N.C. 205, 119 S.E. 200; *S. v. Singleton,* 183 N.C. 738, 110 S.E. 846; *Brooks v. Orange Rice Mill Co.,* 182 N.C. 258, 108 S.E. 725. Where a

directed verdict is proper (that is, where all the evidence points in the same direction with but a single inference to be drawn) a formula has been suggested as more consistent with the office of the jury,—"if you find from the evidence the facts to be as all the evidence tends to show you will answer the issue," etc.

For these reasons the defendants are entitled to a new trial, and it is so ordered.

New trial.

STATE v. JAMES G. HEDGEPETH.

(Filed 2 March, 1949.)

1. Criminal Law § 38f—Experimental evidence held competent upon a showing of substantially similar conditions.

The State's case rested largely upon what a witness testified she saw through a certain window on a particular morning. Defendant introduced testimony that at the time in question the whole sky was overcast. Defendant tendered witnesses who would have testified that on the day before the trial the sky was overcast, and that they stood outside the window at distances varying from one to ten feet and could not distinguish any objects in the room, but that they did not know the climatic conditions on the day in question. *Held:* The exclusion of the testimony was error, since it appears from the evidence that the experiments were made under conditions substantially similar to those existing on the day in question.

2. Same—

While the similarity of the circumstances and conditions is a preliminary question for the court in determining the competency of testimony of experiments, the exclusion of such testimony will be held for prejudicial error when such evidence is very material, and adequate predicate for its admission has been laid.

3. Criminal Law § 53d—

It is the duty of the trial court to explain and apply the law to the evidence in the case, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is reversible error.

4. Criminal Law § 53k—

Testimony of the sheriff in this case was competent for the purpose of contradicting the testimony of one of defendant's witnesses. *Held:* An instruction to the effect that the State contended that the jury should believe the testimony of the officer and find the defendant guilty of the offense charged, is erroneous as charging that the impeaching testimony was substantive evidence, and the prejudicial character of the charge was emphasized by the fact that the witness singled out by the court was an officer of the law.

STATE *v.* HEDGEPETH.

APPEAL by defendant from *Morris, J.*, November Term, 1948, GATES. New trial.

Criminal prosecution on bill of indictment charging that defendant feloniously assaulted a female child eleven years of age with the intent to rape.

On 31 August 1948 a Mrs. Bowden passed the window to a bedroom in the home of the child. She testified that she saw defendant and the child on the bed under circumstances which indicated he was attempting an act of intercourse. She saw the girl's arm and thigh and a strip of her dress about one and one-half inches wide and six inches long. She saw the back of the head, shoulder, and shirt of a man. She identified the girl and defendant from what she thus saw.

Mrs. Bowden testified that she was standing about three feet from the window, that a hurricane was approaching, but the sky was clear. Other witnesses for the State testified that it "was very cloudy that morning"; "it was a hazy, cloudy day"; "the sky was overcast with clouds."

There was a galvanized wire screen over the window and under that was regular screen wire, making two layers of wire.

Both the girl and the defendant denied the charge. The girl's father, witness for the State, and her mother, witness for the defendant, testified to facts which tended to contradict Mrs. Bowden and refute the charge. There was other evidence in behalf of defendant.

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

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

Godwin & Godwin and John H. Hall for defendant appellant.

BARNHILL, J. The defendant offered evidence to the effect that the day before the trial "was kind a cloudy, drizzly day," "the whole sky was overcast," and tendered three witnesses who, if permitted so to do, would have testified that on that day, about 11:00 a.m., they went to the home of the girl and examined the bedroom; that it was a very dark room; that they stood outside the room at varying distances of one to ten feet and attempted to look through the window, and that they could not distinguish any objects in the room. Each, in response to a question by the court, stated that he did not know the climatic conditions on 31 August. Thereupon, the tendered testimony was excluded and defendant excepted.

Apparently this testimony was excluded for the reason the witnesses could not say that their experiments were made under conditions substantially similar to those that existed on the day of the alleged crime.

But this was not a prerequisite. The defendant had already shown, through examination of witnesses for the State, that 31 August was a hazy, cloudy day and the sky was overcast with clouds. The condition of the window was the same. Thus it was made to appear that the experiments were made under substantially similar circumstances. *S. v. Phillips,* 228 N.C. 595. The one and only "variation" rests in the testimony of Mrs. Bowden: that while a hurricane was approaching, the sky was clear on 31 August. In the light of all the other testimony, this was not sufficient to render the tendered testimony incompetent. *S. v. Phillips, supra.*

While the similarity of the circumstances and conditions is a preliminary question for the court, we are of the opinion that its ruling here was a bit "too wide of the mark." The only evidence of guilt is contained in the testimony of Mrs. Bowden. Whether she could see through the window is a material factor in determining the truth of her statements. The testimony developed through the experiments tends sharply to impeach her testimony and assail her credibility. Hence, its exclusion was prejudicial to defendant. See *S. v. Phillips, supra,* where the question is fully discussed.

The charge of the court contains the following to which the defendant excepts, to wit:

"The State says and contends furthermore that it has offered in evidence in this case the testimony of the sheriff of this County, who testified that, in contradiction of the little girl who has testified for the defendant, that he had a conversation with her and that when he had the conversation with her, that the child told him what had taken place between her and the defendant, and the State says and contends that you ought to believe that is actually what took place. The State says and contends that was made at a time when the child had not had an opportunity to be instructed or to be talked to by any person, except the Sheriff, and that the Sheriff was the first person who talked to her, with the exception of Mrs. Bowden, herself; and the State says and contends that at that time the child made an honest confession; that she had not had time to form any fixed design to tell anything except what was the truth about it; and the State says and contends, therefore, you should believe that what she told the sheriff on that occasion is actually what transpired and the defendant is guilty as charged in the bill of indictment."

Thus the court in effect instructed the jury that the State contended the statement of the girl to the sheriff was substantive evidence of guilt, that it was a "confession" sufficient to prove the guilt of defendant, that they should believe their sheriff and find that what the girl told him on that occasion actually transpired as testified to by the sheriff and return a verdict of guilty.

It is the duty of the court to explain and apply the law to the evidence in the case and set the minds of the jury at rest in respect to the principles of law which should guide them in arriving at a verdict. And so it should not at any time give an instruction, even in the form of a contention, which presents an erroneous view of the law or an incorrect application thereof.

Having given the contention of the State based on this testimony in a form calculated to lead the jury to understand that if they believed the sheriff they should return a verdict of guilty, the court should have instructed them forthwith as to the nature of the evidence and the manner in which it was to be considered by them, so that an erroneous conception thereof would not find lodgement in their minds.

The court at no time cautioned the jury that the testimony of the sheriff was not substantive evidence but was to be considered only as it might tend to impeach the testimony of the girl, a witness for the defendant. This instruction was its only reference thereto. Its prejudicial nature is further enhanced by the fact the witness singled out by the court was the sheriff of the county. *S. v. Watkins,* 159 N.C. 480, 75 S.E. 22; *S. v. Rhinehart,* 209 N.C. 150, 183 S.E. 388; *S. v. Hart,* 186 N.C. 582, 120 S.E. 345; *S. v. Horne,* 171 N.C. 787, 88 S.E. 433; *S. v. Benton,* 226 N.C. 745, 40 S.E. 2d 617. Jurors are prone to believe the testimony of their officers. This is as it should be, for no man who is unworthy of belief should hold public office. Though the charge was in the form of a contention, its legal inferences were such as to mislead the jury. Under the circumstances of this case, it must be held for error.

For the reasons stated there must be a

New trial.

JOE DAWSON v. SEASHORE TRANSPORTATION COMPANY, INC.

(Filed 2 March, 1949.)

1. Automobiles § 8d—

While a motorist is not under duty to anticipate that an unlighted vehicle may be standing on the traveled portion of the highway without flares or other warning, he is still under duty to keep a proper lookout and proceed as a reasonably prudent person would under the circumstances.

2. Negligence § 19c—

Since the burden of proof on the issue of contributory negligence is upon defendant, nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom.

3. Automobiles §§ 8d, 18h (3)—

The evidence tended to show that in driving down grade nearing an underpass plaintiff ran into a dense fog mixed with smoke which limited visibility to about nine feet, that he immediately slowed to fifteen or twenty miles per hour, and, after proceeding six or eight yards, ran into the rear of defendant's bus, which was stopped about the center of plaintiff's lane of traffic without lights, flares or other warning signals. *Held:* The evidence is insufficient to establish contributory negligence on the part of plaintiff as a matter of law, and nonsuit on this ground was error.

APPEAL by plaintiff from *Bone, J.*, at November Term, 1948, of WILSON.

Civil action to recover for personal injuries alleged to have been sustained as a result of the negligence of the defendant.

It is disclosed by the plaintiff's evidence that he was driving his automobile between 7:00 and 7:30 o'clock p.m., on the night of 7 December, 1946, along U. S. Highway 301-A, in the corporate limits of the town of Wilson. The highway is four lanes wide and the north and south lanes are separated by a parkway. The plaintiff was proceeding north on his right-hand side of the northbound lane of the highway at about 20 or 25 miles an hour. Foggy weather had prevailed for several days. When the plaintiff was nearing the underpass of the Norfolk Southern Railroad, going down grade, he ran into a streak of dense fog mixed with smoke, coming from the town dump nearby. The fog and smoke made visibility so poor that he could see only about 9 feet in front of him. He immediately slowed down to 15 or 20 miles per hour, and after proceeding 6 or 8 yards in this dense fog and smoke, he ran into the rear end of the defendant's bus, which was stopped about the center of the northbound lane without lights, flares or other signals as a warning of its presence. Almost immediately, and before the three occupants of the plaintiff's car could get out, two other cars following plaintiff's vehicle, ran into the back of plaintiff's car, knocking it back into the defendant's bus.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed and the plaintiff appealed to the Supreme Court.

Connor, Gardner & Connor for plaintiff.

Lucas & Rand and Z. Hardy Rose for defendant.

DENNY, J. The sole question presented on this appeal is whether or not the plaintiff, under the facts and circumstances disclosed by the evidence, was guilty of contributory negligence as a matter of law? We do not think so.

The appellee is relying upon *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Riggs v.*

Oil Corp., 228 N.C. 774, 47 S.E. 2d 254, and *Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203.

In the last cited case, Sibbitt was driving about 50 or 55 miles per hour. He saw blankets of smoke across the highway coming from fires on the side thereof, and put on his brakes and slowed down to approximately 30 or 40 miles per hour. He then proceeded about 50 or 60 yards in the smoke, when he saw a light flare on the left side of the road, which he mistook for an approaching automobile. When he saw this light he realized that the "smoke was a solid wall," and at the same time he saw the light "flare" he saw the "rear end of an oil truck," and immediately applied his brakes, but his automobile collided with the rear end of the tanker. In *Riggs v. Oil Corp., supra,* the plaintiff testified he was driving his car with the dimmers on, not exceeding 25 miles an hour along a street in the City of Kinston, in foggy weather with mist and rain, and could not see 5 feet ahead of him 5 feet above the ground. He also testified that under the existing weather conditions he could have seen an object down the highway for about 200 feet, but with the beam of his lights shining down and under the truck he did not see it in time to even attempt to put on his brakes. In *Tyson v. Ford, supra,* atmospheric conditions played no part. It was a clear, cold night, the plaintiff, according to his testimony, was operating his car too rapidly to stop it or turn to the left and avoid hitting a truck parked on the highway. The plaintiff was driving 40 to 45 miles per hour when he hit the truck. He testified he was familiar with the road "and as we rounded one curve and hit a small hill, then went over the hill, I suddenly saw a truck in the road ahead of me. . . . If I had seen it in time, I could have turned to the left and avoided striking it. . . . No car (was) coming from the opposite direction." In *Bus Co. v. Products Co., supra,* the facts disclose that the night was "dark, raining and foggy." Shortly before the collision the bus met a truck traveling in the opposite direction with lights dimmed, but that vehicle had passed before the collision occurred. The driver of the bus testified he was within 8 or 10 feet of the parked truck of the defendant, before he saw it and was too close to stop or turn. According to the testimony of the highway patrolman, with ordinary automobile lights under the conditions then existing normal vision was 75 feet. A further examination of the original record shows that plaintiff's driver testified that he was driving 35 miles an hour and "slackened his speed" as he passed the approaching vehicle, but the weather would not permit his front lights to "shine over 10 or 15 feet." There was no evidence of any sudden change in the atmospheric conditions, as there is in the case now before us. In each of the above cases, the plaintiff was held guilty of contributory negligence as a matter of law.

A motorist is not under the duty to anticipate that an unlighted vehicle might be left on the traveled portion of the highway, without flares or other warning of danger, but even so, this does not relieve him of the duty of keeping a proper lookout and proceeding as a reasonably prudent person would under the circumstances. *Stacy, C. J.,* said, in *Tyson v. Ford, surpa:* "The test of liability for negligence, primary or contributory, is the departure from the normal conduct of the reasonably prudent man, or the care and prevision which a reasonably prudent person would employ in the circumstances. The rule is constant, while the degree of care which a reasonably prudent person is required to exercise varies with the exigencies of the occasion. *Diamond v. Service Stores,* 211 N.C. 632, 191 S.E. 355. For this reason, no factual formula can be laid down which will determine in every instance the person legally responsible for a rear-end collision on a highway at night between a standing vehicle and one that is moving. 'Practically every case must "stand on its own bottom."' *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637."

Moreover, the burden of proof on the issue of contributory negligence is upon the defendant, and a judgment of nonsuit on this ground should not be granted unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom. *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 131; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137; *McCrowell v. R. R.,* 221 N.C. 366, 20 S.E. 2d 352; *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Hayes v. Telegraph Co.,* 211 N.C. 192, 189 S.E. 499.

Consequently, we are not inclined to hold that where an automobile was being driven at a speed of 20 to 25 miles per hour, in foggy weather without difficulty for lack of vision, and suddenly entered a dense streak of fog and smoke that cut down visibility to "about three yards," and the automobile collided with the rear end of an unlighted bus, which had been left on the traveled portion of the highway, before the automobile had proceeded under such conditions more than 6 or 8 yards, at a speed of not more than 15 or 20 miles per hour, that the driver of such automobile was guilty of contributory negligence as a matter of law. This is a border line case, and for that very reason, we think the issues of negligence and contributory negligence ought to be submitted to a jury. See the second line of decisions in *Tyson v. Ford, supra; Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793, and *Moseley v. R. R.,* 197 N.C. 628, 150 S.E. 184.

The judgment of the court below is

Reversed.

RAYMOND F. HARDEE v. VIOLET GRACE MITCHELL.

(Filed 2 March, 1949.)

1. Divorce § 17—

Decree for absolute divorce which awarded the custody of the child of the marriage was entered in another state and the parties thereafter moved to this State. *Held:* The proper procedure for either party to determine the right to the custody of the child is by a special proceeding under G.S. 50-13.

2. Appeal and Error § 40a—

A single exception "to the signing of the judgment" presents the sole question whether the facts found or admitted support the judgment.

3. Divorce § 19—

Findings that the parties had been married and divorced, that the wife was a person of good character, resident in this State, that the husband is financially responsible, and that the best interest of the minor child of the marriage would be promoted by awarding its custody to the wife, is sufficient to sustain decree awarding its custody to her and requiring him to make contributions for the support of the child.

4. Same—

The welfare of the child at the time of the contest is controlling in determining the right to the custody of the child as between its divorced parents.

5. Same—

A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent and may be later modified by the court upon change of conditions.

APPEAL by petitioner from *Bone, J.*, at October Term, 1948, of NASH.

The petitioner, Raymond F. Hardee, and the respondent, Violet Grace Mitchell, *nee* Violet Grace Myrick, intermarried in North Carolina 25 December, 1941, and established a matrimonial domicile in Florida, where their son, Kenneth Ray Hardee, was born 10 January, 1944. Their marriage was terminated by a decree of absolute divorce rendered in the Circuit Court of Seminole County, Florida, 5 April, 1946, which awarded "the permanent care, custody, and control" of Kenneth Ray Hardee to respondent and required petitioner to contribute $50.00 monthly to respondent for the support and education of Kenneth Ray Hardee until "he arrives at the age of 21 years, or until the further order of this court." Both petitioner and respondent subsequently contracted second marriages with other spouses and located in North Carolina, the former settling in Nash County and the latter in Halifax County, where she now resides

with her present husband, Joseph P. Mitchell, and the child, Kenneth Ray Hardee.

On 10 April, 1947, the petitioner commenced this special proceeding against the respondent in the Superior Court of Nash County to determine the custody of the minor, Kenneth Ray Hardee. In his petition, he prayed in the alternative either that he be granted the custody of the child, or that he be released from the requirement of the Florida decree that he contribute as much as $50.00 monthly to the child's support and education. The respondent answered, alleging that the child's best interest demanded his continuance in her custody and asking that the petitioner be compelled to pay $50.00 per month to her for the child's maintenance. Judge Bone heard the evidence offered by petitioner and respondent in support of their respective claims without request from either of them for any specific findings. In actuality, the parties merely disagreed as to the inferences deducible from the salient facts, which were admitted in the pleadings on both sides and which disclosed the matters heretofore set forth, the good character of the respondent, and the financial ability of the petitioner to pay $50.00 monthly towards the support of his small son. Upon a "consideration of the whole matter," Judge Bone found that "the provisions set out below will promote the welfare of said child" and entered judgment providing "that the custody of the child, Kenneth Ray Hardee, be and remain in the respondent, subject to the provisions hereinafter set forth; that the petitioner shall pay to the respondent for the support of said child the sum of $50.00 per month, said payments to be made on the 5th day of each and every month, until further order of the court; that during the entire month of July of each year the petitioner shall be permitted to take and keep with him the said child, Kenneth Ray Hardee, and further, during each calendar month in the year, except July, petitioner shall be permitted to have and keep with him the said child for one week-end to be selected by the petitioner, which said week-end shall commence at 9 o'clock A. M. on Saturday and end at 6 o'clock P. M. on Sunday."

The petitioner noted a solitary exception "to the signing of the judgment" and appealed therefrom to this Court.

S. L. Arrington for petitioner, appellant.
Banzet & Banzet for respondent, appellee.

ERVIN, J. The parties to this proceeding were divorced in Florida. Hence, the petitioner has been well advised in point of procedure because the pertinent statute expressly prescribes that the custody of the child "of parents who have been divorced outside of North Carolina may be determined in a special proceeding instituted by either of the parents in

the superior court of the county wherein the petitioner, or the respondent, or the child" resides at the commencement of the proceeding. G.S. 50-13; *Phipps v. Vannoy,* 229 N.C. 629, 50 S.E. 2d 906.

Petitioner did not request the court to find the facts or except to the finding made by it. He merely took a single exception "to the signing of the judgment." This exception presents to this Court the sole question whether the facts found or admitted support the judgment. *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228; *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555; *Ingram v. Mortgage Co.,* 208 N.C. 329, 180 S.E. 594; *Warren v. Bottling Co.,* 207 N.C. 313, 176 S.E. 571; *Wilson v. Charlotte,* 206 N.C. 856, 175 S.E. 306; *Ullery v. Guthrie,* 148 N.C. 417, 62 S.E. 552.

The admitted facts relating to the marriage, parenthood, and divorce of the parties, the character and residence of the respondent, the tender age of the child, Kenneth Ray Hardee, and the financial ability of the petitioner, and the finding of the judge that the judicial award of custody actually made "will promote the welfare of said child" are sufficient to sustain the judgment. *Price v. Price,* 188 N.C. 640, 125 S.E. 264. This requires an affirmance.

Nevertheless, we have reviewed all of the testimony and have reached the deliberate conclusion that the judgment was entered with due regard for the fundamental principle that in a contest between parents over the custody of a child the welfare of the child at the time the contest comes on for hearing is the controlling consideration. *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617; *Pappas v. Pappas,* 208 N.C. 220, 179 S.E. 661; *Tyner v. Tyner,* 206 N.C. 776, 175 S.E. 144; *Clegg v. Clegg,* 186 N.C. 28, 118 S.E. 824.

It may be well to observe, in closing, that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. *In re Means,* 176 N.C. 307, 97 S.E. 39.

For the reasons set out above, the judgment is

Affirmed.

LILLY COOPER, WIDOW; WILLIAM LEE COOPER, JR., SON; BARBARA JEAN COOPER, DAUGHTER, AND ANNA LEE BOBBITT, STEPDAUGHTER OF WILLIAM LEE COOPER, DECEASED, EMPLOYEE, v. COLONIAL ICE COMPANY, EMPLOYER; AND HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER.

(Filed 2 March, 1949.)

1. Master and Servant § 55d—

Findings of fact of the Industrial Commission are conclusive when supported by evidence, even though the evidence permit an inference *contra*, but conclusions of law deduced from the facts found under a misapprehension of law are reviewable.

2. Master and Servant § 4a—

An independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the results of his work.

3. Master and Servant § 39b—Evidence held to sustain finding that deceased was employee and not independent contractor.

The evidence disclosed that intestate sold ice in his territory at defendant's regular retail price and thereafter paid defendant a stipulated sum for each block sold, that defendant turned over to him all orders received by it within his territory, furnished intestate a horse and wagon and feed for the horse, which were kept at defendant's place of business, that defendant required him to report at the plant at a stipulated time six days a week and that defendant delivered ice to the wagon upon request and did not permit intestate to haul on the wagon more than six blocks of ice at a time, with evidence that at times intestate was on defendant's pay roll, *is held* sufficient to support the finding of the Industrial Commission that intestate was an employee within the coverage of the Workmen's Compensation Act and not an independent contractor. G.S. 97-2 (b).

BARNHILL, J., dissents.

APPEAL by defendant from *Bone, J.*, at October Term, 1948, of WILSON. Affirmed.

Claim by dependents of William Lee Cooper under Workmen's Compensation Act for compensation for fatal injury by accident arising out of and in the course of his employment by defendant Colonial Ice Co.

The facts found by the Industrial Commission, and upon which it based an award may be summarized as follows:

Ten years before his death William Lee Cooper entered into an oral arrangement with Colonial Ice Co. for the sale and delivery of ice in specified territory in Wilson. Defendant agreed to furnish him a horse and wagon, and all equipment used in connection with retail delivery of ice. The name of the Colonial Ice Co. was on the wagon. According

to this arrangement each morning during the season Cooper was to obtain a load of ice at defendant's plant and was charged $1.20 for each block which he was to sell at the Company's regular retail price of $1.80. Cooper was to begin work at 7 a.m. and quit before dark. Whenever orders were received by the defendant for ice to be delivered in the territory served by Cooper these orders were turned over to Cooper to make delivery, and defendant would deliver additional ice to his wagon when requested. Each day when Cooper returned from selling ice, he paid the Ice Company at the specified rate and was credited with ice unsold. The defendant had right to terminate the agreement at any time or discharge him if work unsatisfactory. A similar arrangement applied to retail sale of coal. At times Cooper was on the defendant's pay roll for other work at the plant. The Industrial Commission found his hours of work, territory, and other details concerning the sale and delivery of ice were supervised by defendant, and that the arrangement for purchase and payment of ice was in effect a method of calculating his wages and obtaining payment for ice delivered by him. Cooper kept the horse and wagon in defendant's plant and he fed the horse on materials furnished by defendant. Defendant's manager testified, "During the winter months of '46 and '47 he was on the payroll." Defendant did not allow him to haul on the wagon more than six blocks of ice at the time. Cooper sold ice ticket books and turned the money over to defendant, thereafter accepting tickets as cash. In October, 1947, while Cooper was engaged under this arrangement in delivering ice, he was struck by a motortruck and injured, and died in consequence. In defendant's form report of the injury (employer's report of accident to employee) transmitted to the Industrial Commission 16 October, 1947, the Colonial Ice Co. was named as "employer" and "ice delivery" was put down as Cooper's "regular occupation." In response to the question, "How long employed by you" defendant wrote, "10 years." "Piece or time work?" "Piece." . . . 10 hours per day, 6 days per week, average weekly earnings $40.

The Industrial Commission found that Cooper's fatal injury was by accident arising out of and in the course of his employment by defendant Ice Company, and awarded compensation in accord with the statute. On appeal by the defendants to the Superior Court the action of the Industrial Commission was in all respects affirmed, and defendants appealed to this Court.

Connor, Gardner & Connor and Cyrus F. Lee for plaintiffs, appellees.
Ruark & Ruark for defendants, appellants.

DEVIN, J. The defendants denied liability on the ground that the decedent William Lee Cooper, at the time of his injury, was not an em-

ployee of the defendant Colonial Ice Co. within the meaning of the statute (G.S. 97-2 (b)) but was an independent contractor. It was urged that the facts, as such, found by the Industrial Commission sustain the defendants' view, and are insufficient to support an award in favor of claimants under the Workmen's Compensation Act.

In order to implement the remedial purposes of the Workmen's Compensation Act the Industrial Commission is constituted the fact-finding body, and the statute declares that the findings of this Commission shall be "conclusive and binding as to all questions of fact." G.S. 97-86; *Hunter v. Peirson,* 229 N.C. 356, 49 S.E. 2d 653; *Gabriel v. Newton,* 227 N.C. 314, 42 S.E. 2d 96; *Smith v. Paper Co.,* 226 N.C. 47, 36 S.E. 2d 730; *Beach v. McLean,* 219 N.C. 521, 14 S.E. 2d 515; *Cloninger v. Bakery Co.,* 218 N.C. 26, 9 S.E. 2d 615; *Lockey v. Cohen,* 213 N.C. 356, 196 S.E. 342; *Carlton v. Bernhardt-Seagle Co.,* 210 N.C. 655, 188 S.E. 77. But this does not mean that the conclusions of the Commission from the facts found are in all respects unexceptionable. *Perley v. Paving Co.,* 228 N.C. 479, 46 S.E. 2d 298. Or as expressed by *Justice Denny* in *Whitted v. Palmer-Bee Co.,* 228 N.C. 447, 46 S.E. 2d 109, "When facts are found by the Commission under a misapprehension of the law, the court is not bound by such findings." Here the material facts are not controverted. But it is argued that these facts necessarily develop the defendant's contention that the contract of service of the decedent was that of an independent contractor. Question is raised whether the findings of fact made by the Industrial Commission are supported by competent evidence (*Carlton v. Barnhardt-Seagle Co., supra*), and, if so, whether on the facts so found the contractual relationship between the decedent and the defendant Ice Company was such as to invoke remedy under the Act.

It is well settled as a general rule that an independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the results of his work. *Perley v. Paving Co., supra; Greer v. Construction Co.,* 190 N.C. 632, 130 S.E. 739. The distinction between an independent contractor and an employee entitled to benefits under the Workmen's Compensation Act has frequently been considered by this Court and applied to the particular circumstances of individual cases. *Perley v. Paving Co., supra; Bell v. Lumber Co.,* 227 N.C. 173, 41 S.E. 2d 281; *Creighton v. Snipes,* 227 N.C. 90, 40 S.E. 2d 612; *Smith v. Paper Co., supra; Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137; *Beach v. McLean, supra; Creswell v. Pub. Co.,* 204 N.C. 380, 168 S.E. 408; *Johnson v. Hosiery Co.,* 199 N.C. 38, 153 S.E. 591.

An examination of the record in the case at bar in the light of these decisions leads to the conclusion that the findings of fact of the Industrial Commission have their inception in the evidence adduced at th hearing

and are based thereon, and that the inferences of fact deducible therefrom support the award in favor of claimants. Hence, we think the judgment of the Superior Court in affirmance should not be disturbed. In *Rewis v. Ins. Co.*, 226 N.C. 325, 38 S.E. 2d 97, *Chief Justice Stacy*, speaking to this point, said: "The Courts are not at liberty to reweigh the evidence and to set aside the findings of the Commission, simply because other inferences could have been drawn and different conclusions might have been reached." And in *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96, it was said: "Permissible inferences *contra* would not warrant setting aside the findings of the Commission."

We think the record discloses facts sufficient to sustain the award. *DeVine v. Steel Co.*, 227 N.C. 684, 44 S.E. 2d 77.

Defendants rely on *Creswell v. Pub. Co.*, 204 N.C. 380, 168 S.E. 408, but we think the characteristics of an employment which is cognizable under the Act are here more pronounced than in the Creswell case, and that the facts are distinguishable.

The judgment sustaining the award of the Industrial Commission is Affirmed.

BARNHILL, J., dissents.

STATE v. JACK CANTRELL

(Filed 2 March, 1949.)

1. Criminal Law § 50d—

The court, in interrogating defendant's witness, stated "in other words you were in sympathy with" defendant. *Held:* The remark is reversible error as tending to prejudice the witness or defendant in the eyes of the jury and as constituting an expression of opinion by the court as to the weight or sufficiency of the evidence.

2. Criminal Law § 42c—

It is reversible error for the court to ask a witness an impeaching question.

3. Criminal Law § 53d—

The statement of the court in its charge that defendant had admitted that he had been tried and convicted of certain offenses, *held* not supported by the evidence of record.

APPEAL by defendant from *Phillips, J.*, at September Term, 1948, of SURRY.

STATE *v.* CANTRELL.

Criminal prosecution tried upon an indictment charging the defendant with having carnal knowledge of a female child of the age of ten years.

The defendant was tried at the April Term, 1948, of the Superior Court of Surry County, for the capital offense charged in the bill of indictment, and after due deliberation the jurors informed the court that it was impossible for them to reach a verdict. Thereupon the court withdrew a juror and ordered a mistrial.

When the case was again called for trial, the Solicitor announced that the State would not ask for a verdict of guilty of rape, but would ask for a verdict of guilty of an assault with intent to commit rape.

The defendant is the father of the child he is charged with assaulting.

Verdict: Guilty of an assault on a female with intent to commit rape. Judgment: That the defendant be confined in the State's Central Prison at hard labor, for not less than 14 nor more than 15 years.

The defendant appeals and assigns error.

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

Frank Freeman and Charles L. Folger for defendant.

DENNY, J. The defendant entered a plea of not guilty to the charge in the bill of indictment, and undertook to prove an alibi. He offered a witness in his behalf not only for the purpose of establishing his alibi, but also to testify to a conversation which the witness claimed to have had with the prosecutrix sometime prior to the trial, which conversation tended to exonerate the defendant. Whereupon, the court took over the examination of the witness and asked him the following questions:

"Q. When did you talk to her? A. I talked with her on Saturday, two weeks before the last court.

"Q. Where was she? A. At my place.

"Q. You asked her about it? A. Yes, sir, I asked her about it. That is right.

"Q. Why did you ask her about it? A. Well, the fellow was in jail.

"Q. In other words you were in sympathy with her father? A. Well, everybody else was against him."

The court struck out the last answer of the witness and instructed the jury not to consider it.

The defendant in apt time excepted to the statement made by the court, as follows: "In other words, you were in sympathy with her father?"

The defendant insists this statement was intended to impeach the witness and to discredit his testimony. We think the exception well taken and must be upheld. Any remark of the trial judge, made in the presence

of the jury, which has a tendency to prejudice the minds of the jurors against the unsuccessful party or his witnesses, will be held for error. *Perry v. Perry,* 144 N.C. 328, 57 S.E. 1. Moreover, under our practice, any expression of opinion by the trial judge, as to the sufficiency or insufficiency of the evidence or any part of it which is pertinent to the matter at issue, is error. *S. v. Dick,* 60 N.C. 440; *Withers v. Lane,* 144 N.C. 184, 56 S.E. 855; *S. v. Ownby,* 146 N.C. 677, 61 S.E. 630; *Park v. Exum,* 156 N.C. 228, 72 S.E. 309; *S. v. Rogers,* 173 N.C. 755, 91 S.E. 854.

Likewise, it is error for the trial judge to ask a witness an impeaching question. "No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility." *S. v. Owenby,* 226 N.C. 521, 39 S.E. 2d 378. *S. v. Auston,* 223 N.C. 203, 25 S.E. 2d 613; *S. v. Buchanan,* 216 N.C. 34, 3 S.E. 2d 273; *S. v. Winckler,* 210 N.C. 556, 187 S.E. 792; *Morris v. Kramer,* 182 N.C. 87, 108 S.E. 381. Counsel may ask questions for the purpose of impeaching a witness on cross-examination or of an adverse witness, but this privilege does not extend to the trial judge. *S. v. Bean,* 211 N.C. 59, 188 S.E. 610.

The remark was undoubtedly an inadvertence. However, any expression made by the judge in the course of a trial, in the presence of the jury, which amounts to an expression of opinion as to the sufficiency or insufficiency of evidence, or which tends to impeach a witness, even though inadvertently made, cannot ordinarily be cured by instructing the jury to disregard such expression; and here the court made no effort to do so. *Thompson v. Angel,* 214 N.C. 3, 197 S.E. 618; *S. v. Winckler, supra; S. v. Oakley,* 210 N.C. 206, 186 S.E. 244; *S. v. Rogers, supra.*

We think it is proper to call attention to another error which appears on the face of this record, although the defendant did not except thereto. His Honor in recapitulating the evidence in his charge to the jury, stated that the defendant "admitted, on cross-examination, that he had been in trouble in Kentucky, having been indicted and convicted for violating the prohibition laws on more than one occasion; and that he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton; and that the judgment of the court in Virginia was that he be imprisoned for a period of eighteen months, that sentence being suspended on condition that he leave the State; then he came to North Carolina and has been living here with his family until the time he was arrested on this charge."

This appeal is before us on an agreed case and the trial judge has had no opportunity to review it. It may be that in the course of the trial below the defendant did admit that "he had been tried and convicted of an assault with intent to commit rape on his daughter Dorline Shelton,"

who was a witness for the State in the trial below, but no such admission appears in the record.

There must be a new trial, and it is so ordered.

New trial.

JUDY MAE ALLEN, BY HER NEXT FRIEND, AGNES ALLEN, v. HILLIARD HUNNICUTT.

(Filed 2 March, 1949.)

1. Parent and Child § 5—

An illegitimate child may not maintain an action against its father to require its father to provide for its support.

2. Bastards § 11—

G.S. Chap. 49 and G.S. 7-103 provide an exclusive remedy to compel a father to provide for the support of his illegitimate child, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support.

3. Parent and Child § 9—

G.S. 14-322 relates only to legitimate children and an illegitimate child is not protected thereby.

4. Administrative Law § 5—

The remedy provided by statute for the enforcement of a right created by statute is exclusive, and a party asserting such right must pursue the prescribed remedy.

5. Bastards § 1—

G.S. Chap. 49 was enacted to prevent illegitimates from becoming public charges, and benefit to the child is incidental to such social purpose, and such rights as the child may have must be enforced under the statute and in accord with the procedure therein prescribed.

APPEAL by defendant from *Nettles, J.*, December Term, 1948, BUNCOMBE.

Civil action to establish the paternity of an illegitimate child and for support.

Plaintiff is an illegitimate infant. She alleges that defendant is her putative father and prays an order (1) declaring that defendant is her father, and (2) requiring defendant to provide her with reasonable and adequate support.

Defendant denied that he is the father of plaintiff, pleaded a judgment of the domestic relations court of Buncombe County, and prayed that he go hence without day.

The cause came on to be heard before *Clement, J.*, at the September Term, 1948, and issue of paternity was submitted to and answered by the jury in favor of plaintiff. Clement, J., departed the county without having signed judgment. Thereafter, at the December Term, 1948, Nettles, J., on motion of plaintiff, signed judgment on the verdict *nunc pro tunc,* decreeing that the defendant is the father of plaintiff and ordering and directing that he make certain monthly payments for her support and maintenance until she reaches the age of eighteen. Defendant excepted and appealed.

Don C. Young for plaintiff appellee.
George Pennell for defendant appellant.

BARNHILL, J. The defendant's exception to the refusal of the court to dismiss the cause as in case of nonsuit presents for decision this question: May an illegitimate child maintain a civil action to establish its paternity and compel its putative father to furnish it support when the right of action is based solely upon the alleged relationship? The answer is no.

Under the common law an illegitimate child is *nullius filius,* and its putative father is under no obligation to support or contribute to its support. It has no father known to the law, no distinction being made between a reputed father and an admitted father. 7 A.J. 627. Accordingly, the courts in states which have adopted the common law have held in almost every case in which the question has been raised that without legislation the father of an illegitimate child cannot be required to provide for its support. *Kimbrough v. Davis,* 16 N.C. 71; *S. v. Boston,* 102 P. 2d 889 (Okla.); *Brown v. Brown,* 32 S.E. 2d 79; *Beebe v. Cowley,* 156 NE 214 (Ohio); *Hoffer v. White,* 4 NE 2d 595 (Ohio); *S. v. Lindskog,* 221 NW 911 (Minn.); *Law v. S.,* 191 So. 831 (Ala.); *Carlson v. Bartels,* 10 NW 2d 671 (Neb.); *Kordoski v. Belanger,* 160 A. 205 (R.I.); *Kessler v. Anonymous,* 18 N.Y.S. 2d 278; Anno., 30 A.L.R. 1069; 7 A.J. 673.

"It is universally held that a statute must be found imposing the obligation on the putative father before he can be charged with the child's support." *Hurst v. Wagner,* 43 P. 2d 964 (Wash.).

This does not mean that an action based on contract may not be maintained in the absence of a statute. In such case the right of action is bottomed on the obligation of the contract and not on the moral or natural obligation to support. *Kimbrough v. Davis, supra; Burton v. Belvin,* 142 N.C. 150; *Sanders v. Sanders,* 167 N.C. 319, 83 S.E. 490; *Thayer v. Thayer,* 189 N.C. 502, 127 S.E. 553, 39 A.L.R. 428, Anno. p. 434; *Redmon v. Roberts,* 198 N.C. 161, 150 S.E. 881; *Conley v. Cabe,* 198 N.C.

298, 151 S.E. 645; *Hyatt v. McCoy,* 195 N.C. 762, 143 S.E. 518; *Green v. Green,* 210 N.C. 147, 185 S.E. 651.

But the plaintiff insists that we have said in at least two cases that "there is a natural obligation to support even illegitimate children which the law not only recognizes, but enforces." So we have. *Sanders v. Sanders, supra; Green v. Green, supra.* But in each of those cases the action was being prosecuted by a legitimate child. Furthermore, we did not say and have not said the obligation may be enforced in an action instituted and maintained by an illegitimate child. As stated in *Burton v. Belvin, supra,* the natural obligation of the father to support will be enforced under the statute recognizing the obligation and imposing the duty. G.S. Chap. 49; G.S. 7-103.

G.S. 14-322 relates only to legitimate children. An illegitimate child is not protected thereby. *S. v. Gardner,* 219 N.C. 331, 13 S.E. 2d 529.

The remedy provided by statute for the enforcement of a right created by statute is exclusive. A party asserting such right must pursue the prescribed remedy. *R. R. v. Brunswick County,* 198 N.C. 549, 152 S.E. 627; *Bar Asso. v. Strickland,* 200 N.C. 630, 158 S.E. 110; *Maxwell, Comr. v. Hinsdale,* 207 N.C. 37, 175 S.E. 847; *Rigsbee v. Brogden,* 209 N.C. 510, 184 S.E. 24; *Padgett v. Long,* 225 N.C. 392, 35 S.E. 2d 234; *Moose v. Barrett,* 223 N.C. 524, 27 S.E. 2d 532; *S. v. Boston, supra; Kordoski v. Belanger, supra; Carlson v. Bartels, supra;* Anno. 30 A.L.R. 1070.

"Where a right is given and a remedy provided by statute, the remedy so provided must be pursued." *Moose v. Barrett, supra.*

The duty of a putative father to support his illegitimate child was not created primarily for the benefit of the child. The legislation is social in nature and was enacted to prevent illegitimates from becoming public charges. The benefit to the child is incidental. Such rights as it may have must be enforced under the statute and in accord with the procedure therein prescribed. G.S. Chap. 49, G.S. 7-103.

The judgment below is

Reversed.

MRS. LOTTIE A. PRIVETTE, ADMINISTRATRIX OF THE ESTATE OF J. H. PRIVETTE, DECEASED, v. MRS. LOTTIE A. PRIVETTE, WIDOW; LUCILLE PRIVETTE; CORNELIA PRIVETTE; BEVERLY PRIVETTE; AND STEPHEN PRIVETTE, HEIRS AT LAW OF J. H. PRIVETTE, DECEASED.

(Filed 2 March, 1949.)

1. Appeal and Error § 2—

As a general rule an appeal will lie only from a final determination of the whole case, and an appeal from an interlocutory order will lie only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant.

2. Same—

While the Supreme Court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion.

APPEAL by respondent, plaintiff herein, from *Bone, J.,* September Term, 1948, NASH.

Special proceeding to sell land to make assets, heard on motion in the cause.

A phase of the controversy between the parties herein was before this Court at the Spring Term, 1947, *Privette v. Morgan,* 227 N.C. 264, 41 S.E. 2d 845. After the opinion in that case was certified down, the defendants Lucille Privette Hyde, J. Beverly Privette, and Stephen Privette, appeared and moved to vacate the decree of confirmation, the deed executed pursuant thereto, and certain interlocutory orders entered in this proceeding. Thereupon, plaintiff appeared and moved to strike various allegations and statements contained in the motion. The clerk denied the motion to strike. On appeal the judge below affirmed the order of the clerk and respondent appealed.

L. L. Davenport and Hobart Brantley for Mrs. Lottie A. Privette Morgan, respondent appellant.

Sharp & Pittman, Cooley & May, and Battle, Winslow & Merrell for defendant appellees.

BARNHILL, J. An appeal may be taken to this Court only from a "judicial order or determination . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the

action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." G.S. 1-277.

As a general rule an appeal will not lie until there is a final determination of the whole case. *Moore v. Hinnant,* 87 N.C. 505; *S. v. Keeter,* 80 N.C. 472; *Railroad v. Warren,* 92 N.C. 620; *Hailey v. Gray,* 93 N.C. 195. It lies from an interlocutory order only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant. *Skinner v. Carter,* 108 N.C. 106; *Warren v. Stancill,* 117 N.C. 112; *Martin v. Flippin,* 101 N.C. 452; *Parrish v. R. R.,* 221 N.C. 292, 20 S.E. 2d 299.

An appeal from such order will be dismissed unless the order affects some substantial right and will work injury to the appellant if not corrected before appeal from the final judgment. *Cole v. Trust Co.,* 221 N.C. 249, 20 S.E. 2d 54; *Utilities Com. v. Coach Co.,* 218 N.C. 233, 10 S.E. 2d 824; *Nissen Company v. Nissen,* 198 N.C. 808, 153 S.E. 450.

The pleadings in a cause raise issues of fact to be decided by a jury, chart the course of the trial and, in large measure, determine the competency of evidence. They are to be read to the jury. If they contain irrelevant or impertinent averments not competent to be shown in evidence, a refusal to strike might impair or imperil the rights of the adversary party. For this reason this Court has entertained appeals from orders denying motions to strike allegations in pleadings.

But the same reasons which prompted the Court to hear and decide appeals in such cases do not apply to a motion in a cause which, as here, merely raises questions of fact for the judge to decide. It is his function in every case to sift the relevant from the irrelevant, and he can readily cut through any prolixity of language to the heart of the motion and ascertain and decide the matter sought to be presented, without being unduly prejudiced by irrelevant averments contained therein. No substantial right is likely to be impaired or seriously imperiled. Hence an appeal from an order denying a motion to strike will not lie.

Here one of the principal grounds of attack upon the validity of the material orders entered in the special proceeding is the alleged nonservice of process upon the infant defendants. The record before us discloses that the infants were duly served. There is no motion to amend the return. Just where this may leave the movants is a question for the court below to decide.

As the appeal must be dismissed, we may not consider the motions filed in this Court.

Appeal dismissed.

STATE v. ERNEST ANDERSON.

(Filed 2 March, 1949.)

1. **Assault § 14b—**

A charge predicating the right of self-defense upon actual or real danger alone must be held for reversible error in excluding the right to fight or kill in self-defense if it reasonably appears from the circumstances surrounding defendant at the time that his assailant is about to take his life or to do him great bodily harm.

2. **Same—In absence of intent to kill, defendant may fight in self-defense even though not in real or apparent danger of death or great bodily harm.**

Upon an indictment charging defendant with assault with a deadly weapon with intent to kill, G.S. 14-32, the court properly submitted to the jury under the evidence the question of defendant's guilt of the less degree of assault with a deadly weapon, G.S. 15-170, and the jury found defendant guilty of the lesser offense. *Held:* In the absence of an intent to kill, defendant had the right to protect himself from bodily injury or offensive physical contact at the hands of his assailant even though he were not put in actual or apparent danger of death or great bodily harm, and an instruction to the effect that defendant had the right to fight in self-defense only to avoid death or great bodily harm is prejudicial error.

APPEAL by defendant from *Clement, J.*, and a jury, at October Term, 1948, of BUNCOMBE.

The defendant, Ernest Anderson, was charged by indictment with feloniously assaulting, wounding and seriously injuring the State's witness, Clarence Holcombe, with a deadly weapon with intent to kill contrary to G.S. 14-32. The State offered testimony tending to show that the defendant and Holcombe fought by mutual consent in a public place, and that in the course of the combat the defendant inflicted serious injury upon Holcombe with a knife. The defendant presented evidence indicating that Holcombe made an unprovoked attack upon him "with some kind of an instrument" and a knife, and that he cut Holcombe merely to protect himself against injury.

The court left it to the jury to determine whether the defendant was guilty of the felonious assault charged in the indictment, or guilty of a nonfelonious assault with a deadly weapon, or not guilty. There was a verdict of guilty of an assault with a deadly weapon, judgment of imprisonment was imposed thereon, and defendant appealed, assigning errors.

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

Don C. Young for defendant, appellant.

ERVIN, J. The court charged the jury as follows: "One is permitted to fight in self-defense or kill in self-defense when it is necessary for him to do so in order to avoid death or great bodily harm." This instruction was not qualified elsewhere in the charge, and constitutes one of the defendant's assignments of error.

Manifestly, the instruction denied to the accused the right "to fight in self-defense or kill in self-defense" in the absence of an actual necessity for so doing even though he may have honestly and reasonably believed from the circumstances surrounding him at the time that the prosecuting witness was about to take his life or to do him great bodily harm. Thus, it erroneously limited the right of self-defense to actual or real danger alone. *S. v. Glenn,* 198 N.C. 79, 150 S.E. 663; *S. v. Barrett,* 132 N.C. 1005, 43 S.E. 832.

The excerpt from the charge is objectionable in another view.

It is undoubted law that a person cannot excuse taking the life of an adversary upon the ground of self-defense unless the killing is, or reasonably appears to be, necessary to protect himself from death or great bodily harm. *S. v. Hand,* 170 N.C. 703, 86 S.E. 1005. The defendant has not taken human life. It is alleged in the indictment, however, that he committed a felonious assault and battery upon the prosecuting witness with a deadly weapon in an unsuccessful attempt to kill the prosecuting witness contrary to G.S. 14-32. Both authority and logic declare that the law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and that an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. 40 C.J.S., Homicide, section 89. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. *S. v. Elmore,* 212 N.C. 531, 193 S.E. 713; *S. v. Bridges,* 178 N.C. 733, 101 S.E. 29.

Since the evidence justified such action, the court properly charged the jury that the defendant might be acquitted of the felonious assault and battery with intent to kill charged in the indictment, and convicted of an assault of lower degree, namely, an assault with a deadly weapon, which is a misdemeanor. G.S. 15-170; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140. The jury found defendant "guilty of assault with a deadly weapon" and thereby established that he acted without intent to kill the prosecuting witness.

It is quite conceivable that a verdict of acquittal would have been returned if the jury had been properly instructed with respect to the right of an accused to defend himself again nonfelonious assaults. The court made its instruction on the law of self-defense applicable to defend-

ant's conduct irrespective of whether he acted with intent to kill. In final result, it charged the jury that one is never privileged by law to employ force in self-protection unless he is threatened with death or great bodily harm.

The instruction is in direct conflict with *S. v. Dixon,* 75 N.C. 275, and repeated subsequent decisions containing this statement: "A distinction which seems reasonable and is supported by authority is taken between assaults with felonious intent and assaults without felonious intent. In the latter the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, though he is allowed to repel force by force and give blow for blow." *S. v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519; *S. v. Bryant,* 213 N.C. 752, 197 S.E. 530; *S. v. Johnson,* 184 N.C. 637, 113 S.E. 617.

The law does not compel any man to submit in meekness to indignities or violence to his person merely because such indignities or violence stop short of threatening him with death or great bodily harm. If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. *S. v. Maney,* 194 N.C. 34, 138 S.E. 441; *S. v. Allen,* 166 N.C. 265, 80 S.E. 1075; *S. v. Belk,* 76 N.C. 10; *S. v. Bryson,* 60 N.C. 476; *S. v. Davis,* 52 N.C. 52; *Taylor v. State,* 17 Ala. App. 508, 85 So. 877; *People v. Lopez,* 238 App. Div. 619, 265 N.Y.S. 211; *State v. Woodard,* 58 Idaho 385, 74 P. 2d 92, 114 A.L.R. 627; 4 Am. Jur., Assault and Battery, section 38; 6 C.J.S., Assault and Battery, section 92.

Since the erroneous instruction on the law of self-defense was prejudicial to defendant, the verdict and judgment is vacated, and the defendant is awarded a

New trial.

STATE v. B. R. (BERDINE) PLEMMONS.

(Filed 2 March, 1949.)

1. Assault § 10—

The indictment charged defendant with an assault with a deadly weapon with intent to kill "and murder," inflicting serious injury not resulting in death. *Held:* The words "and murder" are surplusage and place no additional burden on the State.

2. Assault § 14a: Criminal Law § 53d—

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge.

3. Assault § 14b—

A charge on the right of self-defense that if defendant was at his place of business and an assault was made upon him, he had a right to protect himself regardless of whether the assault was felonious or nonfelonious, and use such force as was necessary or reaonably appeared to him necessary under the circumstances to protect himself from death or great bodily harm, is correct and adequate, and an exception thereto is not sustained.

APPEAL by defendant from *Clement, J.*, September Term, 1948, of BUNCOMBE.

Criminal prosecution on indictment charging the defendant with an assault with a deadly weapon with intent to kill "and murder," inflicting serious injury not resulting in death.

The record discloses that the defendant owns the "Star Dust Trail" on Riverside Drive in the City of Asheville, where beer and other drinks are sold. On the night of 25 July, 1948, around the hour of midnight, John B. Bulis and four or five others came to the defendant's place of business in a taxicab. They were all drinking. They began to play a slot machine in the defendant's place of business which was supposed to pay off in tokens. The machine failed to operate properly; whereupon Bulis picked it up, put it under his arm and started out the door with it. The defendant followed him with pistol in hand.

Bulis testified that as he stepped through the door he lost his balance and fell with the slot machine; that the defendant picked up the machine and shot him in the abdomen while he was lying on the ground.

The defendant's evidence was to the effect that Bulis neither fell nor was on the ground when shot. The defendant testified that he followed Bulis into the yard and asked him where he was going with his machine; that as he reached to take the machine, Bulis struck at him with his right fist and threw him off balance causing him to stumble and nearly fall; that as he straightened up Bulis was coming on him with the slot machine in his hand, threatening to strike him in the face with it; whereupon the defendant shot him "right along the watch pocket" to ward off the assault, fearing that his life was in danger.

Verdict: "Guilty of an assault with a deadly weapon with intent to kill, inflicting serious and permanent injury not resulting in death."

Judgment: Imprisonment in the State's Prison for a term of not less than four nor more than six years.

Defendant appeals, assigning errors.

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

Henry C. Fisher and Claude L. Love for defendant.

STACY, C. J. The defendant is charged with an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. This is made a felony by G.S. 14-32.

The use of the words "and murder" following the phrase "with intent to kill" in the bill was surplusage and placed no additional burden on the prosecution. The jury was careful to spell out its verdict and the spelling appears to have followed the language of the statute. *S. v. Ellison, post,* 59; *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891.

The defendant complains that the trial court failed to explain to the jury "what is meant by the term, 'with intent to kill,' as used in the statute." The court opened his charge to the jury with an explanation of the different grades of an assault, dependent upon the attendant circumstances of aggravation, and closed the explanation with this statement and instruction: "Then there is another type of assault, assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. To constitute that offense the assault must be made with a deadly weapon; there must be an intent to kill and serious injury inflicted, not resulting in death."

The jury could hardly have failed to understand what was meant by the expression "with intent to kill." It is self-explanatory. There is no point in elaborating the obvious. *S. v. Gore,* 207 N.C. 618, 178 S.E. 209. The instruction follows closely the decision in *S. v. Hefner,* 199 N.C. 778, 155 S.E. 879, wherein the essential elements of the offense are enumerated as (1) an assault (2) with a deadly weapon (3) with intent to kill and (4) the infliction of serious injury (5) not resulting in death. *S. v. Bentley,* 223 N.C. 563, 27 S.E. 2d 738.

The defendant also complains that his plea of self-defense was inadequately submitted to the jury. The substance of the charge in this respect was as follows: "If the defendant was there at his place of business and an assault was made upon him he had a right to protect himself. It does not make any difference whether it was a felonious assault or a non-felonious assault he would have a right to protect himself and use such force as was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

This instruction affords the defendant no ground for a valid assignment of error. *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427; *S. v. Spruill,* 225 N.C. 356, 34 S.E. 2d 142.

No reversible error has been made to appear, hence the verdict and judgment will be upheld.

No error.

STATE v. ABRAHAM ELLISON.

(Filed 2 March, 1949.)

1. Bastards § 1—

In a prosecution of defendant for willful nonsupport of his illegitimate child, the burden is on the State to prove beyond a reasonable doubt that defendant is the father of the child, that he had refused or neglected to support it, and that such refusal or neglect was willful.

2. Bastards § 7—

A verdict of "guilty of willful nonsupport of illegitimate child" is insufficient in that it fails to fix the paternity of the child.

3. Criminal Law § 54b—

When the jury undertakes to spell out its verdict without specific reference to the charge it is essential that the spelling be correct.

APPEAL by defendant from *Morris, J.*, at October Term, 1948, of HYDE.

The defendant was tried upon a bill of indictment charging him with the seduction of Eunice Mae Mackey, a female, under promise of marriage and upon a warrant charging him with the willful nonsupport of his illegitimate child, begotten upon the body of Eunice Mae Mackey. The two cases were consolidated for trial.

The jury returned the following verdict: "The said Abraham Ellison is not guilty of seduction, as charged in the grand jury bill of indictment, but is guilty of willful nonsupport of illegitimate child."

The defendant excepted to the judgment entered on the verdict and appealed to the Supreme Court and assigned error.

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

D. D. Topping for defendant.

DENNY, J. In order to convict the defendant of the offense charged in the warrant herein, the burden was upon the State to show beyond a reasonable doubt not only that he was the father of the child, but that he had refused or neglected to support and maintain it, and that such refusal or neglect was willful, that is, intentionally done "without just cause,

excuse or justification," after notice and request for support. *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728; *S. v. Hayden,* 224 N.C. 779, 32 S.E. 2d 333.

The warrant charges the defendant with the willful failure to support his illegitimate child. However, the jury did not return a verdict of "Guilty," or "Guilty as charged," or "Guilty as charged in the warrant," or "Guilty of willful non-support of *his* illegitimate child," but returned a verdict of "Guilty of willful non-support of illegitimate child." G.S. 49-2; *S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885. This verdict does not fix the paternity of the child, *S. v. Spillman,* 210 N.C. 271, 186 S.E. 322, and is, therefore, insufficient to support the judgment entered below. *S. v. Allen,* 224 N.C. 530, 31 S.E. 2d 530, and cases cited therein. *Stacy, C. J.,* said, in speaking for the Court in *S. v. Lassiter,* 208 N.C. 251, 179 S.E. 891: "When the jury undertakes to spell out its verdict without specific reference to the charge, as in the instant case, it is essential that the spelling be correct. *S. v. Parker,* 152 N.C. 790, 67 S.E. 35." *S. v. Whitley,* 208 N.C. 661, 182 S.E. 338; *S. v. Cannon,* 218 N.C. 466, 11 S.E. 2d 301; *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458.

Venire de novo.

MARY CHARLES McCARTNEY v. APPALACHIAN HALL, INC.

(Filed 2 March, 1949.)

Process § 15—

Where, in an action for abuse of process, the complaint alleges that the process was null and void, demurrer is properly sustained, since a cause of action for abuse of process lies only for the malicious misuse or misapplication of valid process.

APPEAL by plaintiff from *Shuford, Special Judge,* November Term, 1948, of BUNCOMBE. Affirmed.

Don C. Young for plaintiff, appellant.

Smathers & Meekins for defendant, appellee.

DEVIN, J. In the first cause of action set out in plaintiff's complaint she undertook to allege abuse of process as the basis of a claim for damages. Defendant's demurrer thereto was sustained and plaintiff appealed. Plaintiff's second cause of action as set out in her complaint is not involved in the appeal.

The gravamen of the complaint was that plaintiff had been received as an insane person in defendant's institution on the authority of a letter

from one who claimed to have been appointed her guardian in Blount County, Tennessee, and that she was detained thereunder by the defendant for a longer period than 20 days (G.S. 35-58). It is alleged that the entire proceeding "was totally null and void," and later was so determined by the courts of Tennessee.

It was said in *Ellis v. Wellons,* 224 N.C. 269, 29 S.E. 2d 884, quoting with approval from 1 A.J. 176, that "abuse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. In brief, it is the malicious perversion of a regularly issued process whereby a result not lawfully or properly attainable under it is secured." And in *Melton v. Rickman,* 225 N.C. 700, 36 S.E. 2d 276, it was again declared that abuse of process was "the malicious perversion of a legally issued process." Hence, it follows that whatever remedies the plaintiff may be entitled to pursue for redress of her alleged wrongs, she may not be permitted to maintain, as against a demurrer, a cause of action for abuse of process upon allegation that the process under which she was made to suffer was totally null and void.

The judgment sustaining the demurrer to plaintiff's first cause of action is

Affirmed.

W. A. NORMAN v. BESSIE MAE MILLS NORMAN.

(Filed 2 March, 1949.)

1. Judgments § 27c—

The remedy against an erroneous judgment is by appeal, and a motion made before another Superior Court judge to set aside an order on the ground that the court was without authority to enter the order, is properly denied.

2. Divorce § 13—

Where in the husband's action for divorce *a vinculo*, the wife sets up a cross-action for divorce *a mensa*, the court has the power to make an order for the payment of alimony upon the jury's determination of the issues in favor of the wife.

APPEAL by plaintiff from *Sink, J.,* October Term, 1948, of JACKSON. Affirmed.

M. V. Higdon and W. R. Francis for plaintiff, appellant.
Hugh Monteith for defendant, appellee.

DEVIN, J. The plaintiff, husband, instituted his action for divorce *a vinculo* on the ground of adultery. G.S. 50-5 (1). The defendant,

wife, answered denying the allegations of adultery, and for affirmative relief set up a cross-action for divorce *a mensa*. G.S. 50-7 (10). The case was tried before Judge Alley and a jury at October Term, 1947, and resulted in a verdict for the defendant, establishing the fact that defendant had not committed adultery, and that plaintiff had willfully abandoned her and failed to provide her support. Judgment was rendered accordingly, and the plaintiff was required to pay alimony.

Thereafter, on 22 May, 1948, plaintiff lodged a motion to set aside the judgment of Judge Alley on the ground that the court was without authority to make an order for the payment of alimony. This motion came on for hearing before Judge Sink at October Term, 1948, and was denied.

Clearly, the plaintiff's remedy against a judgment thought to be erroneous was an appeal to this Court. Judge Sink properly denied the plaintiff's motion. Plaintiff contends, however, that the defendant's cross-action for alimony could not be maintained in the suit which he had instituted, citing *Silver v. Silver,* 220 N.C. 191, 16 S.E. 2d 834. In that case it was held that the wife's cross-action for alimony without divorce under C.S. 1667 (now G.S. 50-16) would not sustain a judgment for permanent alimony. *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517; *Adams v. Adams,* 212 N.C. 373, 193 S.E. 274. But here judgment has been rendered on the verdict of the jury for divorce *a mensa,* and the court had the power to make an order for the payment of alimony as incident thereto, as pointed out in the *Silver case. Shore v. Shore,* 220 N.C. 802, 18 S.E. 2d 353; *Jenkins v. Jenkins,* 225 N.C. 681, 36 S.E. 2d 233; *Nall v. Nall,* 229 N.C. 598, 50 S.E. 2d 737.

Judgment affirmed.

WILLIAM BRYAN PILLEY AND WIFE, CORA W. PILLEY, v. R. O. SMITH.

(Filed 2 March, 1949.)

1. Deeds § 13a—

The granting clause and the *habendum* of the deed in question conveyed a fee simple and the warranty clause was in harmony therewith. Following the description and just before the *habendum* was inserted a paragraph reserving a life estate to grantors and providing that upon their death the conveyance should be in full force to the grantees "their lifetimes then to their children" with provision that if any of them should die without children, his share should go back to the "family." *Held:* The deed conveyed a fee simple. G.S. 39-1, *Artis v. Artis,* 228 N.C. 754. Whether the reservation of the life estate was effective, *quœrre?*

2. Same—

The granting clause is the very essence of the contract.

PILLEY *v.* SMITH.

APPEAL by defendant from *Morris, J.*, December Term, 1948, of BEAUFORT.

Controversy without action submitted on agreed statement of facts.

Plaintiffs, being under contract to convey to the defendant a 130-acre tract of land in Pantego Township, Beaufort County, duly executed and tendered deed sufficient in form to invest the defendant with a fee-simple title to the property, and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refuses to make payment of the purchase price, alleging the title offered to be defective.

On the facts agreed, the court being of opinion that the deed tendered was sufficient to convey a good title, gave judgment for the plaintiffs, from which the defendant appeals, assigning error.

John A. Mayo for plaintiffs, appellees.

M. C. Paul for defendant, appellant.

STACY, C. J. On the hearing the question in difference was made to turn on the construction of a deed of gift from W. H. Pilley and wife to their five children, including the plaintiff herein, William Bryan Pilley.

The deed is dated 15 December, 1910, and was duly registered 17 January, 1911. The words used (1) in the granting clause, "to said parties of the second part, their heirs and assigns," (2) in the *habendum* "to the said parties of the second part, their heirs and assigns, their only use and behoof forever," and (3) in the warranty, "covenant with said parties of the second part, their heirs and assigns, that they are seized of said premises in fee and have right to convey in fee simple . . . and doth hereby forever warrant . . . the said title," are words of inheritance and indicate a conveyance in fee. *Whitley v. Arenson,* 219 N.C. 121, 12 S.E. 2d 906.

Following the description and just before the *habendum* is inserted a paragraph in these words: "The parties of the first part except their life estate in this deed for their use their life time after our death it may be in full force to the five children their lifetimes then to their children, if any of them die without any children their share shall go back to the Pilley family."

The grantors in the deed, W. H. Pilley and wife, are both dead. All five of the grantees are now married and have living children. They, therefore, survived their parents, as did another single daughter who was born 16 July, 1913.

The trial court held that under the decision in *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 228, the five children of W. H. Pilley and wife, named as grantees in the deed of 15 December, 1910, took a fee-simple title to the lands conveyed thereby.

Whether the reservation of the grantors' life estate would have been valid is not presented for consideration. *Brown v. Brown,* 168 N.C. 4, 84 S.E. 25. The question is now moot. The remainder of the clause may not affect the operative provisions of the deed, as no clear, effective, intentional deviation therefrom is made manifest by this portion of the inserted clause. Indeed, in the inserted clause itself the "full force" of the deed is again declared after the death of the grantors. This would seem to render the added inconsistency or repugnancy inoperative. *Bryant v. Shields,* 220 N.C. 628, 18 S.E. 2d 157; *Bagwell v. Hines,* 187 N.C. 690, 122 S.E. 659. *Cf. Lee v. Barefoot,* 196 N.C. 107, 144 S.E. 547. "The granting clause is the very essence of the contract." 16 Am. Jur. 567. The *habendum* and the warranty in the instant deed are in harmony with the granting clause, and these are reaffirmed in the inserted paragraph. Hence, the ruling below will be upheld on authority of the *Artis case* and the statute which provides that a conveyance of real estate shall be held and construed to be a conveyance in fee, "unless such conveyance, in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." G.S. 39-1; *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79.

It is conceded that if the deed in question be construed to convey a fee, the remaining questions presented by the appeal are perforce eliminated.

Affirmed.

STATE v. HAROLD JACK GILBERT.

(Filed 2 March, 1949.)

Husband and Wife § 23—

In a prosecution of defendant for willful abandonment and nonsupport of his wife, an instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty must be held for reversible error. G.S. 14-322.

APPEAL by defendant from *Phillips, J.,* December Term, 1948, of ROCKINGHAM.

Criminal prosecution on warrant charging the defendant with willful abandonment and nonsupport of his wife.

The defendant was married in 1943. He first took his wife to the home of his stepfather in Greensboro. In July, 1948, they were given notice to vacate their room. The defendant then took his wife to Reidsville to live in her father's house. He promised to provide for her support and to return weekly to see her. Neither of which he did.

Verdict: Guilty as charged.
Judgment: Twelve months on the roads.
The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Bruton Rhodes, and Moody for the State.
William Reid Dalton and John R. Hughes for defendant.

STACY, C. J. The following excerpt from the charge constitutes one of defendant's exceptive assignments of error:

"The court charges you if he willfully failed to provide her with adequate support after leaving her at her father's house and you so find from the evidence and beyond a reasonable doubt, your verdict would be guilty."

It will be noted that the element of willful abandonment is omitted from this instruction. The defendant is charged with a violation of G.S. 14-322, which provides that "If any husband shall wilfully abandon his wife without providing adequate support for such wife, etc., he shall be guilty of a misdemeanor." The challenged instruction, therefore, was inadequate and necessitates another hearing. *S. v. Yelverton,* 196 N.C. 64, 144 S.E. 534. It is so ordered.

New trial.

C. J. FLEMING v. CAROLINA POWER & LIGHT COMPANY.

(Filed 2 March, 1949.)

Pleadings § 10: Parties § 10a—

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, that the consumer had executed an agreement to indemnify, save harmless and defend the power company against all liability or loss due to defective construction, wiring or appliances on consumer's property, and that certain named insurance companies had made payments to consumer on account of his loss. *Held:* The power company was *prima facie* entitled to the joinder of the named insurers as parties to the action.

PETITION to rehear decision reported in 229 N.C. 397.

Gholson & Gholson and Murray Allen for plaintiff, C. J. Fleming.
Murray Allen for appellants, Insurance Companies.
A. A. Bunn, Perry & Kittrell and A. Y. Arledge for defendant, appellee.

SEAWELL, J. In the opinion reported in 229 N.C. 397, it was inadvertently stated that it did not appear that plaintiff Fleming had been paid for his loss by any insurance company, whereas it is alleged that five of these insurers (Capital Fire Insurance Co., Citizens Insurance Company of New Jersey, Continental Insurance Co., Home Insurance Co., and by reason of merger the American National Fire Insurance Co. is owner of the claim of the North Carolina Home Insurance Company), have made payments to him on account of this loss. These corporations would, therefore, be at least *prima facie* proper parties, and the order made here that the additional parties brought in under the defendant's motion be stricken from the record is modified accordingly.

In view of the claims now alleged to have been paid by the named insurance companies, a majority of the Court is of the opinion that the allegations in defendant's second defense, based upon plaintiff's agreement to indemnify and defend the defendant against all claims for loss, costs and expenses on account of defective appliances on plaintiff's side of the point of delivery of electric current, would be sufficient to survive a demurrer in respect to the allegations therein of an agreement to defend, and that the court below properly overruled the demurrer. Hence the order striking out the defendant's cross-action is to that extent modified.

The cause is remanded for further proceeding not inconsistent with the opinion as herein modified.

Except as herein allowed, the petition to rehear is dismissed.

STATE v. EMMETT GARNER.

(Filed 2 March, 1949.)

Criminal Law § 80b (4)—

Where defendant fails to file statement of case on appeal or apply for writ of *certiorari* within the time allowed, the appeal will be dismissed on motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

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

No counsel contra.

PER CURIAM. At a regular term of the Superior Court of Harnett County held on the first Monday in September, 1947, it being the first

day of September, 1947, for the trial of criminal cases exclusively, the defendant Emmett Garner was tried upon a bill of indictment charging him with crime of murder in the first degree. There was verdict of guilty of murder in the first degree as charged in the bill of indictment, upon which judgment of death as required by law was pronounced by the court at said term of court.

From this judgment defendant gave notice of appeal to the Supreme Court, and was allowed to appeal *in forma pauperis,* that is, without giving security for costs. Defendant was allowed sixty days to prepare and serve statement of case on appeal, and the State was allowed sixty days thereafter to prepare exceptions thereto or statement of countercase.

The Clerk of Superior Court of Harnett County certifies, under date of 22 May, 1948, that "no statement of case of appeal to the Supreme Court in this case has ever been filed in this office, and . . . that no writ of *certiorari* in this case has been served" on him.

The Attorney-General of the State of North Carolina moves to docket and dismiss the case under Rule 17 of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 544, at p. 551, and for affirmance of the judgment.

In the absence of apparent error upon the face of the record the motion is allowed. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Brooks,* 224 N.C. 627, 31 S.E. 2d 754; *S. v. Nash,* 226 N.C. 608, 39 S.E. 2d 596; *S. v. Ewing,* 227 N.C. 107, 40 S.E. 2d 600; *S. v. Lampkin,* 227 N.C. 621, 44 S.E. 2d 30; *S. v. Little,* 227 N.C. 701, 41 S.E. 2d 833; *S. v. West,* 229 N.C. 416, 47 S.E. 2d 712.

Appeal dismissed—judgment affirmed.

GARNER HUTCHINS AND WIFE, CLEOTA HUTCHINS, v. MYRTLE B. DAVIS.

(Filed 9 March, 1949.)

1. Judgments § 17b—

A judgment must be supported by and conform to the verdict in all substantial particulars, and therefore where the verdict contains no finding sufficient to impose liability upon one of the parties, such party's exception to the signing of the judgment will be sustained.

2. Bills and Notes § 34—

Where the maker admits execution of a note and chattel mortgage and the nonpayment of the note, nothing else appearing, the payee is entitled to judgment on the pleadings, and the submission to the jury of the question of the maker's liability on the note is error.

3. Election of Remedies § 3—

Where the purchaser is induced to buy certain property by the actionable fraud of the seller, the purchaser within a reasonable time after the discovery of the fraud must elect between the inconsistent remedies of repudiating the sale or affirming it, and the purchaser's voluntary act in recognition of the validity of the contract after discovery of the fraud constitutes an election and terminates his power to repudiate his purchase.

4. Sales § 25—

Ordinarily, the purchaser will not be allowed to repudiate the contract of purchase unless he is in a position to restore to the seller what he has received under it.

5. Same—

Where the purchaser elects to repudiate the sale for fraud, he is entitled to be placed in *statu quo ante*, and therefore he should return or offer to return to the seller the property received by him, and he is then entitled to recover the purchase price, which he may do either by independent action or by counterclaim in the seller's action for the purchase price or any part thereof remaining unpaid.

6. Sales § 28—

Where the purchaser, after discovery of the fraud, elects to retain the property, he is entitled to set up by way of counterclaim in the seller's action to recover the balance of the purchase price, the damages sustained by him by reason of the fraud, which ordinarily is the difference between the value of the property sold and its value if it had been as represented.

7. Same—

In the seller's action on a note given for the balance of the purchase price, the purchaser admitted the execution and nonpayment of the note and set up a counterclaim for fraud. *Held:* Judgment for the purchaser for the amount of damages resulting from the fraud as ascertained by the jury must be modified so as to permit recovery by the seller of the amount of the note with interest.

APPEAL by plaintiffs from *Clement, J.*, and a jury, at October Term, 1948, of MADISON.

On 27 May, 1946, Garner Hutchins, who is hereafter called the male plaintiff, made an oral sale of the equipment and good will of a business in Mars Hill, North Carolina, known as the Campus Corner Cafe, to the defendant, Myrtle B. Davis, for a consideration of $7,000.00. Defendant paid half of this sum in cash, and gave the male plaintiff her promissory note signed by her mother as surety for the other half. Sometime later the defendant's mother died, and thereupon the defendant took up the original note, giving the male plaintiff therefor another note for $3,500.00 executed by herself alone, and paying interest on the unpaid part of the sale price through 26 May, 1947. The new note specified that

it bore interest at the rate of six per cent per annum, and was to mature 24 May, 1948. Its payment was secured by a chattel mortgage embracing all of the equipment originally sold to defendant by the male plaintiff.

When the note fell due, the defendant refused to pay it, or to relinquish to the male plaintiff the property covered by the chattel mortgage. The male plaintiff thereupon brought this action, praying judgment against defendant for the principal and interest mentioned in the note and asking a foreclosure of the chattel mortgage under decree for satisfaction of the judgment. He laid claim to the immediate possession of the mortgaged property by ancillary claim and delivery process, but the defendant gave the required undertaking for replevy and retained the property.

Upon motion of defendant, the *feme* plaintiff, Cleota Hutchins, was made a party to the action. The defendant filed an answer, admitting the matters set out above and pleading counterclaims for damages for fraud and conversion. Plaintiffs replied, denying the validity of the counterclaims. The parties offered testimony for the avowed purpose of sustaining their respective pleadings.

As made out by her answer and evidence, the defendant's counterclaims were as follows:

By his contract with her, the male plaintiff undertook to sell to defendant for the agreed price of $7,000.00 all of the equipment and supplies located in the building at Mars Hill occupied by the Campus Corner Cafe on the day of the sale, together with the good will of the business and a lease which he professed to own on the building. Between the date of the making of the sale and 1 June, 1946, when defendant began to operate the cafe, the male plaintiff wrongfully removed from the Campus Corner Cafe and converted to his own use a portion of the supplies sold by him to defendant consisting of canned goods, flour, and sugar of the market value of $200.00. The monetary worth of the Campus Corner Cafe was derived largely from the advantageous location of the building in which it was housed. During the negotiations preceding and culminating in the sale, the male plaintiff made two positive representations to the defendant, one concerning a lease which he professed to hold on the building containing the cafe and the other relating to a freezing unit used in connection with a fountain in the building. The male plaintiff exhibited to defendant a copy of a lease dated 6 February, 1946, whereby Charlie C. Bruce and W. L. Robinson had leased the building occupied by the Campus Corner Cafe from its owners, Mattie I. Huff and O. J. Burnett, for five years with the right to renew the agreement at the end of the term for another period of five years, and represented to defendant that he had subsequently rented the building "for five years with the option for five more" under a written lease "just

like that" displayed by him, and that he would assign his written lease to defendant on demand in case she purchased the Campus Corner Cafe. This representation was false in that the male plaintiff had no written lease whatever, but occupied the premises as a mere tenant from month to month under an oral sublease from Bruce and Robinson. The male plaintiff also represented to defendant that a certain freezing unit then in use in connection with a soda fountain in the building was his absolute property whereas, in fact, such unit belonged to the Southern Dairies and was simply loaned by it to him for use on the premises during such time as its products were retailed there. The male plaintiff knew both of the representations to be false in the particulars stated, and made them with intention to deceive the defendant and cause her to purchase the Campus Corner Cafe. Defendant believed the representations to be true, and was thereby induced to purchase the Campus Corner Cafe from the male plaintiff for $7,000.00. Defendant suffered damage as the proximate result of the fraud in that the value of the Campus Corner Cafe was substantially less than it would have been if the statements had been true. The defendant did not discover the falsity of the representations made to her by the male plaintiff until about June, 1947, when the Southern Dairies removed the freezing unit from the premises and when she lost an opportunity to sell the Campus Corner Cafe at a considerable profit because of the inability of the male plaintiff to assign to her the written lease which he falsely professed to own. Since that time defendant has continued to carry on the cafe at the same stand, but has been unable to acquire any right to occupy the premises other than as a tenant from month to month.

Although no allegation pertaining thereto appears in the answer, the court permitted the defendant to introduce evidence to the effect that after the sale she paid $18.48 in settlement of taxes levied on the poll, dogs, and personal furniture of the male plaintiff, and submitted such testimony to the jury upon the eleventh, twelfth, and thirteenth issues. This was done over the exceptions of plaintiffs. The court subsequently reversed its rulings in these respects by refusing to award judgment to defendant for the amount of these taxes.

The court submitted seventeen issues. These issues and the answers of the jury thereto were as follows:

1. Did the defendant execute and deliver to the plaintiff a chattel mortgage and note as alleged in the complaint? Answer: Yes.

2. What amount, if any, is the defendant indebted to the plaintiff on said note? Answer: No.

3. Is the plaintiff the owner and entitled to the possession of the property set forth and described in the Chattel Mortgage? Answer: No.

4. Was Garner Hutchins the sole owner of the Cafe business sold to the defendant? Answer: No.

5. Did the plaintiff Garner Hutchins represent to the defendant that he owned a lease covering the Campus Corner Cafe at Mars Hill, N. C., in accordance with the terms of a lease dated 2 February, 1946, executed between Mattie I. Huff and O. J. Burnett to Charlie C. Bruce and W. L. Robinson, and would assign his said lease to the defendant? Answer: Yes.

6. Were the above representations of the plaintiff Garner Hutchins false and fraudulent and made for the purpose of deceiving the defendant? Answer: Yes.

7. Did the defendant rely upon said false and fraudulent statements and was she damaged thereby? Answer: Yes.

8. What amount, if any, is the defendant entitled to recover as damages by reason of the false and fraudulent representations made by the plaintiff? Answer: $3,500.

9. Did the plaintiff remove, after the sale, from said Cafe certain flour, canned goods and sugar? Answer: Yes.

10. If so, what was the value of said merchandise so removed? Answer: $200.00.

11. Did the plaintiff Garner Hutchins represent that the property sold to the defendant was free and clear of all encumbrances? Answer: Yes.

12. If so, was said statement false? Answer: Yes.

13. What amount, if any, is the defendant entitled to recover by reason of said representation? Answer: $18.48.

14. Did the plaintiff Garner Hutchins represent to the defendant that he was the owner of a freezing unit used in connection with the fountain in said cafe? Answer: Yes.

15. Was said statement false and fraudulently made for the purpose of deceiving the defendant? Answer: Yes.

16. Did the defendant rely on said statement, and was she damaged thereby? Answer: Yes.

17. What damage, if any, is the defendant entitled to recover as damages on account of such representations? Answer: $250.00.

The court adjudged that "the plaintiff have and recover nothing from the defendant" and that "the defendant have and recover from the plaintiffs both jointly and severally judgment in the amount of $3,950.00," and that "the plaintiffs pay the costs."

Plaintiffs excepted to the judgment and appealed, assigning errors.

Carl R. Stuart and James S. Howell for plaintiffs, appellants.

Sanford W. Brown for defendant, appellee.

ERVIN, J. Nothing is better settled in law than the rule that in all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars. *Speight v. Anderson,* 226 N.C. 492, 39 S.E. 2d 371; *Supply Co. v. Horton,* 220 N.C. 373, 17 S.E. 2d 493; *Durham v. Davis,* 171 N.C. 305, 88 S.E. 433. When the verdict of the jury in the case at bar is interpreted in the light of the pleadings, the evidence, the issues, and the charge, it is plain that it contains no finding sufficient to impose any liability upon the *feme* plaintiff, Cleota Hutchins, with respect to the counterclaims asserted in the answer of the defendant. *King v. Elliott,* 197 N.C. 93, 147 S.E. 701; *Sitterson v. Sitterson,* 191 N.C. 319, 131 S.E. 641, 51 A.L.R. 760; *Merrill v. Tew,* 183 N.C. 172, 110 S.E. 850; *Croom v. Lumber Co.,* 182 N.C. 217, 108 S.E. 735; *Balcum v. Johnson,* 177 N.C. 213, 98 S.E. 532; *Weldon v. R.R.,* 177 N.C. 179, 98 S.E. 375; *Jones v. R. R.,* 176 N.C. 260, 97 S.E. 48; *Bank v. Wilson,* 168 N.C. 557, 84 S.E. 866; *Donnell v. Greensboro,* 164 N.C. 330, 80 S.E. 377; *McAdoo v. R. R.,* 105 N.C. 140, 11 S.E. 316. Hence, the court erred in adjudging that the defendant is entitled to recover anything of the *feme* plaintiff, Cleota Hutchins, upon the counterclaims, and her exception to the judgment is sustained.

It is otherwise, however, with reference to the male plaintiff, Garner Hutchins, for the reason that the answers to the fifth, sixth, seventh, eighth, ninth, tenth, fourteenth, fifteenth, sixteenth, and seventeenth issues fully support the adjudication that the defendant is entitled to recover $3,950.00 of the male plaintiff upon the counterclaims as damages for fraud and conversion.

But we are constrained to hold that the exceptions of the male plaintiff to the submission of the second and third issues and to the adjudication based on the answers of the jury thereto that such plaintiff was not entitled to recover of the defendant upon the note for $3,500.00 are well taken. The execution of the note and chattel mortgage and the nonpayment of the note were not issuable facts. They were admitted by the answer, and the male plaintiff was entitled to judgment against the defendant on the pleadings for the principal of the note with interest thereon from 27 May, 1947. This is true for the reasons set out below.

When a person discovers that he has been induced to purchase property by the actionable fraud of another, he has the right at the outset to choose between two inconsistent courses with reference to his purchase. He may either affirm it or repudiate it. But he cannot do both, either in whole or in part, for the law will not let him blow both hot and cold. The election must be made promptly and within a reasonable time after the discovery of the fraud. When once made, the election is final and conclusive. The purchaser terminates his power to repudiate his purchase

if he voluntarily does some act in recognition of the validity of the contract of purchase after discovering the fraud.

Ordinarily, the purchaser is not allowed to repudiate the transaction unless he is in a position to restore to the seller what he has received under it. Consequently, the purchaser should return or offer to return to the seller the property received by him under the sale if he desires to repudiate the transaction. When he has done this, he may resort to remedies calculated to place him in *status quo*. Thus, he can recover the purchase price or any portion of it he may have paid, or avail himself of the fraud as a defense in bar of recovery by the seller of the purchase price or any part of it which remains unpaid. Moreover, he may be entitled in a proper case to the equitable remedies of rescission and cancellation or reformation.

But the purchaser has the right at his election to affirm the contract of purchase and retain whatever property or advantage he has received under it. When he does so, the transaction is validated as to both parties, and either may sue the other to enforce any rights arising to him under the contract. In such case, the purchaser is liable to the seller for any portion of the purchase price which remains unpaid. While his affirmance ends his right to rescind the contract, it does not prevent him from recovering from the seller either in an independent action or by way of counterclaim when sued by the seller for the purchase price the damages sustained by him by reason of the fraud of the seller. As a general rule, the damages recoverable by the defrauded purchaser in such event consist of the difference between the value of the property sold as it was and as it would have been if it had come up to the fraudulent representations.

These legal propositions are fully sanctioned by many well considered decisions of this Court. *Randle v. Grady,* 228 N.C. 159, 45 S.E. 2d 35; *Small v. Dorsett,* 223 N.C. 754, 28 S.E. 2d 514; *Buick Co. v. Rhodes,* 215 N.C. 595, 2 S.E. 2d 699; *Frick Co. v. Shelton,* 197 N.C. 296, 148 S.E. 318; *Glass v. Fidelity Co.,* 193 N.C. 769, 138 S.E. 143; *Fields v. Brown,* 160 N.C. 295, 76 S.E. 8; *Van Gilder v. Bullen,* 159 N.C. 291, 74 S.E. 1059; *Machine Co. v. Feezer,* 152 N.C. 516, 67 S.E. 1004; *Modlin v. R. R.,* 145 N.C. 218, 58 S.E. 1075; *May v. Loomis,* 140 N.C. 350, 52 S.E. 728.

Here, the defendant affirmed the purchase of the Campus Corner Cafe by retaining the benefits received by her under the sale. Consequently, the male plaintiff was entitled to maintain an action against her on the note representing a portion of the purchase price, subject, of course, to any counterclaim she had against him.

We have carefully studied all of the remaining assignments of error and have found nothing therein prejudicial to any substantial right of the male plaintiff.

Our conclusions necessitate the grant of a new trial to the *feme* plaintiff. But it is not so with respect to the male plaintiff because the truth relating to all matters in controversy between him and the defendant has been determined by the verdict of the jury and the admissions in the pleadings. The judgment between the male plaintiff and the defendant is modified so as to award the male plaintiff judgment against the defendant on the note for the sum of $3,500.00 with interest at the rate of six per cent per annum since 27 May, 1947, and so as to tax against the male plaintiff all costs in the court below other than those incident to making the *feme* plaintiff a party to the action. As thus modified, the judgment between the male plaintiff and the defendant is affirmed. The costs of all parties in this Court will be taxed against the male plaintiff.

Judgment modified and affirmed on the appeal of the plaintiff, Garner Hutchins.

New trial on the appeal of the plaintiff, Cleota Hutchins.

S. D. SCOTT & COMPANY v. J. H. JONES, INDIVIDUALLY AND TRADING AS J. H. JONES HATCHERY,

and

MILDRED B. HOOKER v. JOE HENRY JONES.

(Filed 9 March, 1949.)

1. Process § 6—

Service of process by publication and attachment is valid only when the provisions of the statute have been strictly complied with. G.S. 1-99, G.S. 1-440.7, G.S. 1-440.14.

2. Same—

The statutory requirement that service of summons by publication be not less than once a week for four successive weeks requires that the publication be spaced substantially at seven day intervals for four successive weeks, and therefore, while it is not required that twenty-eight days elapse between the first and fourth publication, a publication on Saturday of one week and on Monday of each of the following three weeks, is insufficient to meet the requirements of the statute.

3. Judgments §§ 21d, 27b—

Where judgment has been rendered upon an insufficient publication of notice of summons and attachment, the judgment is void and does not constitute a lien upon the lands of the judgment debtor.

4. Judgments §§ 21d, 25—

Where a judgment by default final instead of by default and inquiry has been rendered for goods sold and delivered on open account, the judg-

ment is not void but is merely irregular, G.S. 1-211, G.S. 1-212, and when no attack is made upon it at the hearing, it constitutes a valid lien upon the lands of the judgment debtor.

5. Homestead § 2—

Homestead interest in land is terminated by the owner's removal from the State. N. C. Constitution, Art. X, sec. 2.

6. Same—Evidence held insufficient to support finding that judgment debtor was resident of this State.

Where the judgment debtor through counsel makes a special appearance and orally claims his homestead exemption, but the judgment creditor introduces evidence that he had moved his residence from this State to a city of another state, where he was employed and had given a home address in that city, and the judgment debtor's only evidence is an affidavit of some person of that city that the judgment debtor was not known at the address given, *held:* the judgment creditor has rebutted the presumption that the judgment debtor, having been a resident of this State, continued to reside here, and the evidence is insufficient to support a finding by the court that the judgment debtor is a resident and entitled to homestead.

7. Appeal and Error § 40d—

Findings of fact made by the trial court are not conclusive when they are not supported by evidence.

APPEAL by plaintiff S. D. Scott & Co. and Lindsey-Robinson Co., movent, from *Morris, J.*, at Chambers, 18 December, 1948, of PASQUOTANK.

Scott & Co. and Lindsey-Robinson Co., judgment creditors of defendant Jones, filed motions in the case of *Hooker v. Jones* to determine the priority of right between them as to a fund in the hands of the Clerk derived from partition sale of real property of defendant Jones. The judgment debtor Jones through counsel made oral claim for homestead right in this fund.

In October, 1947, Mildred B. Hooker, tenant in common with Joe Henry Jones in certain real property in the county, instituted proceeding for the sale thereof for partition. 14 July, 1948, the land was sold and the net share of defendant Jones, amounting to $998.52, was paid into the office of the Clerk of the Superior Court for the purpose of disposition to Jones or his judgment creditors as their interests might appear. Thereafter S. D. Scott & Co., claiming judgment in the sum of $3,036, and Lindsay-Robinson Co., judgment creditor, in the sum of $4,877, filed motions that they be adjudged entitled to the fund, each claiming priority of right.

There was no controversy as to the facts. The Lindsay-Robinson Co.'s action was begun 18 March, 1948, for goods sold and delivered on open account. Summons was personally served on defendant Jones

27 March, 1948, and, no answer having been filed by him, judgment by default final was rendered by the Clerk 3 May, 1948, and judgment docketed.

S. D. Scott & Co.'s action was begun 5 April, 1948, the complaint alleging debt of $3,036 evidenced by two checks aggregating $1,873, and account stated $1,163. Summons was returned by the Sheriffs of Pasquotank and Currituck Counties that defendant was not to be found in either of said counties. 8 April on affidavit that defendant Jones was a nonresident of the State, owning property therein, and was indebted to plaintiff as above, and that summons had issued therefor and bond given, warrant of attachment was issued. The Sheriff levied attachment on defendant Jones' interest in the real estate described in *Hooker v. Jones,* and the Sheriff's return to the warrant of attachment with description of the land was docketed on the judgment docket 9 April, 1948. Notice of *lis pendens* was also filed. 22 April, 1948, plaintiff filed affidavit that summons had been returned that defendant was not to be found, and that defendant could not after due search and diligence be found in the State of North Carolina, that defendant was a nonresident of the State owning property therein, and that a cause of action as above stated existed in favor of plaintiff, and that warrant of attachment had been levied on described real property, and prayed that an order be made for publication of summons and notice of attachment.

Thereafter, on 23 April, it was ordered that publication of notice of summons and attachment be made in *The Independent,* a newspaper published in the County, once a week for four successive weeks, requiring defendant to appear within 20 days after 25 May, 1948, and answer or demur. The notice was published first time Saturday, 24 April, and again on Monday, 26 April, Monday, 3 May, and last on Monday, 10 May. No answer having been filed, the Clerk, on 19 June, 1948, rendered judgment by default final for the sum alleged, decreeing that the judgment constituted a lien on the property attached.

The respective motions of S. D. Scott & Co. and of Lindsey-Robinson Co., each asserting prior right to the fund, were heard by Morris, J., at chambers, 18 December. Scott & Co. claimed priority by virtue of the attachment, and that the lien of the judgment pursuant thereto related back to the docketing of the attachment. *Pierce v. Mallard,* 197 N.C. 679, 150 S.E. 342. Lindsey-Robinson Co. claimed its judgment was prior in time, and that Scott & Co.'s judgment should be held void for that the purported service of summons and attachment was insufficient to bring the defendant into court because not published for the length of time required by the statute.

At the hearing defendant Jones, appearing specially through counsel, moved to vacate the attachment and judgment of Scott & Co. for failure

to publish notice of summons and attachment in accordance with the statute. Defendant Jones, also, through counsel, orally claimed that he was a resident of the State and entitled to homestead exemption in the fund.

It was held that Scott & Co.'s judgment was invalid for insufficient publication of notice of summons and attachment, and that no lien in its favor attached to the fund; that the judgment of Lindsey-Robinson Co. constituted a first lien on the fund, but that defendant Jones was a resident of the State and entitled to homestead exemption in the fund, it being regarded for this purpose as real property. Judgment was rendered accordingly.

S. D. Scott & Co. appealed from the judgment vacating its judgment and lien, and Lindsey-Robinson Co. appealed from so much of the judgment as held defendant Jones a resident of the State and entitled to homestead.

McMullan & Aydlett and John H. Hall for Lindsey-Robinson Co., appellant.

Killian Barwick and J. Henry LeRoy for plaintiff S. D. Scott & Co., appellant.

Harry B. Brown for defendant Joe Henry Jones, appellee.

APPEAL OF S. D. SCOTT & CO.

DEVIN, J. The court below ruled that the purported service of process by publication upon the defendant Jones was invalid, and that the judgment based thereon created no lien on the fund derived from the sale of defendant's real property. The appeal presents for review the propriety of this ruling.

The only attack upon the validity of the proceedings whereby this plaintiff sought to bring the defendant Jones into court was that the publication in the newspaper of the summons and notice of attachment was insufficient. The statute, G.S. 1-99, prescribes that service of summons by publication shall be for "not less than once a week for four successive weeks," and in like manner the notice of attachment must be published once a week for four consecutive weeks. G.S. 1-440.7, G.S. 1-440.14 (Session Laws 1947, c. 693, s. 1). Here the first publication in the newspaper was on Saturday, 24 April; the next on Monday, 26 April, Monday, 3 May, and, last, Monday, 10 May. So that the entire period of publication occupied 16 days. Another statute, G.S. 1-100, provides that the summons shall be deemed served at the expiration of 7 days from date of last publication. Thus, according to appellant's interpretation of the statute, 23 days after first publication the defendant was "then in court."

We think the court ruled correctly that the publication was insufficient to constitute valid service. The service of process by publication upon an individual nonresident, as here alleged, is valid only when the provisions of the statutes authorizing constructive service have been strictly complied with. *Southern Mills, Inc. v. Armstrong,* 223 N.C. 495, 27 S.E. 2d 281; *Ditmore v. Goins,* 128 N.C. 325, 39 S.E. 61. The primary purpose of the requirements as to publication is to give notice to the defendant, and publication in a newspaper of general circulation in the County is permitted as the most likely means available for that purpose. Hence, the minimum time prescribed is essential for establishing constructive notice. Publication for a period, or in a manner, less than that prescribed would be insufficient in law to bring the defendant constructively into court or justify a judgment based thereon. *Guilford Co. v. Georgia Co.,* 109 N.C. 310, 13 S.E. 861; 50 C.J. 540.

The requirement that publication be made not less than once a week for four successive weeks is not complied with by the publication here shown. The statutory provisions as to time and method of giving notice are mandatory. According to Webster a week is "a period of seven days, usually reckoned from one Sabbath or Sunday to the next," but when used to denote a space of time it usually means seven days duration without regard to the particular day on which it commences. *Leach v. Burr,* 188 U.S. 510, 52 A.J. 337. The expression not less than once a week for four successive weeks contemplates a publication once each week for four consecutive weeks, and this should be understood to require that the publications be spaced substantially at intervals of 7 days for four successive weeks as being best calculated to give notice. 31 A.J. 429; *Young v. Downey,* 145 Mo. 250; *Morse v. U. S.,* 29 App. (D.C.) 433. The four publications need not occupy the full period of 28 days and may be deemed completed with less than that number of days intervening between first and last publication when considered in connection with the statutory provision that service shall be deemed complete 7 days after last publication. Thus, under the statutes now in effect, a publication on the 1st, 8th, 15th, and 22nd would be sufficient, though there be less than 28 days between the first and last publication. *Guilford Co. v. Georgia Co., supra; Myakka Co. v. Edwards,* 68 Fla. 372; *Owens v. Graetzel,* 146 Md. 361, 39 A.L.R. 950; *In re Wright,* 224 N.Y. 293; 50 C.J. 540; 42 A.J. 87; 52 A.J. 337. See also *Heist v. Dunlap Co.,* 193 Ga. 462; *Hollister v. Vanderlin,* 165 Pa. 248; Ann. Cas. 1917 B, 209.

But the publication here shown must be held insufficient to give the court jurisdiction or to authorize a valid judgment based thereon.

While the decisions of this Court are not directly in point, and the decisions in other jurisdictions are not uniform and afford but little assistance in determining the precise question now presented, we think

the rule herein stated interprets the legislative purpose in the enactment of the statutes quoted relating to the service of process by publication.

It is argued that the publication here of the summons on Saturday, 24 April, and again on Monday, the 26th, showed publication on a day of each week, and hence constituted two weeks publication. We cannot agree. This interpretation of the statute would reduce the period and method of publication below the minimum required to constitute legal notice which would subject defendant's real property to the jurisdiction of the court.

While the judgment of the Lindsey-Robinson Co. seems to have been rendered by default final upon a complaint for goods sold and delivered (G.S. 1-211, G.S. 1-212), the judgment was not void, and there was no effort at the time of the hearing to attack it as irregular. Hence, the ruling of the judge below must be upheld. *Supply Co. v. Plumbing Co.*, 195 N.C. 629, 143 S.E. 248; *Jeffries v. Aaron,* 120 N.C. 167, 26 S.E. 696.

APPEAL OF LINDSEY-ROBINSON CO.

At the hearing on the respective motions of Scott & Co. and Lindsey-Robinson Co. as judgment creditors of defendant Jones to be declared entitled to the fund in the hands of the Clerk derived from sale of defendant's real property, counsel representing defendant Jones appeared and orally requested the allotment of the defendant's homestead exemption in the $998 fund, on the ground that he was and still is a resident of the State. The court so found and rendered judgment accordingly. Lindsey-Robinson Co. appealed. Jones did not personally appear, nor has he appeared in any of the proceedings herein referred to, nor has he testified or offered any evidence or affidavit on the issue. The appellant offered several affidavits in opposition to defendant's motion. From this evidence it appears that Jones sold out his business in Elizabeth City 19 March, 1948; that thereafter he could not be found in Pasquotank or Currituck Counties; that from information derived from his family and others the Sheriffs of these counties testified on information and belief Jones had removed from the State and was not a resident of North Carolina; that according to the testimony of the Vice-President of Rosedale Dairy of Norfolk, Virginia, defendant Jones has been employed since middle of September as a driver of one of its delivery trucks in Norfolk; that he gave his home address as 620 South Street, Portsmouth, Virginia. Counsel for defendant Jones offered only the affidavit of some person in Portsmouth that he was not known at that address. While it seems Jones was formerly a resident of Pasquotank County, and nothing else appearing, would be presumed to have continued to reside there, the evidence in the record rebuts that presumption. Homestead interest in land is terminated by the owner's removal from the

State. Constitution of North Carolina, Art. X, sec. 2; *Baker v. Legget,* 98 N.C. 304, 4 S.E. 37; *Fulton v. Roberts,* 113 N.C. 421, 18 S.E. 510; *Brann v. Hanes,* 194 N.C. 571, 140 S.E. 292; *Ransom v. Commissioners,* 194 N.C. 237, 139 S.E. 232; *Owens v. Chaplin,* 228 N.C. 705, 47 S.E. 2d 12.

While the findings of the judge, when based on evidence, are conclusive as to facts found, this rule does not apply when there is no evidence to support the finding. The exception of the Lindsey-Robinson Co. on this ground must be sustained, and the order of the judge, based on such finding, which holds that the fund is subject to defendant's homestead right, must be set aside as improvidently entered.

No procedural questions were raised in any of the matters presented for hearing below.

On appeal of Scott & Co.: Judgment affirmed.

On appeal of Lindsey-Robinson Co.: Judgment reversed.

GRAYSON SHIPPING LINES, INC., A CORPORATION, v. O. F. YOUNG, TRADING AND DOING BUSINESS AS A PRODUCE COMPANY.

(Filed 9 March, 1949.)

1. Appeal and Error § 39e—

The exclusion of testimony of a telephone conversation offered by defendant, if error, cannot be held prejudicial when it appears that the conversation was substantially repeated several times by defendant on plaintiff's cross-examination.

2. Same—

Defendant purchaser claimed that the bananas purchased by him failed to meet the specifications set out in the contract and were unmerchantable. *Held:* The admission of testimony of the seller that the bananas were part of a shipload, the balance of which had been sold to various concerns throughout the country and paid for without complaint, even if technically erroneous, is insufficient to constitute reversible error.

3. Appeal and Error § 6c—

Ordinarily, the omission of defendant's contention or misstatements of the evidence must be brought to the trial court's attention in apt time in order to preserve an exception.

4. Trial §§ 31e, 31f—

Construing the charge from its four corners, *it is held* that the method and manner of arraying the contentions of the parties did not amount to an expression of opinion by the court.

5. Trial § 31e—

The charge in this case construed contextually *is held* not to have assumed that a controverted fact had been established.

DEFENDANT'S appeal from *Clement, J.*, October Term, 1948, BUNCOMBE Superior Court.

The plaintiff, a Florida corporation, sued to recover on a check for the sum of $1,769.35 given it by the defendant in payment for a trailerload of bananas purchased by him in Miami. The check had been put in course of collection, payment stopped by defendant at the bank on which it was drawn, and the check returned to the plaintiff with that notation. Demand was made upon the defendant for payment and declined; and no part of the check had been paid. The defendant admitted giving the check, denied it was for value, and set up the affirmative defense that there was a total breach of the contract on the part of the plaintiff in that the bananas purchased were not of the kind and quality contracted for but were so unmerchantable and worthless that he was compelled at great loss and expense to have them sold for the account of plaintiff, after notification, in order to salvage what he could of the shipment.

The plaintiff and the defendant were brought together in the contract of purchase and sale through a brokerage concern in Charlotte, North Carolina. The resulting contract, according to plaintiff's evidence, provided that the Grayson Shipping Lines (hereinafter called Grayson's), a concern engaged in importing and selling bananas in the United States brought on shipboard from producers in Guatemala, South America, to Miami, Florida, should deliver to the defendant Young for loading upon his trailer at the dock in Miami on the 7th day of January, 1947, a trailerload of bananas from a cargo to arrive on that day. The bananas were to be merchantable bananas, the stems averaging in weight 37 to 40 pounds, at 6½ cents per pound, as weighed on the trailer, payment to be made as picked up by purchaser.

The vessel arrived on the afternoon of the 7th.

Mr. Young's trailer was not in Miami on the 7th, 8th, or 9th, but after telephone calls between the two firms it did arrive on the 10th, at which time the bananas were delivered, loaded upon Young's trailer, and the check given for them after the bananas had been weighed and the amount due computed on the weight at the purchase price per pound. Seven hundred thirty-five stems of bananas were delivered.

When the Young trailer arrived for the bananas, Grayson's office was called and the driver was then notified that the bananas were not at the dock since the vessel had already been discharged after having unloaded two days before, and that the bananas were being held at a railroad freight car, iced at the railroad yard of the Seaboard Railway. The

delivery took place there. The bananas were open to the inspection of the driver of the trailer. The check was delivered to Grayson's, put in course of collection, and returned as aforesaid.

The plaintiff's witness, Grayson, testified that the bananas shipped were in good order at the time of delivery, were of the quality, kind and weight contracted for, and a part of a shipment of 10,000 stems, or bunches, of like quality and character of the same cargo which had been distributed throughout the United States, sold and paid for without complaint.

The defendant moved that this part of the testimony be stricken out, which was declined, and the defendant excepted.

The witness described in detail the nature, character, weight of the bananas sold and delivered to the defendant for comparison with the contract stipulations.

The evidence of the defendant was to the effect that he had started his truck in ample time to arrive at Miami on the 7th of January, the time at which the contract called for delivery of the bananas; that after his truck had reached Sanford, Florida, en route to Miami, in consequence of a telephone call received from Grayson's office in Miami to the effect that the vessel containing the bananas would not reach Miami until the 8th, in order to save loss of time and waiting he caused his truck to be loaded with vegetables and returned to Asheville, figuring that he would lose only one day in the transaction and could then pick up the bananas. Actually his truck did not call for the bananas until the 10th.

On objection by plaintiff, testimony of the witness as to the telephone conversation was rejected; but while the competence of the evidence was still under discussion, the court had the jury to retire and Mr. Young was examined in their absence as to the evidence the defendant desired admitted and there stated as follows:

> "On January 6, 1947, I was in Asheville, at my place of business, when I received a long distance telephone call from Grayson Shipping Lines. I do not remember the party's name that called me. The call came in between 9:00 and 10:00 in the morning. I answered the phone. When I answered the phone the operator asked me if I was O. F. Young and I told the operator I was. The operator told me to hold the line for Miami. I held the line and she connected me with the Grayson Shipping Lines. I know that I was talking to the Grayson Shipping Lines, because the party I talked to said he was with Grayson Shipping Lines, and that he was calling me because word had been received from the boat that it would not be there Tuesday morning, that it would be Wednesday before the bananas could be loaded. I told him I had my trailer there, that I would get my trailer loaded with other produce besides

bananas, and that as soon as it got back I would send the trailer back to Miami for the bananas."

The record discloses that the evidence so taken in the absence of the jury was excluded; but the witness was permitted to testify that he diverted his truck from the Miami objective at Sanford, Florida, because of the telephone call from Grayson Shipping Lines. On cross-examination he testified without objection that the telephone conversation said that the bananas would not be in Miami on the 7th but would be there on the 8th. And again on plaintiff's further cross-examination, defendant testified as follows:

"Q. He called you on the 9th and told you that the bananas were there?"

"A. No, on Monday he said that the bananas would not be there on Tuesday morning."

"Q. This was on the 6th?"

"A. Yes, he said that they wouldn't be there Tuesday, but on Wednesday. He said the bananas would be there Wednesday."

Plaintiff introduced evidence of Strulson, who was then handling the matter for Grayson's, that the Young trailer not having arrived, the bananas were removed from the boat and held for him at his instructions in a "reefer" railroad car equipped with ice bunkers on both ends, especially made for the shipment of bananas. That he called Mr. Young, had a party to party phone conversation with him while the bananas were still on the boat, told Mr. Young that his trailer had not arrived and asked what he wanted them to do and was informed that the trailer was on the way and asked that the bananas be held for him. Strulson personally supervised the loading into the car or "reefer" on the night of January 7, 1947, at which time the bananas were green and in good condition. At that time witness stated, the stems averaged between 37 and 40 pounds. They were not opened, were not poorly filled, were not thin, and their color was green. There were no broken surfaces.

The trailer did not arrive on January 7 or January 9. On the morning of January 9, witness telephoned Young and told him that the trailer had not yet arrived; that he felt that they should dispose of the fruit because it might spoil if continued to be held; and Mr. Young insisted that the fruit be held for him.

The trailer on which the bananas were loaded was refrigerated on sides, top and bottom, but the refrigeration was cut off at Augusta, Georgia, on the trip back to Asheville, as being unnecessary. They arrived at Asheville on the 12th.

The defendant introduced a number of witnesses, professedly experienced in dealing in that kind of fruit, whose testimony was to the effect that the bananas were poor in quality, small, thinly spaced, the bunches open, averaging per bunch from 32 to 33 pounds; largely small or "square" bananas showing evidence of bruising from handling; and that the bananas refused to ripen evenly and properly. The local inspector from the U. S. Department of Agriculture testified that the bananas were of inferior quality, small, the bunches open and poorly filled; and that he had found Rhizopus mold, or black spot, on the bananas where they had been bruised or blackened at the ends. And certificate of an inspection made by him on the 15th day of January was introduced in evidence.

The defendant testified that the persons to whom he had proposed to sell the bananas (they are named in the evidence) refused to take them and that he could not dispose of them. That after notifying the plaintiff of the situation, and some negotiation with it to adjust the matter, all of which failed, he got a local dealer in fruit, the Ideal Fruit Company, to place the bananas in their banana room to the end that they might be saved and prepared as far as possible, and sold for account of the plaintiff as stated above. Testimony of O. G. Farlow, in whose establishment the bananas were stored, stated that they were of a poor quality and failed to ripen satisfactorily as they should have done under the customary conditions in the banana room.

An account was kept of the transactions of this concern and sale by them, showing a small balance which defendant asked to be applied upon his counterclaim against the plaintiff.

The following issues were submitted to the jury and answered as indicated:

> "1. Did the plaintiff and the defendant enter into a contract for the delivery of a trailer load of bananas, averaging 37 to 40 pounds per stem? Answer: Yes.
>
> "2. Did the plaintiff breach the contract? Answer: No.
>
> "3. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: $1,769.35, with no interest thereon."

(Exceptions to the instructions pertinent to the decision will be found in the opinion.)

Upon the coming in of the verdict the defendant moved to set it aside for errors committed during the trial. The motion was declined, and the defendant excepted. To the judgment rendered thereupon for the amount claimed by the plaintiff, without interest, the defendant objected, excepted, and appealed.

Harkins, Van Winkle & Walton and Herschel S. Harkins for plaintiff, appellee.

Paul J. Smith and Don C. Young for defendant, appellant.

SEAWELL, J. The record contains a large number of exceptions, typical of a trial of this kind, which we find it impossible, for want of space, to treat in detail. We confine discussion to the points urged upon us as more important.

The objection that defendant was denied the benefit of the telephone conversation between him and representatives of the plaintiff, *i.e.*, between Asheville and Miami, would require more intimate discussion of that interesting subject except for the fact that the conversation was substantially repeated at least twice by defendant on plaintiff's cross-examination which, in our opinion, cured the error, if any had occurred.

There may be some technical error in the statement of the witness that the balance of his cargo of the same shipload had been sold to various concerns throughout the United States and paid for without complaint, but we are not sufficiently satisfied that it was prejudicial to the defendant as to justify us in holding it for reversible error.

The appellant excepts to the charge as omitting substantial contentions of the defendant and over-emphasizing the contentions of the plaintiff; and that the array, in reality, amounts to a strong argument for plaintiff's side of the controversy, and an expression of opinion by the court; and that there were several misstatements of the evidence.

No adequate reason is given why the exceptive portions of the charge, challenged for omission of defendant's contention or containing misstatements of the evidence, do not come under the rule requiring the matter to be called to the attention of the court at the time, in order to preserve the exception. *S. v. Sutton, post,* 244; *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514.

As to the other objection, that the method and manner of the array of contentions amounted to an expression of opinion, if as defendant suggests, it must be found "from the four corners" of the charge,—and it is difficult to see how else the imbalance could be perceived—careful reading leaves us with the impression that the exception does not point to reversible error.

Appellant points out, however, that the following instruction openly assumed a fact to exist which was a jury question—whether the Grayson ship had arrived on the 7th—and should be held for reversible error:

> "Now, gentlemen, if the bananas when they reached Miami on the ship, on the date of the 7th, when they were unloaded there, were of the character and kind of bananas that the plaintiff sold to the defendant, but due to the defendant's failure to get his truck

there, and in view of the defendant's failure to receive the bananas until the 10th, the plaintiff would not be responsible for any loss or deterioration in character or kind of bananas that were delivered to the plaintiff on the 10th, if they had deteriorated and were not of the kind and character of bananas that were delivered from the ship on the 7th or 8th, or whenever it was unloaded, because, under the contract the bananas were to be delivered to the defendant f. o. b. in Miami at the time that the ship arrived."

This passage is not ideally clear, but sufficiently so to give the jury to understand the proposition, hypothetically put, that if the deterioration in the condition of the bananas was due to a fault of the defendant in delaying their receipt from the time they should have been picked up—from the "7th to the 10th," "or on the 7th or 8th, or whenever it was unloaded," plaintiff would not be responsible for the change in condition. This instruction taken in its entirety, leaves the question of the arrival of the ship open by rephrasing the point. The assignment of error pointed out is unsubstantial, in view of the whole charge.

We are unable to sustain the assignments of error discussed, or others called to our attention, after careful examination, and we find

No error.

RUTH BANKS v. EMORY LEE SHEPARD AND MARS HILL-WEAVERVILLE BUS LINES, INC.

(Filed 9 March, 1949.)

1. Automobiles § 8d—

The mere fact that the driver of a bus stops such vehicle on the traveled portion of the highway for the purpose of receiving or discharging a passenger, nothing else appearing, will not be held to be a violation of G.S. 20-161.

2. Same—

The stopping of a bus on the traveled portion of the highway to discharge a passenger without giving the signal required by statute is negligence, and ordinarily it is for the jury to determine whether such negligence is the proximate cause of injury. G.S. 20-161.

3. Automobiles § 18h (2)—Evidence held for jury as to whether mechanical signal as required by statute was given before stopping bus.

Plaintiff, a passenger in a bus, was injured when a truck following the bus collided with the rear thereof when the bus was stopped on the highway to permit a passenger to alight. Defendant appellant admitted that its driver gave no hand signal but introduced evidence of a rule of the Utilities Commission as to the required lighting equipment on motor

vehicles and evidence that the bus had been inspected and approved by an inspector of the Utilities Commission, and certificate of title issued by the Department of Motor Vehicles, together with testimony of the driver that the stop lights were on only when the brakes were on and then only if one stopped the bus suddenly, and that he slowed down gradually before stopping the bus. *Held:* The evidence is insufficient to show as a matter of law that a mechanical or electrical signal as required by G.S. 20-154 was given, and appellant's motion to nonsuit was properly denied.

4. Negligence §§ 7, 20—

An instruction upon the question of intervening negligence to the effect that if the injury was a natural and probable consequence of the original negligence and could have been foreseen as a probable consequence thereof, it would not be insulated by intervening negligence, must be held for reversible error in failing to charge that the original negligence would be insulated if it would not have caused injury except for the intervention of some distinct wrongful act or omission on the part of another or others.

5. Trial § 31d—

A charge that the burden of proof resting on plaintiff required her to introduce evidence tending to prove "the allegation," must be held for reversible error, since the burden of proof relates to the issues rather than the allegations out of which they arise, and the burden is on plaintiff to prove by the greater weight of the evidence the affirmative of the issues forming the basis of her cause of action.

APPEAL by defendant, Mars Hill-Weaverville Bus Line, Inc., from *McSwain, Special Judge,* at September Term, 1948, of BUNCOMBE.

Civil action for personal injuries sustained by the plaintiff, in a rear-end collision between a bus owned and operated by the defendant, Mars Hill-Weaverville Bus Lines, Inc., and a truck owned and operated by the defendant, Emory Lee Shepard.

On 18 November, 1947, the plaintiff became a passenger on appellant's bus, scheduled to leave Asheville at 2:30 p.m., for Weaverville, but which actually left Asheville about 2:54 p.m. She paid her fare and was a passenger for hire. About 150 feet south of Stoney Knob Grocery Store the highway passes over the crest of a hill; and before the driver reached the crest of this hill he was traveling 40 or 45 miles per hour. The bus was being followed by a one and a half ton Chevrolet truck, driven by the defendant Shepard. It was raining and the pavement was wet. The road was 24 feet wide with a center line.

According to the plaintiff's evidence, just as the bus was approaching the Stoney Knob Grocery Store, while being operated at approximately 30 miles per hour, a passenger sitting on the front seat next to the door of the bus gave a signal to stop; immediately after the signal was given the bus stopped suddenly within 4 or 5 feet. The door was open when the bus stopped and the passenger who was standing at the door, alighted quickly and the truck of the defendant Shepard collided with the bus,

throwing a number of passengers to the floor of the bus, unseating the plaintiff and throwing her to the floor, breaking her neck. The plaintiff offered testimony tending to show that the bus stopped on the traveled portion of the highway and that after the collision the truck and the rear of the bus were across the center line of the highway and the right front wheel of the bus was about 2 feet from the right edge of the pavement.

Miss Jean Cheek, one of the plaintiff's witnesses, testified that when the Roberts girl rang the bell to get off, she moved to the front of the bus and got off quickly, and something hit the back of the bus and she was knocked unconscious.

The defendant bus company admitted that no hand signal was given by the driver of the bus before stopping to discharge the passenger, that the bus was so constructed that a hand signal could not be given, but offered evidence tending to show that an electrical signal was given. The driver of the bus testified the stop lights are on only when the brakes are on and if you stop the bus suddenly, the brakes are on just the length of time that you are stopping the bus. He also testified that he slowed down gradually before stopping and that the truck which was following him was from 200 to 300 feet behind him when he stopped; that when he stopped the bus its right front and rear wheels were off of the hard surface resting on the shoulder of the road.

Miss Roberts, a witness for the defendant, testified that when the bus stopped she "stepped down three steps from the floor of the bus and had taken about two steps on the ground when the crash occurred. . . . The bus drove up and stopped. It was misting. I didn't have an umbrella and I didn't have a raincoat. I was in a hurry to get from the bus to home. I had gotten off the bus, taken two steps . . . when I heard the collision."

The usual motion for judgment as of nonsuit was made and renewed in apt time, and overruled. The jury answered the issues of negligence and damages against both defendants, and from the judgment entered thereon the defendant, Mars Hill-Weaverville Bus Lines, Inc., appeals and assigns error.

E. L. Loftin and Jones & Ward for plaintiff.

Smathers & Meekins and Geo. Pennell for defendant, Mars Hill-Weaverville Bus Lines, Inc.

DENNY, J. The appellant excepts and assigns as error the refusal of the court below to allow its motion for judgment as of nonsuit.

According to the plaintiff's testimony the appellant's driver stopped the bus within four or five feet, after the bell rang, indicating a passenger wanted to get off the bus. The evidence also tends to show that the bus

was stopped on the hard surface or traveled portion of the highway and that the collision occurred within a matter of seconds after the bus stopped.

The mere fact that the driver of a bus stops such vehicle on the traveled portion of the highway, for the purpose of receiving or discharging a passenger, nothing else appearing, will not be held to be a violation of G.S. 20-161. *Leary v. Bus Co.* 220 N.C. 745, 18 S.E. 2d 426; *Peoples v. Fulk,* 220 N.C. 635, 18 S.E. 2d 147; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Morgan v. Coach Co.,* 228 N.C. 280, 45 S.E. 2d 339. Even so, such stop must be made with due regard to the provisions of G.S. 20-154, the pertinent parts of which read as follows: "(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line 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. (b) 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, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department. . . . All signals to be given from left side of vehicle during last fifty feet traveled."

It was admitted in the trial below, that when the bus was stopped to discharge the passenger at the time of the collision complained of herein, no hand signal was given by the driver of the bus. It then became a pertinent question as to whether or not a proper signal was given by a mechanical or electrical signal device which had been approved by the Department of Motor Vehicles, as required by the above statute.

The appellant offered in evidence Rule 34, of the Utilities Commission, describing the required lighting equipment on motor vehicles used by motor vehicle carriers, and offered evidence tending to show that the bus involved in this collision had been inspected and approved by an inspector of the Utilities Commission. It also offered in evidence its certificate of title issued by the Department of Motor Vehicles.

We do not think this evidence sufficient to show compliance with the statute. *Barnhill, J.,* in speaking for the Court in *Conley v. Pearce-Young-Angel Co., supra,* said: "Mere stopping on the highway is not prohibited by law, and the fact of stopping in itself does not constitute negligence. *Leary v. Bus Corp.,* 220 N.C. 745, 18 S.E. 2d 426. It is stopping without giving a signal by hand and arm 'or any approved mechanical or electrical signaling device' approved by the Department

of Motor Vehicles *whenever the operation of any other vehicle may be affected by such movement.* G.S. 20-154."

The failure to give a signal as required by statute, before stopping a motor vehicle on a public highway, is negligence, *Betchler v. Bracken,* 218 N.C. 515, 11 S.E. 2d 721; and ordinarily it is for the jury to determine whether or not such negligence was the proximate cause of the injury, *Holland v. Strader,* 216 N.C. 436, 5 S.E. 2d 311. *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d 379; *Murphy v. Asheville-Knoxville Coach Co.,* 200 N.C. 92, 156 S.E. 550.

We think the evidence adduced in the trial below, when considered in the light most favorable to the plaintiff, is sufficient to carry the case to the jury, and we so hold. *Pappas v. Crist,* 223 N.C. 265, 25 S.E. 2d 850; *Gregory v. Ins. Co.,* 223 N.C. 124, 25 S.E. 2d 398.

The appellant also excepts and assigns as error the following portion of his Honor's charge: "Now, the law recognizes the doctrine of intervening cause but the Court instructs you that an intervening cause will not relieve from liability when the prior or first negligence was the efficient cause of the injury. The test is not to be found in the number of intervening events but in their character and in the natural connection between the original wrong done and the injurious consequence and if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable, the original wrongdoer is liable notwithstanding an intervening act or event. The Court has said that the rule applying in deciding this question is, was there an unbroken connection between the wrongful act and the injury, the original wrongful act. Was it a continuous operation? Do the facts make a natural whole or was there a new and intervening cause between the wrong and the injury? It must appear that the injury was the natural and proximate consequence of the negligence and that it ought to have been foreseen in the light of attending circumstances. I think that explains to you the law of general negligence and the law of concurrent negligence, and intervening causes."

The vice complained of lies in the fact that the jury was not instructed as to when intervening negligence insulates the original negligent act and becomes the sole proximate cause of the injury. If an original act of negligence "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,* 223 N.C. 49, 25 S.E. 2d 202; *Spease v. Butner,* 217 N.C. 82, 6 S.E. 2d 808. However, whether the negligent act of a defendant may be insulated as a matter of law by an independent act of another, depends on whether or not the original actor "ought to have

foreseen in the exercise of reasonable prevision or in the light of attending circumstances" that the plaintiff or some other person might be injured as a result and probable consequence of the negligence act. *Spease v. Butner, supra; Warner v. Lazarus,* 229 N.C. 27, 47 S.E. 2d 496. We think the exception is well taken and must be upheld.

The appellant likewise excepted to the following portion of the charge: "Burden of proof simply means that it is the duty of the plaintiff in this case to produce evidence tending to prove the allegation. So, the burden of proof means that it is the duty of the plaintiff to offer evidence in this case tending to prove the allegation."

Burden of proof means "the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause." Black's Law Dictionary, 3rd Ed., p. 258.

There is a substantial difference between offering evidence which merely tends to prove an allegation and offering evidence sufficient to carry the burden of proof on the issues raised by the pleadings.

In the instant case, the burden of proof on the issues of negligence and damages, was upon the plaintiff; and the burden rested upon her to prove negligence on the part of the defendants and to establish her damages by the greater weight of the evidence. The issues are raised by the pleadings and the burden of proof relates to the issues, rather than to the allegations out of which they arose. It is quite possible the jury may have been confused as to the measure of proof required. We think the instruction as given was prejudicial to the appellant.

Several other exceptions appear to have some merit, but since there must be a new trial, we deem it unnecessary to discuss them.

The appellant is entitled to a new trial, and it is so ordered.

New trial.

IN THE MATTER OF INCORPORATION OF WESTOVER CANAL LEADING FROM WESTOVER FARMS TO POLLY WALKER SWAMP.

(Filed 9 March, 1949.)

1. Drainage Districts § 5—

In order to constitute a valid drainage assessment it is necessary that the land assessed drain or flow into the canal, G.S. 156-43, and therefore on appeal to the Superior Court on a landowner's exceptions to order of the clerk confirming assessments as proposed by the commissioners, the drainage corporation has the burden of proving the number of acres of land the exceptor owns which drain into the canal and what amount said land should be assessed per acre. The fact that exceptor first introduced evidence, presumably on the theory that the order of the clerk made out a *prima facie* case, does not alter the rule as to the burden of proof.

2. Evidence § 7a—

The making out of a *prima facie* case does not change the burden of proof, but merely places the burden of going forward with the proof upon the adverse party unless he would run the risk of an adverse verdict.

3. Trial § 13—

The order of developing the case on trial in the Superior Court is largely addressed to the discretion of the trial judge.

4. Same—

Ordinarily, the party having the burden of proof first introduces his evidence, and then the opposing party introduces his, and then the first party introduces his evidence in rebuttal, but this is a rule of practice and not of law, and may be departed from whenever the court considers it necessary to promote a fair trial.

5. Appeal and Error § 3—

Where no error is found on plaintiff's appeal from judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void, will be dismissed, since only the party aggrieved may appeal. G.S. 1-271.

APPEALS by Westover Canal Corporation and by exceptor Mattie R. Swain from *Bone, J.*, at October Term, 1948, of WASHINGTON.

Proceeding for incorporation of canal already constructed, and to provide for improvement and enlargement of the canal under the provisions of G.S. 156-43.

The record on appeal discloses these procedural facts: Mrs. Mattie R. Swain, and sixteen others, purporting to be proprietors of land drained by the existing canal, filed petitions seeking the relief provided by the statute.

Thereupon, the Clerk of Superior Court appointed certain named commissioners with directions to make inquiry into the allegations of the petition and report to the court touching certain enumerated matters as specified in the statute.

Thereafter the commissioners made report showing route and plan of the proposed improvement of canal, together with their findings as to lands benefited, including 31 acres of Mattie R. Swain, and the amount of assessments recommended, etc. Ten of the seventeen petitioners, other than Mattie R. Swain, representing specified acreage, consented to the report. But Mattie R. Swain filed exceptions to the report for that, as she asserted, among other things, the improvement of the canal as proposed will in no wise benefit her lands.

Thereafter the Clerk of Superior Court, by order signed, granted the petition for incorporating the district, approved the report of the commissioners in all respects, called a meeting of the corporators for purpose

of organization, and ordered that notice issue to each of the petitioners, of the acreage sought to be assessed and the amount of the proposed assessment,—fixing a date for hearing thereon.

The assessments, as proposed in the report of the commissioners, as to lands of Mattie R. Swain, and of others, were ratified and approved and levied by the Board of Directors of the corporation, Westover Canal, Incorporated, and certified to the Clerk of Superior Court to be by him docketed so as to become liens on their lands as provided by law.

Thereafter the cause coming on for hearing on the exceptions of Mattie R. Swain, the Clerk of Superior Court, by signed order, overruled her exceptions and approved and confirmed the assessment as proposed by the commissioners and the Board of Directors of the corporation as to her land. The assessment was declared a lien upon her land. Mattie R. Swain objected and excepted to each and every part of this order, and gave notice of appeal to Superior Court in term time. Thereupon, on said date, the clerk ordered that the cause be transferred to Superior Court for trial in term time by the jury as provided by law.

Mrs. Swain tendered these issues as properly arising in the matter for trial by the jury:

"1. Is this proceeding void?

"2. Will the lands of Mrs. Mattie R. Swain be damaged by the proposed improvement of the Westover Canal, and, if so, in what amount?

"3. Should the land of Mrs. Mattie R. Swain be assessed in any amount for the proposed improvement of the Westover Canal?

"4. If so, in what amount per acre?"

The record of the case on appeal shows that when the case came on for hearing in Superior Court Mattie R. Swain first offered evidence tending to show that the proposed canal, as constructed, was so located that it did not afford drainage for her land. When she rested the canal corporation moved for judgment as of nonsuit. The motion was denied, and the canal corporation excepted. Exception 1.

Then the canal corporation offered its evidence and rested its case.

Thereupon, Mattie R. Swain offered other evidence, and rested her case.

Then the canal corporation renewed its motion for judgment as of nonsuit. The motion was denied and it excepted. Exception 3.

The case was submitted to the jury, upon issues tendered by the canal corporation, and the presiding judge ruled, and charged the jury, among other things, that burden of proof as to both these issues is on the Westover Canal Corporation to satisfy the jury by the greater weight of the evidence that the facts are as contended by said canal corporation. Exception 4. To like effect are portions of the charge to which Exceptions 5 and 6 relate.

The issues submitted to the jury, and the answers thereto, are these:

"1. How many acres of land of Mattie R. Swain, if any, drain into the Westover Canal? Answer: None.

"2. In what amount should the said land be assessed per acre for the payment of the drainage costs and other costs incident to creating the drainage corporation? Answer: None."

Judgment was entered upon the verdict, and the cause ordered to be remanded to Clerk of Superior Court for further proceeding, etc.

In the judgment, however, it is recited: "During the progress of the trial counsel for the Exceptor, Mattie R. Swain, moved to dismiss the entire proceeding for irregularities appearing in the record and in the evidence. The motion was denied by the court and counsel for Exceptor excepted thereto."

From the judgment Westover Canal, Incorporated, and Mattie R. Swain, respectively, appeal to Supreme Court, and assign error.

Norman & Rodman for Canal Corporation, appellant.
W. L. Whitley for Mattie R. Swain, appellant.

APPEAL BY WESTOVER CANAL, INCORPORATED.

WINBORNE, J. This appeal challenges the ruling of the trial judge that Westover Canal, Incorporated, has the burden of proof on the issues submitted to the jury. This presents the determinative question. A reading of the statute, G.S. 156-43, in the light of applicable principles of law negatives the challenge, and furnishes authority for the ruling.

The general rule is well settled that a special assessment for the purpose of drainage can be levied only upon property benefited by the improvement. It is said that the legal theory underlying drainage assessments is one of benefit increasing the value of the land and justifying its assessment. 28 C.J.S. 409, Drainage, Sec. 59.

Where it clearly appears that the canal will neither drain a particular tract of land nor render it more accessible, there is no valid reason for including it in the district, and if it is nevertheless arbitrarily made a part thereof, the owner may obtain relief. 17 Am. Jur. 791, Drains & Sewers, Sec. 20.

Indeed, the statute, G.S. 156-43, under which this proceeding is instituted, requires that the petition shall set forth "the name of the owners of land draining in such canal and the quantity of land tributary thereto," and that "assessments shall be made on the land tributary to the canal." The word tributary, as defined by Webster, means "a stream feeding a larger stream." Hence as here used the phrases "land tributary thereto" and "land tributary to the canal" mean land from which water drains or flows into the canal. And the statutory provisions determine the prop-

erty liable to drainage assessment. Hence to constitute a valid assessment the particular land against which it is levied must come within the meaning of the statute. And the statute gives to any person dissatisfied with an assessment the right to appeal to a jury at a regular term of the Superior Court of the county. In such event, it would seem that the authority undertaking to establish the assessment would still have the burden of proving the provisions of the statute essential to the creation of a valid assessment. It may be that the order of the Clerk of Superior Court approving and confirming the assessment as proposed by the commissioners and the Board of Directors of the corporation creates a *prima facie* case. But "a *prima facie* case, or *prima facie* evidence, does not change the burden of proof. It stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fail to do so . . . Hence, when such *prima facie* case is made out, the duty of going forward with evidence in reply, if the opposing party would not hazard the chance of an adverse verdict, is shifted or rather cast upon the opposite side." *Speas v. Bank,* 188 N.C. 524, 125 S.E. 398. See also *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766.

Moreover, the order of developing the case on trial in Superior Court is a matter largely addressed to the discretion of the trial judge. *D'Armour v. Hardware Co.,* 217 N.C. 568, 9 S.E. 2d 12. The ordinary rule in presenting the facts in evidence to the jury is for the plaintiff, or party having the burden of proof, to introduce his evidence, then for the defendant, or opposing party, to introduce his evidence, and then the plaintiff's evidence in rebuttal. This is a rule of practice, and not a rule of law, and it may be departed from whenever the court considers it necessary to promote a fair trial. McIntosh N. C. P. & P. in Civil Cases, Sec. 564, p. 711.

All assignments of error presented by Westover Canal, Incorporated, have been given due consideration, and, except as hereinabove set forth, require no treatment, and, on this appeal there is

No error.

APPEAL OF MATTIE R. SWAIN:

Mattie R. Swain, on her appeal, presents this question: "Is the assessment sought to be levied herein void?"

Since only parties aggrieved may appeal in cases prescribed by law, G.S. 1-271, this appeal must be dismissed.

Appeal dismissed.

On appeal of Westover Canal, Inc.—No error.

On appeal of Mattie R. Swain—Appeal dismissed.

BULO CARVER AND WIFE, LULA MAE CARVER, v. TROY LEATHERWOOD AND WIFE, SARAH LEATHERWOOD.

(Filed 9 March, 1949.)

1. Pleadings § 15—

A demurrer presents the sole question whether the complaint is fatally defective in any respect set forth in the demurrer, admitting for the purpose the truth of the allegations of the complaint, and in passing upon the question neither the defenses alleged in the answer nor evidence offered at the hearing may be considered.

2. Easements § 2: Highways § 16: Declaratory Judgment Act § 2a—

Plaintiffs instituted this action to obtain a judicial declaration of their right to an easement appurtenant and by necessity over lands of defendants. *Held:* The action is authorized by G.S. Chap. 1, Art. 26, and the Superior Court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. G.S. 136-68.

3. Easements § 2—

In an action to declare plaintiffs entitled to an easement appurtenant or an easement by necessity, allegations that plaintiffs' land was cut off and isolated from any public road and praying that defendants be enjoined from blocking the only means of ingress and egress, is a sufficient allegation that plaintiffs have no other way of ingress and egress if such allegation be deemed essential.

4. Same—

Allegations that defendants sold a parcel of a larger tract owned by them, that at the time a roadway existed to such smaller tract over the remaining land of defendants, that the parties contracted with a view to this condition and that the purchaser, who conveyed to plaintiffs, used the cartway without objection, with further allegations that the smaller tract was isolated from any public road, are sufficient to establish, as against demurrer, plaintiffs' right to an easement appurtenant and by necessity. Whether plaintiffs should not be required to decide whether they rely upon an easement appurtenant or an easement by necessity, *quære?*

SEAWELL, J., dissents.

APPEAL by plaintiffs from *Sink, J.,* in Chambers, 20 October 1948, HAYWOOD. Reversed.

Civil action for a declaratory judgment fixing and adjudicating the right of plaintiffs to a roadway over and across the land of defendants as an appurtenance to land owned by them and to restrain defendants from closing said right of way.

The plaintiffs in their complaint allege in substance that (1) on and prior to 1 January 1932 defendants owned a large boundary of land in Jonathan Creek Township, Haywood County, (2) on 1 January 1932 they sold to one Hessie Sutton by warranty deed 59½ acres of their boundary, together with "all privileges and appurtenances thereto belong-

ing," (3) said 59½ acre tract was and is cut off from a public road by the portion of said boundary retained by the grantors in said deed, (4) at the time of the severance of said tract from the larger boundary there existed a roadway from the public road over and across the land of one R. W. Howell and defendants herein to and upon the 59½ acre tract which was the only way of ingress and egress to and from said tract, (5) said roadway was used by said Hessie Sutton as a way of ingress and egress from the time she purchased said tract until February 1948 when she sold and conveyed the same to these plaintiffs, and plaintiffs since said date have so used said road, and (6) defendants have recently forbidden plaintiffs to use said way of ingress and egress and are now threatening to block or close the same. They further allege that the right of ingress and egress over and across defendants' land along and upon said roadway is appurtenant to the land acquired by them by *mesne* conveyance from the defendants and that they, as a matter of law, are entitled to a way of necessity over the land of defendants. They pray that the court adjudge that plaintiffs "have and are entitled to a right and easement of a way of necessity over the lands of the defendants," and that defendants be restrained and enjoined from "closing off, barring, or blocking the only existing means of egress and ingress over their lands to the lands of the plaintiffs."

When the cause came on to be heard on the notice to show cause why the temporary restraining order theretofore issued should not be continued to the hearing, the defendants filed answer in which certain defenses are pleaded and also demurred to the complaint for that (1) it is not alleged that plaintiffs have no other way of egress and ingress to and from a public road; (2) the plaintiffs' remedy, if any, is by special proceeding for the establishment of a cartway under G.S. 136-68; (3) the complaint does not state and allege a cause of action; and, (4) the court is without jurisdiction of the cause.

The court heard certain evidence and then entered its judgment sustaining the demurrer and dismissing the action. Plaintiffs excepted and appealed.

James H. Howell, Jr., for plaintiff appellants.
Grover C. Davis and W. R. Francis for defendant appellees.

BARNHILL, J. The demurrer, for the purposes of this appeal, admits the facts alleged in the complaint. Whether the complaint is fatally defective in any one or more respects set forth in the demurrer is the one question presented. In deciding the same we may not consider either the defenses alleged in the answer or the evidence offered at the hearing.

This is not an action to establish a cartway, which must be instituted before the clerk in the form of a special proceeding. G.S. 136-68, 69.

It is a civil action to obtain a judicial declaration of the right of plaintiffs to use the described roadway as an appurtenance to their land and as a way of necessity, and is authorized by Chap. 1, Art. 26, of the General Statutes of North Carolina. Hence, there is no want of jurisdiction in the court to hear the cause and enter judgment therein.

If plaintiffs in this action are required to allege that they have no other way of ingress and egress—which we do not now decide—such allegation sufficiently appears in the complaint. It is alleged that the land of plaintiffs was "cut off, severed from, and isolated from a public road" by the land now owned by defendants, and plaintiffs pray that defendants be enjoined from "blocking the only existing means of egress and ingress . . ." Under the rule of liberal construction these allegations are sufficient to meet this ground of demurrer.

The plaintiffs allege in effect that the roadway was in existence at the time the 59½ acre tract was severed from the larger boundary, that the presence of the roadway was a condition which openly and visibly existed at that time, that the parties contracted with a view to this condition, and that in recognition thereof the roadway was so used by defendants' immediate grantee without any objection by them. Thus, they assert, the cartway or road constitutes an easement appurtenant to their land, impliedly granted by the deed of defendants. They further allege that when their land was severed from the larger tract it was thereby isolated from any public road, and that therefore they are entitled to a roadway across the land of defendant as a way of necessity impliedly granted by defendants. Thus the complaint states facts sufficient to entitle plaintiffs to a judicial determination of their alleged contractual right to a roadway from their land across the land of defendants to the public road.

As the sufficiency of the complaint is the only question presented, we have studiously avoided any discussion of the merits of plaintiffs' claim. It is not amiss to note, however, that plaintiffs refer to their alleged right both as an easement in a specific roadway, appurtenant to their land, *Bowling v. Burton,* 101 N.C. 176; 17 A.J. 944, sec. 32 *et seq.;* Anno. 8 A.L.R. 1368; *Packard v. Smart,* 224 N.C. 480, 31 S.E. 2d 517; *Neamand v. Skinkle,* 225 N.C. 383, 35 S.E. 2d 176, and as a way of necessity by reason of the fact the severance isolated their land from a public road, *Lumber Co. v. Cedar Works,* 158 N.C. 161, 73 S.E. 902; 17 A.J. 959, sec. 48 *et seq.* As there are substantial differences between the two rights, it might be well for plaintiffs to decide upon which right they rely. This would greatly facilitate the trial and lessen the possibility of error.

The judgment below is

Reversed.

SEAWELL, J., dissents.

CLAUD L. BUCKNER AND WIFE, MARY BUCKNER, v. DeFOIX W. HAWKINS AND WIFE, JEAN HAWKINS, INDIVIDUALLY, AND JAMES L. WAGNER, EDGAR J. DUCKWORTH, J. D. RAY AND W. T. DUCKWORTH, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF OLIVER D. REVELL, DECEASED.

(Filed 9 March, 1949.)

1. Wills § 33a—

A clause in a will that "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes a devise in fee simple. G.S. 31-38.

2. Wills § 33i—

A stipulation annexed to a devise in fee that the devisee should not sell, mortgage or dispose of the realty during his natural life, is void, since a restraint upon alienation annexed to a devise in fee, even though the restraint be for a limited time, is void as contrary to public policy.

APPEAL by defendants from *Nettles, J.*, in Chambers, 22 December, 1948, of BUNCOMBE.

Controversy without action submitted pursuant to provisions of G.S. 1-250.

The salient facts pertinent to the controversy involved on this appeal, as set forth in the agreed statement of facts, may be summarized as follows:

I. On 14 December, 1948, plaintiffs Claud L. Buckner and his wife, Mary Buckner, and defendants DeFoix W. Hawkins and wife, Jean Hawkins, entered into a written contract for the sale by the Buckners, and the purchase by the Hawkins of that certain piece or parcel of improved real estate situate in the City of Asheville, County of Buncombe, State of North Carolina, described as the property devised to said Claud L. Buckner in and by Clause Twenty-Second of the last will and testament of Oliver D. Revell, deceased, duly probated, and recorded in the will records of said county,—it being agreed that Oliver D. Revell died seized of said real estate, in fee simple and free and clear of all liens and encumbrances.

II. Clause Twenty-Second of the last will and testament of Oliver D. Revell, deceased, under which Claud L. Buckner claims title, reads as follows:

"Twenty-Second: I give, devise and bequeath to Claud L. Buckner, of Asheville, North Carolina, my house and lot at 121 Pearson Drive, being on the East side of said Pearson Drive and on the South side of the W. H. Brooks home, with a frontage of about 60 feet on Pearson Drive and a depth of 118 feet back to the East line of said lots; excepting and reserving from this bequest five (5) feet running Eastwardly and Westwardly along the North line of said lot; which said strip is hereby

bequeathed to H. W. Brooks and Kathleen Brooks. This property not to be mortgaged, sold or disposed of during the life of said Claud L. Buckner. Also to the said Claud L. Buckner and his mother, jointly, I bequeath anything they may owe to me on their house on Ora Street, in the City of Asheville, North Carolina, at the time of my death. . . ."

"All of these lands are devised and bequeathed to the said Claud L. Buckner with the restriction that the same shall not be sold, mortgaged or disposed of during his natural life. . . ."

III. Plaintiffs contend that, under the provisions of said Clause Twenty-Second, as set forth in preceding paragraph, Claud L. Buckner acquired a fee simple title to said real estate, in that any restrictions contained in said clause against the transfer of this property by Claud L. Buckner are inconsistent with the fee simple estate devised to him by said clause of said will, and are, therefore, contrary to law and void; and, hence, the deed duly executed by plaintiffs and tendered to defendants, being sufficient in form, conveys a good and merchantable title in fee simple. On the other hand, defendants Hawkins contend that Claud L. Buckner did not acquire, and is unable to convey such title, and for this reason refuse to accept the deed for, and pay the purchase price of said land.

IV. The defendants James L. Wagner, Edgar J. Duckworth, J. D. Ray and W. T. Duckworth, as trustees of the residuary estate of said Oliver D. Revell, join in the contentions of defendants Hawkins for the purpose of protecting such interest, if any, as the estate of Oliver D. Revell, deceased, may have in said property.

The court, being of opinion and holding (1) that the personal restraints against the alienation of the property, the subject of this controversy are contrary to law and void, (2) that defendants, trustees, have no interest in or legal claim to said property; and (3) that plaintiffs are seized in fee of said property, and are able to convey same in fee, ordered defendants Hawkins to perform their contract of purchase of said real estate.

All defendants appeal therefrom to Supreme Court and assign error.

Adams & Adams for plaintiffs, appellees.

Sale, Pennell & Pennell for defendants, appellants.

WINBORNE, J. The judgment below is accordant with well settled principles of law in this State.

The clause "I give, devise and bequeath to Claud L. Buckner . . . my house and lot at 121 Pearson Avenue . . ." standing alone, constitutes a devise in fee simple. G.S. 31-38, formerly C.S. 4162. See also *Elder v. Johnston,* 227 N.C. 592, 42 S.E. 2d 904; *Early v. Tayloe,* 219 N.C. 363,

13 S.E. 2d 609; *Heefner v. Thornton,* 216 N.C. 702, 6 S.E. 2d 506; *Williams v. McPherson,* 216 N.C. 565, 5 S.E. 2d 830, and cases cited.

Moreover, the clauses, "This property not to be mortgaged, sold or disposed of during the life of said Claud L. Buckner" and "All of these lands are devised and bequeathed to the said Claud L. Buckner with the restriction that the same shall not be sold, mortgaged or disposed of during his natural life" are such restraints upon alienation as are contrary to public policy and void. And restraints upon alienation, though for a limited time, annexed to a grant or devise in fee, are void. *Pritchard v. Bailey,* 113 N.C. 521, 18 S.E. 668; *Latimer v. Waddell,* 119 N.C. 370, 26 S.E. 122; *Wool v. Fleetwood,* 136 N.C. 460, 48 S.E. 785, 67 L.R.A. 444; *Christmas v. Winston,* 152 N.C. 48, 67 S.E. 58, 27 L.N.S. 1084; *Lee v. Oates,* 171 N.C. 717, 88 S.E. 889; *Combs v. Paul,* 191 N.C. 789, 133 S.E. 93; *Williams v. Sealy,* 201 N.C. 372, 160 S.E. 452; *Douglass v. Stevens,* 214 N.C. 688, 200 S.E. 366; *Williams v. McPherson, supra,* and cases cited.

Therefore, the devise, stripped of these void clauses, vests in Claud L. Buckner an estate in fee.

The cases *Shuford v. Brady,* 169 N.C. 224, 85 S.E. 303; *Roberts v. Saunders,* 192 N.C. 191, 134 S.E. 451; *Williams v. Rand,* 223 N.C. 734, 28 S.E. 2d 247, relied upon by appellees, are distinguishable from case in hand. Likewise the case of *Ex Parte Watts,* 130 N.C. 237, 41 S.E. 289, also cited by appellee, is distinguishable. See *Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730.

The judgment below is

Affirmed.

WALTER H. MERCER, JR., ARLENE MERCER GARNER AND HUSBAND, HENRY J. GARNER, AND WILLARD RAY MERCER v. VIVIAN D. MERCER, BRANCH BANKING & TRUST COMPANY, GUARDIAN OF VIVIAN D. MERCER, A MINOR, J. H. THOMPSON, TRUSTEE, SALLIE BASS THOMPSON AND HUSBAND, J. H. THOMPSON, MAY BASS NEWSOME, N. R. BASS AND WIFE, ESSIE BASS, HUBERT L. BASS, WALDENE BASS McCLENNY AND HUSBAND, G. A. McCLENNY, AND WALTER MERCER.

(Filed 9 March, 1949.)

1. Wills § 33h—

The common law rule against perpetuities, which is a mandate of law to be obeyed irrespective of the question of intention, is recognized and enforced in this State. N. C. Const., Art. I, sec. 31.

2. Same: Trusts § 3a—

The rule against perpetuities which prescribes that title must vest within the life or lives of persons in being and twenty-one years and ten lunar months thereafter, applies to private trusts.

3. Same—

Where a private trust violates the rule against perpetuities, the court will not limit the duration of the trust but will declare the whole trust invalid.

4. Wills § 33h—

Testator devised property in trust for the benefit of his daughter during her lifetime and then for the benefit of her surviving children without limitation over after the death of such issue and without provision for final termination of the trust. The daughter died leaving her surviving two children who were living at the time of the execution of the will and two children who were born subsequent thereto. *Held:* Under its terms the trust could not terminate until the death of the last child of testator's daughter, and therefore the trust is void as violative of the rule against perpetuities, since title might not vest in a person having the power of alienation until long after the period prescribed by the rule.

APPEAL by plaintiffs from *Bone, J.,* October Term, 1948, WILSON. Reversed.

Civil action in which the plaintiffs pray a decree adjudging a testamentary trust void for that it is violative of the rule against perpetuities, heard on motion for judgment on the pleadings.

Nathan Bass in his will devised the *locus* to his daughter, Vivian Mercer, in fee. Thereafter he executed a codicil, the pertinent part of which is as follows:

"All the real and personal property in my said last will and testament devised and bequeathed to my daughter, Vivian Mercer, I hereby give, devise and bequeath unto my trusted son in law, J. H. Thompson, in special trust and confidence and upon the following uses and trusts, to-wit:

"He shall take possession of all the real estate devised unto my daughter, Vivian Mercer, and hold the same in trust for her during the term of her natural life . . . in the event of the death of my daughter . . . the said Trustee shall take possession of and rent the same out according to his best judgment and the said rents so received by him after the payment of taxes . . . he shall use for the support, sustenance, education and benefit of the children of my daughter, Vivian Mercer, surviving her . . ."

Nathan Bass died on or about 30 May 1926. At the time of his death, his daughter, Vivian Mercer, was 29 years of age and had two children, plaintiffs Walter H. Mercer, Jr., and Arlene Mercer Garner. Thereafter there were born to her two other children, plaintiff Willard Ray

Mercer and defendant Vivian D. Mercer. Testator's daughter died 21 December 1944, leaving surviving said four children. Upon the death of Nathan Bass, the trustee named in his will took possession of the property devised to him in the testator's codicil and is now in possession thereof.

The plaintiffs instituted this action to have the trust declared void as violative of the rule against perpetuities. Defendants answered. Thereupon plaintiffs moved for judgment upon the pleadings. When the motion came on to be heard in the court below, the judge entered judgment denying the motion, decreeing that said trust is not violative of the rule against perpetuities, and dismissing the action. Plaintiffs excepted and appealed.

Z. Hardy Rose and Lucas & Rand for plaintiff appellants.

F. L. Carr and L. H. Gibbons for defendant appellees.

BARNHILL, J. The court below not only denied the motion of plaintiffs for judgment on the pleadings, but also affirmatively adjudged, without objection or exception, that the trust created by the testator's codicil to his will is valid. Hence the one question presented for decision is this: Is said trust within the rule against perpetuities?

Much has been written on the subject of perpetuities. Repetition here would serve no useful purpose. Suffice it to say that the common law rule against perpetuities is recognized and enforced in this State.

This rule is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention. N. C. Const., Art. I, sec. 31; *Lockhart's Estate,* 306 Pa. 394, 159 A. 874; *Re Friday,* 313 Pa. 328; 170 A. 123, 91 A.L.R. 766; 41 A.J. 58. Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect, or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. 41 A.J. 74.

While there are some cases *contra,* the great preponderance of authorities in the United States is to the effect that the rule applies to private trusts. 1 Bogert, Trusts and Trustees, 670, 680, and cases cited in note, p. 680. *Billingsley v. Bradley,* 166 Md. 412, 171 A. 351, 104 A.L.R. 274. The decisions of this Court are in line with the majority view. "A trust for private purposes must terminate within a life or lives in being and twenty-one years and ten lunar months thereafter." *Trust Co. v. Williamson,* 228 N.C. 458; *Springs v. Hopkins,* 171 N.C. 486, 88 S.E. 774.

The rule is thus applied for the reason a trust violative of the rule in duration effects an undue postponement of the direct enjoyment of the property and works an unreasonable restraint on alienation.

If the period of the trust is too long, the court does not reduce the limitation to lives in being and twenty-one years, but declares the whole trust invalid. 1 Bogert, Trusts and Trustees, 680, and cases cited in note.

Had Vivian Mercer died without issue surviving, the estate would have vested free of the limitations of the trust within the prescribed time. But such is not the case. She left issue surviving, two of whom were not in being at the time of the death of the testator. Still others might have been born to her. Gray, Perpetuities, 4th Ed., 214, sec. 215. There is no limitation over after the death of such issue and no provision for the final termination of the trust. Certainly it continues until the death of the survivor. Whether the title then vests in the heirs of testator or the heirs of the grandchildren, there is a future interest which may not vest in the ultimate takers free of the trust limitation until long after the expiration of the prescribed period. In the meantime, the trust continues and the property is fettered thereby, with title vested in no one having the power of alienation. The rule is designed to guard against just this type of situation. 1 Bogert, Trusts and Trustees, 640; *Ibid.* 670, sec. 218.

It follows that the trust the testator attempted to create in his codicil is void. Hence the judgment below must be

Reversed.

FLORENCE JARRETT ET AL. *v.* GAY GREEN, EXEC., ET AL.

(Filed 9 March, 1949.)

1. Executors and Administrators § 13a: Trusts § 20: Wills § 46—Beneficiary is entitled to pay debts of estate in order to prevent sale of unique property to make assets.

The will in question set up a trust fund for the benefit of testator's widow and nephew, the *corpus* to be paid the nephew upon the widow's death. Included in the estate was stock in a close corporation, and testator expressed his intent that this stock should not be sold unless necessary to pay debts, cost of administration or inheritance taxes, and provided further that in case of sale it should be offered to the stockholder-directors of the corporation at the value determined for inheritance-tax purposes, unless a better bid were obtainable. Plaintiff beneficiaries introduced evidence that they had made suggestions as to how the stock might be saved to the trust estate and that the nephew had offered to deposit money to take care of the debts of the estate in order to leave the stock undisturbed, and permitting the inference, considering the evidence in the light most favorable to plaintiffs, that the price at which the executor had sold some of the stock was greatly less than its market value. *Held:* The executor was not only enjoined specifically by testator to retain the stock if feasible but was also under fiduciary duty to the beneficiaries to do so, and in an action to vacate the sale of the stock and to require an accounting, plaintiffs' evidence was sufficient as against demurrer.

2. Wills § 31—

The intent of the testator is his will.

3. Trusts § 5d—

In this action to establish a constructive or a resulting trust in certain stock sold by executor, to recover the property and have an accounting, the evidence *is held* sufficient as against demurrer to show that the purchasers of the stock were not innocent purchasers for value without notice.

4. Equity § 2: Limitation of Actions § 2e—

An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within ten years from the date of the accrual of the cause of action. G.S. 1-56.

APPEAL by plaintiffs from *Clement, J.,* October Term, 1948, of BUNCOMBE.

Civil action to establish trust, vacate sale of corporate stock, and require an accounting.

On 7 November, 1941, J. N. Jarrett of Buncombe County died testate leaving Gay Green executor and trustee of his estate. A trust was set up, the income from which was to go to the testator's widow for a period of ten years; thereafter $200 a month was to be paid to her for life and the excess paid to his nephew, Earl Messer; the trust was to terminate at the death of his widow and the principal paid over to Earl Messer. Should Earl Messer not be living when entitled to receive any interest or principal, then such income or principal was to go to his nephew, Rex M. Jarrett.

The testator owned 392 shares of stock in the Imperial Life Insurance Company at the time of his death. He was particularly interested in preserving this stock to his trust estate, and withheld from the Trustee any power to sell "said stock except with the consent of the beneficiaries of this trust, or such of them as may be legally capable of giving their consent."

In Item 6 of the will it is provided that if it should "be necessary to dispose of any portion of my stock in the Imperial Life Insurance Company . . . to complete the payment of the debts of my estate, costs of administration, or succession or inheritance taxes . . . then said executor . . . is authorized to do so. In such event said stock proposed to be sold shall first be offered to the stockholders of Imperial Life Insurance Company who are then directors thereof. . . . If said offer is made within two years from the date of my death it shall be at the value per share determined for inheritance tax purposes. . . .

"The intent and purpose of these provisions is to enable my executor or trustee to dispose of my stock in said corporation, if it is plainly wise

to do so, but at the same time to prevent said stock from passing outside of the ownership of those principally interested in said corporation, if they desire to purchase said stock and will pay as much therefor as can otherwise be obtained."

Shortly after the death of the testator, Gay Green qualified as executor of his estate and entered upon the duties of his office. On 9 March, 1943, he sold 86 shares of stock in the Imperial Life Insurance Company to pay debts of the estate, costs of administration and inheritance taxes, at the price of $225 per share. 40 shares were issued to Gay Green; 40 shares to O. E. Starnes, and 6 shares to J. Warlick, all of whom were then stockholders and directors of the Imperial Life Insurance Company. Thereafter, on 8 September, 1943, the executor sold six additional shares of this stock at the same price, issuing 2 shares to himself; 2 shares to O. E. Starnes and 2 shares to J. Warlick.

However, prior to the sale of any of this stock, Earl Messer had protested to the executor against its disposal, offering many suggestions as to how it might be saved to the trust estate, and finally in a conference during the first week of March, 1943, said: "Now, Mr. Green, if they won't accept this offer that I have made you, I will deposit the money with you to take care of the debts of the Jarrett estate, and we will just leave the stock where it is. . . . Mr. Green replied to this that he would let me know and we adjourned our conference from Mr. Wright's office. . . . We found a source of money, several sources, where we could get it. Then I made Mr. Green a final offer that we would put up the money. . . . I was ready, able and willing to turn it over to Mr. Green, as executor, for the purpose of paying off the debts and costs of administration, including succession and inheritance taxes. . . . I told him that I was willing to do so. . . . Mr. Green said he would take it up with his directors and let me know. . . . He did not let me know anything, . . . or what he had decided to do."

On 16 March, 1943, just a week after the sale of the first 86 shares of the stock, counsel for the defendant Green in a letter to counsel for Earl Messer, used this language: ". . . it looks now as though we will probably have to submit the question to the court for an interpretation of the section of the will dealing with the sale of stock. Under the circumstances, of course, it would not be possible to do anything with regard to any of the stock until the controversy is determined."

There was other evidence, taken in the light most favorable to the plaintiffs, tending to show that the value of the stock, at the time of its transfer in March and September, 1943, was far in excess of the amounts for which it was sold.

The defendants denied liability, and pleaded laches and the three-year statute of limitations.

From judgment of nonsuit at the close of plaintiffs' evidence, they appeal, assigning errors.

Smathers & Meekins and W. R. Francis for plaintiffs, appellants.

George H. Wright, Harkins, Van Winkle & Walton and Williams & Williams for defendants, appellees.

STACY, C. J. The question for decision is whether the evidence suffices to carry the case to the jury in the face of the demurrers. The trial court answered in the negative. We are inclined to a different view.

The executor was well advised "to submit the question to the court for an interpretation of the section of the will dealing with the sale of stock." He was ill-advised when, apparently without the knowledge of his own counsel, he sold the 86 shares on 9 March, 1943, at the price of $225 per share. Not only was he enjoined specifically by the testator to retain the stock if feasible, but he was also under a fiduciary duty to the plaintiffs to prevent its sale, if reasonably within his power. *Van Alstyne v. Brown,* 77 N.J.Eq. 455, 78 Atl. 678; Scott on Trusts, Vol. 2, Sec. 176. The value determined for inheritance-tax purposes was the price fixed for offering the stock to the stockholders of the Imperial Life Insurance Company, who were then directors, in the absence of a better obtainable bid. This is made manifest by the last paragraph of Item 6 of the will. Note that in this last paragraph the testator spells out his intent, which after all is his will. *Bank v. Corl,* 225 N.C. 96, 33 S.E. 2d 613; *Cannon v. Cannon,* 225 N.C. 611, 36 S.E. 2d 17. The stock was without general market price because closely held and none offered for sale.

Initially, however, there was to be no sale of the stock except in case of necessity, or plain wisdom, and under the plaintiffs' evidence the occasion of necessity was nonexistent at the time of the purported sales. At least the permissible inferences deducible therefrom suffice to overcome the demurrers. *Leno v. Ins. Co.,* 228 N.C. 501, 46 S.E. 2d 471. Hence, we do not reach the terms of the will under which the executor was authorized to sell to stockholder-directors of the Insurance Company.

We refrain from discussing the evidence as the defendants are yet to be heard. It is suggested on behalf of Starnes and Warlick that they are innocent purchasers for value without notice. Suffice it to say there is evidence to support a contrary finding.

The action is to establish a constructive or resulting trust, to recover the property, and for an accounting. *Bank v. Crowder,* 194 N.C. 312, 139 S.E. 601; *Costner v. Cotton Mills Co.,* 155 N.C. 128, 71 S.E. 85; *Lemly v. Atwood,* 65 N.C. 46. It readily survives the plea of laches and the applicable ten-year statute of limitations. G.S. 1-56; *Creech v. Creech,* 222 N.C. 656, 24 S.E. 2d 642; *Teachey v. Gurley,* 214 N.C. 288,

199 S.E. 83. In protesting the nonsuit, counsel for plaintiffs say, "We are entitled to pursue the hunt so long as we can track the fox; and not until we lose the trail are we obliged to abandon the chase, call our dogs and go home."

There was error in sustaining the demurrers to the plaintiffs' evidence. Reversed.

LEE BAKER v. HUGH BAKER.

(Filed 9 March, 1949.)

Pleadings § 22b—

Plaintiff sued to recover a truck purchased by him which he permitted his brother to drive under a rental agreement. Plaintiff's evidence was to the effect that the truck plus certain rent money and money belonging to plaintiff were used in the swap of the truck for another vehicle. *Held:* The trial court had discretionary power to allow plaintiff to amend to assert his right to recover the new vehicle by virtue of a resulting or a constructive trust, since the amendment does not change the nature of the case or add any cause of action, G.S. 1-163. Whether plaintiff would not be entitled to recover possession even in the absence of amendment, *quære?*

DEFENDANT'S appeal from *Moore, J.*, August Term, 1948, YANCEY Superior Court.

The plaintiff sued the defendant for the recovery of a Chevrolet truck described in the complaint as a 1941 model, motor number AD1077937, serial number 9AK07-10368, one-half-ton capacity, and sued out claim and delivery. The defendant denied the allegation asserting plaintiff's right to recover, and claimed ownership in himself.

Plaintiff testified that he purchased a Chevrolet truck in Charlotte in 1940 and paid for it with his own money. That he had examined the papers and it was the truck therein described. Certificate of title to a Chevrolet truck of 1938 model, motor number K-1890184 was introduced by plaintiff, issued by the Motor Vehicles Bureau, October 7, 1939; and renewal thereof August 10, 1948.

Further evidence for the plaintiff is to the effect that he and the defendant are brothers. That he carried the truck home and let his brother Hugh drive it; that Hugh was to pay rent for it. Plaintiff was drafted into service soon thereafter, staying in C. C. Camp six months, then serving three years and 10 months in the army, coming back home in July, 1945. That Hugh admitted taking the car to Johnson City and swapping it for the car named in the complaint. That Hugh refused to surrender the car. That it was worth $250.00 in rent and that he had

never been paid anything. He admitted the title to the truck received in the swap was not in his name.

B. S. Baker testified that he was the father of the plaintiff and the defendant. He corroborated the plaintiff as to the purchase of the truck and the arrangement made with Hugh, testifying that during Lee's absence Hugh several times came to the house and paid sums of money for its use. He then came to the house and said Lee wanted him to go to Johnson City and swap it for a new truck, and asked for what money Lee had, and got from $75 to $100 of Lee's money. When other payments on the new truck had to be made Hugh came to the house from time to time and got money. The money was Lee's. Hugh said he was going to have the title made back to Lee—didn't know why he had them made in his own name.

Defendant, testifying, said that he and his brother were joint purchasers and joint owners of the truck. That Lee had turned over the old truck to him, saying that if he could pay for it, go ahead. He got an allowance of $227 and some cents for the truck. He said the money he brought to the house was not payment for rent, but his own money. The installments were likewise paid with his own money.

Mrs. Hugh Baker testified in corroboration of the defendant, and stated that Hugh often carried papers and money to the house for his mother to keep.

Plaintiff offered evidence in rebuttal.

After the evidence was in, the court, over defendant's objection, permitted plaintiff to amend his pleading, assert title to the car described in the complaint, being the one got by defendant in trade in Johnson City, by virtue of resulting or constructive trust, entitling plaintiff to pursue the money or his property so wrongfully invested, if it should be so established; and to conform the pleadings to the evidence. The defendant excepted.

On issues submitted to the jury the verdict was favorable to plaintiff. The defendant, having made formal motion to set aside the verdict, which was declined, objected and excepted to the ensuing verdict, and appealed.

R. W. Wilson for plaintiff, appellee.

Charles Hutchins for defendant, appellant.

SEAWELL, J. The crux of this case lies in the permission given the plaintiff to amend his pleading to make it conform to the evidence. It may be noted that the defendant did not make any request for a mistrial or time to meet any new phase of the evidence with any testimony. The case reaches us on appeal without change of theory.

The amendment did not change the nature of the case or add a new cause of action. Since the evidence of plaintiff tended to show he was the equitable owner of a chattel in the hands of a trustee *ex maleficio,* and the action is possessory, it is a question whether the amendment was necessary at all to support recovery. Be that as it may, the court was well within its discretionary power under pertinent statute law, and the decisions of this Court in permitting the amendments, and committed no error in so doing. *Dorsey v. Corbett,* 190 N.C. 783, 130 S.E. 842; G.S. 1-163. In *Moore v. Edmiston,* 70 N.C. 510, 619, this section was interpreted as follows:

> "By a sweeping curative supplement to this most curative system of pleading, this section confers upon the court the power, both before and after judgment, to make almost any conceivable amendment so as to conform the pleadings to the facts proved."

Other objections to the trial do not disturb our conclusion that there is No error.

STATE v. ROY COCKRELL.

(Filed 9 March, 1949.)

1. Homicide § 25—

Evidence that defendant, armed with a gun, led his wife into a field where father and son were working, to force her to confess in their presence that she had had intimate relations with the father, that her alleged paramour fled, leaving the son at the scene, and that shortly thereafter defendant deliberately shot and killed his wife, together with testimony of statements thereafter made by him that he did what he intended to do, *is held* sufficient to sustain the jury's verdict of murder in the first degree, notwithstanding his evidence that he had been assaulted by the son with a pitchfork and that his assailant pulled his wife between them as he raised his gun to defend himself.

2. Criminal Law § 81c (3)—

Defendant, charged with uxoricide, contended that difficulty arose because of intimate relations between his wife and his landlord. *Held:* The action of the court in sustaining objection to question asked on cross-examination of the landlord whether he had not been accused of breaking up three homes theretofore, if error, cannot be held of sufficient prejudicial effect to warrant a new trial.

3. Criminal Law § 81b—

Appellant has the burden of showing that alleged error was prejudicial in order to be entitled to a new trial.

4. Criminal Law § 77d—

The Supreme Court can judicially know only what appears of record.

5. Constitutional Law § 34d: Criminal Law § 46—

While in a capital case, accused is entitled to have counsel present at every stage of the proceeding, it is the duty of counsel to observe what transpires during the regular sittings of the court and to arrange for his notification should the occasion arise.

6. Criminal Law § 81b—

The presumption of regularity prevails in the absence of a showing to the contrary, and where matter complained of does not appear of record, appellant has failed to make irregularity manifest.

7. Criminal Law § 53m—

Upon request from the jury, the court gave additional instructions, presumably at regular session of court. *Held:* Counsel is charged with notice of matters transpiring during regular session of court, and therefore even if counsel for defendant were absent when the additional instructions were given, such absence would not perforce result in a new trial.

8. Same—

Objection to the giving of additional instructions in the absence of counsel should be raised in the trial court and a finding and ruling made thereon as the basis for an exceptive assignment of error.

APPEAL by defendant from *Bone, J.*, November-December, 1948, of NASH.

Criminal prosecution on indictment charging the defendant with the murder of his wife, Eva Batts Cockrell.

The record discloses that on the afternoon of 2 November, 1948, Berry Joyner and his son Arthur were getting up hay and loading it on a truck in a field about 200 yards from the house in which the defendant lived with his wife and children. Arthur Joyner was throwing the hay up on the truck with a pitchfork and his father was on the truck packing it down. The defendant was a share-crop tenant on the farm of Berry Joyner and had been arrested three times during the year, once in May at the instance of the landlord, and twice in September on warrants sworn out by his wife. The defendant suspected his landlord with inciting his wife to swear out the warrants and the two with conniving to keep him in jail. He says that his wife confessed to him on 2 November, 1948, that Berry Joyner had over-persuaded her to yield to his embraces and that he asked her to go with him into the field and make the same confession in the presence of her alleged paramour. As they approached the Joyners, the defendant had a shotgun in his right hand and was holding his wife's left arm or left hand. Some words passed between

the defendant and Berry Joyner, whereupon Arthur Joyner joined in the conversation and told his father to run or get out of the way, which he did. The only persons then on the scene were Arthur Joyner, who had a pitchfork, the defendant, who had a gun, and the defendant's wife, who was unarmed. The defendant lifted his gun to his shoulder and fired. His wife was shot in the head and she was killed instantly.

Later that afternoon the defendant told Everette Morgan just before the officers arrived, that he had "played hell." He said, "I went down there to kill them all, but I killed my wife instead; I especially wanted to kill Berry Joyner, but the G . . . d . . . s.o.b. is too sorry to die."

The defendant told Deputy Sheriff Ollie Laughter, when taken into custody, that he had "done exactly what he wanted to do." Continuing he said: "I caught them again this morning. . . . I have killed her and I want the court to do what they think is right, give me 35 years. . . . You ought to get Berry Joyner for speeding. . . . He is the damdest runningest old man I've seen."

G. W. Bone testified that on the following morning, while in the hospital, "the defendant said he killed the one he wanted to kill, his wife; I asked him why didn't he kill Mr. Joyner, and he said he was too sorry to die."

The defendant testified that when he and his wife approached the truck Berry Joyner "commenced to look at us just like a turkey, and, well, if he had had wings I believe he would have flew, and when we got up there I says, 'All right, Mr. Joyner, you go and take out a warrant for my wife, she has told on you this time,' and he says, 'Get him, Arthur, get him.'"

The defendant further testified that Arthur Joyner started at him with a pitchfork, and as he raised his gun to defend himself, his assailant pulled the defendant's wife between them and she was shot in the head as he was attempting to ward off the pitchfork thrust; that he never intended to kill his wife; that he could have done that at the house without going out to the truck. He denied the testimony of the several witnesses as to what he had said to them about the shooting, contending that if he did make such statements he was not in condition to appreciate or know what he was saying. The defendant was under the influence of an intoxicant at the time of the shooting.

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

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

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

Leon T. Vaughan for defendant.

STACY, C. J. The State's evidence was quite sufficient to make out a case of murder in the first degree. The defendant's evidence, on the other hand, supported his version of the matter. The jury has returned a capital verdict and rejected the defendant's plea of self-defense in a trial free from reversible error. We can do none other than uphold the judgment.

Berry Joyner was called as a witness for the prosecution. He was asked on cross-examination "if he had not been accused of breaking up three homes before this time?" Objection sustained; exception. While the ruling on this objection might well have been otherwise, it does not appear that it had any appreciable effect on the verdict or that baneful consequences resulted therefrom. To work a new trial the appellant must show that he was prejudiced by the court's action. Error alone, or inconsequential error, will not suffice. *S. v. Creech,* 229 N.C. 662; *S. v. Gibson,* 229 N.C. 497.

Sometime after the jury had retired to consider the case, they returned to ask the Judge to state again the precise meaning of premeditation. This was done with exactitude and aptly applied to the facts of the case. The defendant now complains that this further charge was given in the absence of his attorney. The record fails to show that the requested instruction was given in the absence of counsel for the defendant. We can know judicially only what appears on the record. *Ericson v. Ericson,* 226 N.C. 474, 38 S.E. 2d 517. Hence, no irregularity in this respect has been made manifest.

True it is, that in a capital case the accused is entitled to have his counsel present at every stage of the proceeding, and this right is usually observed. Conversely, however, it is the duty of counsel, pending the consideration of the case, to observe what transpires during the regular sittings of the court, and to arrange for his notification should occasion arise. The presumption of regularity prevails in the absence of a contrary showing. *S. v. Harris,* 204 N.C. 422, 168 S.E. 498. Presumably, the instruction was given at a regular session of the court. *S. v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196. Thus, the absence of counsel when the instruction was given, even if established, would not perforce result in a new trial. *S. v. Denton,* 154 N.C. 641, 70 S.E. 839. See *Burns v. Laundry,* 204 N.C. 145, 167 S.E. 573, and cases there cited. As basis for an exceptive assignment of error, the point should have been raised in the trial court and a finding and ruling made thereon.

On the record as presented, the verdict and judgment will be upheld.

No error.

BROOKS HENSLEY, BY HIS NEXT FRIEND, W. B. HENSLEY, v. E. L. BRIGGS.

(Filed 9 March, 1949.)

1. Automobiles §§ 15, 20a—

Negligence on the part of the rider ordinarily will not be imputed to a guest passenger on the bicycle who has no control over its movement.

2. Automobiles § 22—

In this action to recover for injuries to a boy riding on a bicycle with the owner, plaintiff's evidence tended to show that the bicycle was being ridden on his left shoulder of the highway and that an automobile operated by defendant, traveling in the opposite direction, was suddenly driven off the hard surface on its right, and hit the bicycle. Plaintiff alleged that defendant saw or by the exercise of reasonable care could have seen the boys on the bicycle and could have avoided the collision by the exercise of reasonable care. *Held:* The granting of defendant's motion of nonsuit was error.

3. Negligence § 10—

A guest passenger not amenable to the charge of contributory negligence is not under necessity of invoking the principle of last clear chance.

APPEAL by plaintiff from *Moore, J.*, November Term, 1948, of YANCEY. Reversed.

Suit to recover damages for personal injury resulting from collision between automobile driven by defendant and a bicycle on which plaintiff was riding.

The evidence offered by plaintiff tended to show that the collision occurred on a street in the Town of Burnsville 14 October, 1947, about 8:30 a.m. The defendant was driving his automobile south and the bicycle on which plaintiff was riding at the invitation of Eugene Banks was going north. Banks was pedaling and guiding the bicycle which he owned, and plaintiff had no control over its operation or direction. Plaintiff and Banks were each 14 years of age and on the way to school. The paved surface of the road was 16 feet wide, with firm shoulders on each side 4 feet wide. In order to avoid an automobile driven by J. R. Pate, which passed going in the same direction, Banks had turned his bicycle to the left, and was on the west shoulder 3½ feet from the pavement and within half a foot of the ditch when the defendant coming from the opposite direction suddenly drove his automobile off the pavement and struck the bicycle, breaking plaintiff's leg. At the time defendant was looking back over his shoulder. There was no other car there at the time. Pate's automobile had already passed.

Highway Patrolman Miller described the scene as he saw it immediately after the collision as follows: "The Buick (defendant's automo-

bile) was located 126 feet south of the nearest bridge. The road curved slightly to the right where the automobile was. It was parked 20 or 25 feet in the curve. From the bridge going in the direction the automobile was traveling the highway is straight for approximately 75 feet and then it's a right-hand curve, not too sharp. Approaching the curve traveling south in an automobile visibility is clear and unobstructed 85 feet from the bridge. Beyond the curve and south of the curve the road is slightly upgrade and straight for 400 feet to the place where the highway crests . . . on the road back of the Buick automobile were skid-marks approximately 70 or 75 feet in length on the pavement . . . the right front wheel was about 5 feet off the pavement on the right side."

The court permitted this witness, on cross-examination, to testify, over plaintiff's objection, that defendant (who had not gone on the stand) told him another vehicle traveling north "crowded him and he left the road." However, plaintiff's evidence tended to show that the bicycle was 25 feet north of the crest when Pate's car passed it going north, and that Pate testified he met and passed defendant's automobile at the bridge.

At the conclusion of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed, and plaintiff appealed.

W. E. Anglin for plaintiff, appellant.
Smathers & Meekins for defendant, appellee.

DEVIN, J. Without undertaking to discuss in detail the evidence hereinbefore summarized, or to express opinion as to its weight, we think the plaintiff's evidence, considered in the light most favorable for him, was sufficient to carry the case to the jury, and that the judgment of nonsuit was improvidently entered.

According to plaintiff's view he was at the time of his injury a guest passenger on Banks' bicycle, without power to control its movement, and hence negligence on Banks' part, if any, would not be imputable to him, and he would not be barred of recovery for defendant's negligence unless the negligence of Banks were the sole and only proximate cause of the injury. *Mason v. Johnston,* 215 N.C. 95, 1 S.E. 2d, 379; *Gaffney v. Phelps,* 207 N.C. 553, 178 S.E. 231; *Newman v. Coach Co.,* 205 N.C. 26, 169 S.E. 808; *Gaines v. Campbell,* 166 S.E. (Va.) 704; *Johnson v. Shattuck,* 125 Conn. 60; 172 A.L.R. 736. Defendant suggests that plaintiff's case is bottomed on the principle of last clear chance, and that he has not pleaded it. *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833; *Redmon v. R. R.,* 195 N.C. 764, 143 S.E. 829; *Hudson v. R. R.,* 190 N.C. 116, 129 S.E. 146. But we note it is alleged in the complaint that defendant saw or by the exercise of reasonable care could have seen the boys on the bicycle and could have by the exercise of reasonable care avoided

the collision, and that defendant neglected and failed to take any precaution whatever to avoid the collision. Furthermore, according to plaintiff's evidence, if he was being transported as a guest passenger and not amenable to the charge of contributory negligence, he would not be under necessity of invoking the principle of last clear chance. However, these are matters which, if they arise on another hearing, will be more accurately presented and determined when all the evidence has been heard.

Judgment of nonsuit is

Reversed.

CANSADA BAILEY ET AL. v. STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 9 March, 1949.)

Eminent Domain §§ 21c, 21½a: Husband and Wife § 6: Reformation of Instruments § 13—

At the time respondent entered upon the land, registered title thereto was in the name of husband and wife. The husband executed a release for all damages by reason of the taking of a right of way by respondent. The release and right of way agreement was not registered. Thereafter the deed to the husband and wife was reformed by judgment striking out the name of the husband and declaring the wife the sole owner of the land. *Held:* The sole interest of the husband in the land originally and at the time of signing the release was that of tenant by the curtesy initiate, and the release signed by him does not bar the wife's action for compensation.

APPEAL by petitioners from *Moore, J.*, Special November-December Term, 1948, of YANCEY.

Special proceeding under G.S. 136-19 and G.S. 40-12 to recover compensation for right of way taken by respondent over lands of *feme* petitioner in the construction of Highway No. 197 in Yancey County.

On petition and answer duly filed, appraisers were appointed to estimate the damages sustained by the petitioner by reason of the construction of the highway in question, and they assessed the damages at $4,200, less special benefits of $1,000.

Prior to entering upon the land, the respondent had obtained from D. C. Bailey, husband of the petitioner, a release for "all claims for damage by reason of the right of way for the said project across the lands of the undersigned." This release was pleaded by the respondent in bar of petitioner's right to recover herein. D. C. Bailey was made a nominal petitioner because C.S. 454, which authorizes a married woman to sue in

her own name, seems not to have been brought forward in the General Statutes.

The appraisers filed their report on 20 April, 1948. Ten days thereafter, the respondent filed exceptions to the report and contended, first, that the cause was improvidently instituted before the Clerk who was without jurisdiction in the premises, and, second, that the damages awarded were grossly excessive and not justified by the facts.

After due notice for hearing and determination of exceptions to the report of the appraisers the Clerk overruled the exceptions and awarded judgment for the petitioner in the sum of $3,200.

From this judgment and award, the respondent appealed to the Superior Court of Yancey County, where judgment was entered dismissing the proceeding.

From this latter ruling, the petitioners appeal, assigning errors.

J. Frank Huskins and W. E. Anglin for petitioners, appellants.

R. Brookes Peters, Jr., and Fouts & Watson for respondent, appellee.

STACY, C. J. When the case was called for hearing in the Superior Court, a jury trial was waived, and the "matters and things involved in the proceeding" were, by consent, submitted to the court for hearing and determination.

It was made to appear that on 31 January, 1920, the property was conveyed to D. C. Bailey and wife, Cansada Bailey, by deed duly registered in Yancey County. This was the condition of the title on 14 May, 1941, when D. C. Bailey executed right-of-way agreement and release to the respondent which is pleaded in bar of petitioners' right to recover herein, and on 28 May, 1947, when the respondent entered upon the premises and appropriated a right-of-way across the land in question. The right-of-way agreement and release has not been registered.

Thereafter, on 14 November, 1947, the *feme* petitioner instituted an action against her husband to reform the deed of 31 January, 1920, and to have herself declared the sole owner of the land therein conveyed, it being alleged that the entire consideration came from her separate estate and that the name of her husband was inserted in the deed through mistake and inadvertence of the draftsman. There was a verdict for the petitioner, establishing the facts as alleged, and judgment was entered thereon at the January Term, 1948, Yancey Superior Court, reforming the deed in accordance with the prayer of the complaint.

Notwithstanding the judgment of reformation, it was ruled herein that at the time of the release signed by D. C. Bailey, the lands were held by him and the *feme* petitioner as husband and wife by the entirety, and that his release constituted a bar to the present proceeding. *Dorsey v.*

Kirkland, 177 N.C. 520, 99 S.E. 407. This holding overlooks the verdict and judgment in the reformation suit in which it was found that the name of D. C. Bailey was inserted in the deed by mistake and inadvertence. *Sills v. Ford,* 171 N.C. 733, 88 S.E. 636. Hence, his only interest in the land originally and at the time of signing the release was that of tenant by the curtesy initiate.

It follows that there was error in dismissing the proceeding.

Error and remanded.

EDWIN GILL, COMMISSIONER, v. BANK OF FRENCH BROAD.

(Filed 9 March, 1949.)

Taxation § 34½—

Where the Commissioner of Revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or setoff against the taxpayer, the bank, in the Commissioner's action to compel compliance, will be held liable also for the costs. G.S. 105-242, subsec. 2 (3).

APPEAL by defendant from *Clement, J.,* September Term, 1948, of MADISON.

Civil action to recover deposit under garnishment for taxes, together with interest thereon for failure to pay same over to the Commissioner of Revenue.

On 26 March, 1946, the plaintiff served notice of garnishment, and attached deposit in the Bank of French Broad belonging to L. L. McLean, for delinquent Schedule "B" taxes amounting to $18,127.50 for period from 6-1-42 to 4-12-45—Sec. 115: Horse and Mule Audit.

Within ten days thereafter, the Bank of French Broad filed with the Commissioner of Revenue a "Report, Answer and Defense," asserting no defense or setoff against the debt represented by the deposit, and undertook to defend on behalf of the depositor, as against the State's claim for taxes, by asserting the invalidity of the procedure adopted and unconstitutionality of the statute under which the horse and mule tax was levied.

This "Report, Answer and Defense," together with the plaintiff's objections thereto, was docketed in the Superior Court of Madison County and was later dismissed for want of jurisdiction, appeal dismissed at the Spring Term, 1947, reported in 227 N.C. 201, 41 S.E. 2d 514.

Thereafter, on 21 April, 1948, the Commissioner of Revenue instituted this action to compel compliance with the terms of the statute. The defendant bank filed a "Report, Answer and Defense" in which it again

reiterated and adopted its original position in respect of the matter, and further set out that in March, 1946, L. L. McLean had on deposit in said bank the sum of $2,718.18; that a check for $2,700 had been drawn against this deposit and was now held by Arthur Cureton. These further facts were supported by "Report, Answer, Defense and Set-off" filed herein by L. L. McLean and "Written Claim" filed by Arthur Cureton respectively.

From judgment on the pleadings in favor of the plaintiff, the defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Abbott and Tucker for plaintiff, appellee.

Don C. Young for defendant, appellant.

STACY, C. J. The garnishee bank, defendant herein, alleges no defense or setoff against the taxpayer. The amount of the deposit, subject to the taxpayer's demand, was less than the tax asserted. Hence, under the statute, the constitutionality of which was upheld in *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646, affirmed 332 U.S. 749, 92 L. Ed. 13, it was the defendant's duty to remit the deposit to the Commissioner of Revenue before whom all interested parties are permitted to assert their rights with full assurance of protection, including those of the garnishee. G.S. 105-242, subsection 2 (3).

It follows, therefore, that by meddling with strife belonging not to it (Prov. 26:17), the garnishee has rendered itself liable for the costs of the action.

The judgment will be upheld.

Affirmed.

MRS. HELEN CHESSER v. MRS. SUE C. McCALL.

(Filed 9 March, 1949.)

1. Automobiles §§ 8j, 18h (2), 18h (3)—

Plaintiff's evidence tended to show that she was driving on a trip with defendant in defendant's car, that upon the car skidding to a hardly perceptible degree, defendant became excited and grabbed the wheel, pulling the car to the right and causing it to crash into a tree. *Held:* Plaintiff's evidence does not disclose such an emergency as to relieve defendant's action altogether of the imputation of negligence, and the issues of negligence and contributory negligence should have been submitted to the jury, and nonsuit was error.

2. Trial § 22b—

On motion to nonsuit, defendant's evidence which tends to discredit plaintiff's case is not to be considered.

APPEAL by plaintiff from *Nettles, J.*, December Term, 1948, of BUNCOMBE. Reversed.

This was a suit for damages for a personal injury alleged to have been due to the negligent action of the defendant.

It appeared from plaintiff's testimony that on the occasion alleged plaintiff and defendant were proceeding in defendant's automobile from Winston-Salem to Asheville. It had been raining and a light rain was falling. Near Hickory the defendant, who had theretofore been driving, became tired and asked plaintiff to drive. While plaintiff was driving, at the rate of about 25 miles per hour, on the right side of the highway, according to her testimony, "there was a slight skid, hardly noticeable, and she (defendant) reached over and grabbed the wheel, pulling the car to the right, and we crashed into the tree. Both my hands were on the steering wheel. I can't say how far the car went before it hit the tree but a very little distance off the highway. . . . For some reason Mrs. McCall became excited and reached over and grabbed the wheel and took control of it away from me." Plaintiff sustained injury in consequence.

The defendant offered evidence tending to show both plaintiff and defendant were observed after the accident to be under the influence of intoxicating liquor, and that plaintiff had not at first claimed defendant caught hold of the steering wheel. The defendant herself did not testify. On the other hand, the plaintiff testified in rebuttal: "I had not had any alcoholic beverages to drink on the day in question. Mrs. McCall had drunk a couple of beers." She denied making any statement which differed from her testimony at the trial.

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

James S. Howell and Oscar Stanton for plaintiff, appellant.

Williams & Williams for defendant, appellee.

DEVIN, J. The appeal from the judgment of involuntary nonsuit presents the question whether the plaintiff's evidence considered in the light most favorable for her was sufficient to carry the case to the jury.

We think it was, and that the judgment of nonsuit was improvidently entered. This view is supported by the decision in *Jernigan v. Jernigan*, 207 N.C. 851, 175 S.E. 713, where on similar facts nonsuit was reversed. The credibility of the testimony was for the jury. *Barlow v. Bus Lines*, 229 N.C. 382, 49 S.E. 2d 793. The plaintiff's evidence does not disclose

such an emergency as would relieve the defendant's action altogether of the imputation of negligence. *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343; *Hoke v. Greyhound Corp.,* 227 N.C. 412, 42 S.E. 2d 593. Nor under her testimony may the plaintiff's action be dismissed on the ground of contributory negligence. *Lincoln v. R. R.,* 207 N.C. 787, 178 S.E. 601. *Bogen v. Bogen,* 220 N.C. 648, 18 S.E. 2d 162, is inapplicable here. While defendant's evidence tended to discredit plaintiff's case, on motion for nonsuit this evidence is not to be taken into consideration unless favorable to the plaintiff "except, when not in conflict with plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." *Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Gregory v. Ins. Co.,* 223 N.C. 124, 25 S.E. 2d 398.

The judgment of nonsuit is

Reversed.

CLYDE MARLER v. PEARLMAN'S RAILROAD SALVAGE COMPANY.

(Filed 9 March, 1949.)

Negligence § 3: Sales § 17—

Plaintiff's evidence tended to show that defendant gave plaintiff's mother a can of a nationally advertised brand of glue to mend a table that his mother had bought from him, that when plaintiff undertook to open the can, there was a violent explosion when the contents of the can came in contact with the air, and the lid of the container flew up and hit him in the eye causing serious injury. *Held:* Judgment of nonsuit was properly entered.

APPEAL by plaintiff from *Clement, J.,* at September Term, 1948, of MADISON.

This is an action to recover for personal injuries alleged to have been sustained by the plaintiff. The plaintiff alleges (1) negligence, and (2) breach of an implied warranty.

The plaintiff's mother had gone to the defendant's place of business the day before the alleged accident, and complained about the corner of a table having come apart, the table having been bought from the defendant some two years before. Mr. Pearlman, owner of the defendant Salvage Company, offered to repair the table if she would have it sent to his place of business. She informed him she had no way of bringing the table to his place of business. He then told her he would give her a can of glue and she could fix it. She expressed some doubt as to her ability to fix the table and he asked her if she had a son and she said she did. She accepted the can of glue which was a nationally advertised

product. The plaintiff testified that on the following day when he undertook to open the can of glue to fix the dining room table, when the contents of the can came into contact with the air, there was a violent explosion and the lid to the container flew up and hit him in the eye, causing serious and permanent injury to his left eye.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was granted and the plaintiff appealed to the Supreme Court.

J. M. Bailey, Jr., for plaintiff.

Williams & Williams for defendant.

PER CURIAM. A careful consideration of the plaintiff's evidence, when considered in the light most favorable to him, leads us to the conclusion that it is not sufficient to carry this case to the jury. Hence, the judgment of the court below will be upheld.

Affirmed.

DEWARD C. THOMAS v. THURSTON MOTOR LINES, INC., LYNWOOD C. DORMAN, AND JOSEPH WINSTEAD WATSON;

and

THURSTON MOTOR LINES, INC., v. JOSEPH WINSTEAD WATSON.

(Filed 23 March, 1949.)

1. Negligence § 19b (1)—

Nonsuit on the issue of negligence is proper only when the evidence is free from material conflict and the only inference which reasonably can be drawn therefrom is either that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury.

2. Automobiles §§ 9a, 18h (3)—

The operation of a tractor-trailer on the highways at night without the rear and clearance lights burning as required by statute is negligence *per se*, G.S. 20-129, and evidence that the car in which plaintiff was riding as a guest, struck defendant's trailer which was standing across the highway in the car's lane of traffic, and that the trailer did not have burning the lights required by the statute, is sufficient to overrule defendant's motion to nonsuit and motion for a directed verdict in its favor on the issue of negligence, since the question of proximate cause under the evidence is for the jury.

3. Automobiles § 9b—

A tractor-trailer standing on the paved portion of a highway at nighttime is required to have the rear and clearance lights burning, G.S. 20-129,

regardless of whether or not the vehicle is disabled within the meaning of G.S. 20-161 (c).

4. Automobiles §§ 13, 18h (2)—

Evidence that the driver of a tractor-trailer traveling north on a dark and stormy night had stopped at a filling station on the west side of the highway, and at the time of starting his vehicle back across the highway to resume his journey, the driver saw the lights of a car approaching from the opposite direction, but nevertheless drove his vehicle into the path of the approaching car, *is held* sufficient evidence of negligence to overrule defendant's motion to nonsuit and motion for a directed verdict in his favor on the issue of negligence.

5. Automobiles §§ 8d, 18h (2)—

Evidence that the engine and other parts of the tractor-trailer, under the exclusive control of its driver, were in perfect mechanical condition, and that the engine unaccountably stopped as the vehicle was being driven onto the highway out of a filling station, while not requiring the conclusion that the stopping of the engine resulted from want of due care on the part of the driver in its operation, is sufficient to permit an inference by the jury to that effect, since an engine does not stall in such circumstance unless there is some defect in its mechanical condition or negligence in its operation.

6. Automobiles §§ 8d, 8j, 18h (2)—

Where there is evidence that a tractor-trailer was stalled at nighttime with the trailer standing diagonally across the highway and that the trailer did not have its rear and clearance lights burning, although they were in good mechanical condition, and that the driver, upon seeing the headlights of a car approaching from the opposite direction, consumed the whole time before the collision in attempting to restart the vehicle, *is held* sufficient to permit an inference by the jury that the driver was guilty of want of due care under the circumstances in failing to turn on the trailer's rear and clearance lights.

7. Automobiles § 20b—

Negligence on the part of the driver will not be imputed to a guest riding in the automobile when the guest has no interest in the car and no control over the driver.

8. Automobiles § 8d—

Decisions to the effect that a driver is guilty of contributory negligence if he drives upon the highway in the dark at such speed that the vehicle cannot be stopped within the distance that he can see an object ahead of him on the highway do not purport to state a rule of thumb, but merely apply the principle that a driver in such instance will be held to the conduct of a reasonably prudent person under the circumstances as they appear to him, and each case must be determined upon its particular facts.

9. Trial § 22a—

On motion to nonsuit, the evidence favorable to plaintiff will be taken as true and all conflict resolved in his favor.

10. Automobiles §§ 8d, 18h (3)—Evidence held insufficient to establish contributory negligence as matter of law on the part of driver hitting unlighted vehicle on highway.

Evidence tending to show that a tractor was standing on its right of the highway with its headlights shining down its lane of travel but that its attached trailer was standing cross-ways the highway without rear and clearance lights burning, that the driver of a car approaching from the opposite direction had his headlights tilted down in order to better his vision and to avoid blinding motorists traveling in the opposite direction, that he did not see the unlighted trailer in time to avoid the collision because the night was dark, with rain and sleet falling, and because the trailer was spattered with mud, covered with sleet and blended with the surrounding darkness, and because of the three or four feet of space between the surface of the road and the bottom of the trailer, *is held* sufficient to warrant the jury in finding that the driver of the car acted as a reasonably prudent person would have acted under the circumstances, and therefore justified denial of motion to nonsuit on the ground of contributory negligence upon his counterclaim against the driver and owner of the tractor, and the refusal of the court to instruct the jury that he would be liable for contribution in the action by a guest in his car against both drivers and the owner of the truck.

BARNHILL, J., dissents in part.

APPEAL by Thurston Motor Lines and Lynwood C. Dorman from *Bone, J.*, and a jury, at October Term, 1948, of NASH.

For ease of narration, the plaintiff, Deward C. Thomas, and the defendants, Joseph Winstead Watson and Lynwood C. Dorman, are herein called by their respective surnames.

These two actions arose out of a collision between the southbound Plymouth coupe of Watson and the northbound tractor-trailer combination of the Thurston Motor Lines, a domestic corporation. Watson drove the Plymouth, and Thomas, his gratuitous guest, rode beside him on the right side of the seat. Dorman, a chauffeur regularly employed by Thurston Motor Lines, was operating the tractor and trailer on a mission for his employer. The Plymouth and the trailer sustained substantial damage, and Thomas and Watson suffered serious personal injuries.

In the first case, Thomas, as plaintiff, sued Thurston Motor Lines and Dorman, as defendants, for personal injuries. Thurston Motor Lines and Dorman denied liability to Thomas, alleging that his injuries resulted solely from the negligent conduct of Watson. Moreover, they procured an order of court making Watson a party defendant, and prayed for contribution from him as joint tort-feasor in the event of any recovery by Thomas against them. Watson denied liability for contribution, and counterclaimed against Thurston Motor Lines and Dorman for injury to his person and damage to his automobile, and they pleaded contributory negligence on his part as a bar to his counterclaim. In the second

action, Thurston Motor Lines, as plaintiff, sued Watson, as defendant, for damage to its trailer, and Watson renewed his counterclaim against Thurston Motor Lines, which reiterated its plea of contributory negligence against him.

By the implied consent of the parties, the court consolidated the actions for trial and judgment. All of the parties presented testimony, which was received without objection.

There was practically no disagreement in the evidence of the several parties relating to the matters set out in the next three paragraphs.

The collision occurred about 3:45 o'clock in the morning of 8 March, 1947, upon United States Highway No. 301 within the municipal limits of Rocky Mount, North Carolina. The road ran north and south, and was relatively level and straight. It was paved to a width of 22 feet, and a center line divided it into northbound and southbound traffic lanes. The night was cold, dark, and stormy. A heavy mixture of rain and sleet was descending, limiting the vision of motorists and rendering the surface of the roadway somewhat icy.

The over-all length of the tractor-trailer combination was approximately 45 feet. The tractor, which contained the motor and the driver's cab, had single wheels in front and dual wheels in the rear. The trailer had dual wheels in the rear but no wheels at the front, and was connected with the tractor by a coupling device in the center of the rear of the tractor upon which the front of the trailer rested. The coupler was so fashioned that the tractor could be turned "at right angles or more" to the trailer. The trailer resembled a "boxcar," being 8 feet wide, about 12 feet high, and 32 feet long. Its bottom was "3 or 4 feet" above the ground. The trailer itself weighed 7,500 pounds, and was being used to transport 15,000 pounds of cotton goods. The tractor-trailer combination was equipped with the head, rear, and clearance lamps required by G.S. 20-129. Furthermore, the left side of the trailer bore two reflectors. The trailer was dark in color, covered with sleet, and much spattered with mud.

The collision occurred a few feet north of the Tar Heel Service Station, which was located on the west side of the highway and which was open for business at the time. Witnesses estimated the distance between the station and the Tar River bridge to the south at anywhere from 165 to 230 yards. The tractor-trailer combination was actually stationary upon the highway at the precise instant of the collision, the tractor being headed north in the northbound traffic lane and the trailer being "jackknifed" westward at such an angle as to block the entire southbound traffic lane and extend onto the dirt shoulder to the west. The only witness at the trial professing any personal knowledge as to when, how or why the tractor-trailer combination came to a standstill on the paved

portion of the roadway was the defendant Dorman. The Plymouth coupe struck the left side of the stationary trailer while it was moving south along the southbound traffic lane at a speed of approximately 20 miles per hour.

There was sharp conflict in the evidence of the parties with respect to what lights Dorman was displaying at the time named in the pleadings. Witnesses for Thomas and Watson testified, in substance, that the only lights burning on the tractor-trailer combination were the headlights of the tractor, and that they pointed to the north along the northbound traffic lane. Dorman testified, however, that the head, rear, and clearance lights on the tractor-trailer combination were fully displayed.

Thomas and Watson presented evidence tending to show that right after the accident Dorman told police officers that the truck and trailer had been parked at the Tar Heel Service Station and that the collision happened in this manner: "Truck and trailer left service station on west side of the road, pulled into highway headed north, and choked down, completely blocking highway with exception of three feet. Car traveling south ran into left rear of trailer, damaging both vehicles and injuring both occupants of car."

Watson and Thomas were overtaken by the rain and sleet while en route from Roanoke Rapids to their homes in Rocky Mount. Watson testified, in substance, that he drove his Plymouth coupe in a southerly direction along the southbound traffic lane with the utmost caution on account of the state of the highway and weather; that his car proceeded at a speed of about 20 miles per hour, and he could have stopped it at any time within a space not exceeding 35 or 40 feet by applying his brakes, which were in excellent condition; that he observed the headlights of the Thurston Tractor before he crossed the Tar River bridge, and noted that they were projected northward along the northbound traffic lane; that such projection of the headlights combined with the darkness, rain, and sleet to prevent him from ascertaining whether the tractor was moving or standing still; that as he approached the tractor its headlights "stayed the same without blinking or change," and he assumed under the circumstances that it was a motor vehicle proceeding in the opposite direction which he was meeting and about to pass; that he drove his Plymouth coupe with the headlight beams tilted downward so as to see better in the darkness, rain, and sleet, and so as not to project a glaring light to motorists in his front; that his headlights so arranged enabled him to see to the front clearly for 150 feet despite the inclement weather, except when meeting a motor vehicle proceeding in the opposite direction; that as he approached the tractor he could see up to its headlights perfectly, but could not see anything beyond such headlights except blackness, which he "took to be night"; that "there were no lights of any

kind" or anything else in the southbound traffic lane to indicate the presence of the unlighted trailer in his pathway when he approached and passed the tractor and crashed against the left side of the trailer; and that he did not recall passing the headlights of the tractor because when he hit the trailer he "had a slight concussion and it knocked everything completely blank." Thomas gave evidence in accord with that of Watson and stated expressly that he "did not know there was going to be an accident until just about 10 feet before" it happened. Moreover, J. B. Williford, a police officer called to the stand by Watson, testified that "there was no way for a southbound car to have run around" the tractor and trailer on either side.

Thurston Motor Lines and Dorman presented evidence tending to show that both the motor in the tractor and the lighting system of the tractor-trailer combination were in perfect mechanical condition at the time in controversy. Dorman was the only eye-witness testifying in behalf of himself and his employer. He denied that the tractor and trailer had been parked at the Tar Heel Service Station prior to the collision. He testified further that he drove the tractor and trailer combination to his left half of the highway with a view to going onto the service station premises; that he stopped temporarily on such half of the highway and ascertained that he could not "get between the pumps and other vehicles that were sitting there"; that he thereupon put the tractor-trailer combination into motion and undertook "to get back across the road" to the northbound traffic lane to resume his northward journey; that his motor unaccountably stopped causing the tractor-trailer combination to stall on the highway after the tractor had crossed the center line and headed north, but before the trailer had cleared the southbound traffic lane; that at about the same time he became able to see the lights of the approaching Plymouth several hundred yards to the north; that the headlights of the tractor were pointing northward with the beams tilted downward, and he did not attempt to warn the operator of the Plymouth of his situation by blinking his headlights or otherwise because he deemed it wiser to try to start the tractor and pull the trailer onto the northbound traffic lane; and that in consequence he devoted all of his remaining efforts to an unsuccessful endeavor to start his motor until the Plymouth crashed into the left side of the stalled trailer. This statement was elicited from Dorman on his cross-examination: "I started back across the highway and saw the reflection of the lights. I first saw his actual headlights at the River Bridge. So at the time that I was pulling out of the service station to continue my journey north I knew that a car was coming from the north." Dorman confessed to an inability to assign any reason whatever for the stopping of the motor of the tractor. He conceded, however,

that the icy state of the highway did not cause the motor to stop or the tractor-trailer combination to stall.

The court submitted to the jury nine issues arising on the pleadings. These issues and the answers of the jury thereto were as follows:

1. Was plaintiff Thomas injured by the negligence of the defendants Thurston Motor Lines and L. C. Dorman, as alleged in his complaint? Answer: Yes.

2. What damage, if any, is the plaintiff Thomas entitled to recover of said Thurston Motor Lines and L. C. Dorman? Answer: $20,000.00.

3. Were the injuries of the plaintiff Thomas caused by the joint and concurrent negligence of the defendants Watson, Thurston Motor Lines and Dorman, as alleged? Answer: No.

4. Was Joseph W. Watson injured and damaged by the negligence of the defendants Thurston Motor Lines and Dorman, as alleged? Answer: Yes.

5. If so, did said Watson by his own negligence contribute to his injuries and damages, as alleged? Answer: No.

6. What damages, if any, is said Watson entitled to recover of Thurston Motor Lines and L. C. Dorman? Answer: $1,550.00.

7. Was the truck of Thurston Motor Lines damaged by the negligence of Joseph W. Watson, as alleged? Answer: No.

8. If so, did Thurston Motor Lines through its negligence contribute to such damage? Answer: .....

9. What damages, if any, is Thurston Motor Lines entitled to recover of Joseph W. Watson? Answer: .....

The court entered judgment for Thomas and Watson in conformity to the verdict, and Thurston Motor Lines and Dorman, appealed, assigning errors.

Thorp & Thorp for Deward C. Thomas, appellee.

Spruill & Spruill for Joseph Winstead Watson, appellee.

Battle, Winslow & Merrell, Lucas & Rand, and Z. Hardy Rose for Thurston Motor Lines and Lynwood C. Dorman, appellants.

ERVIN, J. The appellants earnestly insist that the trial court erred in denying their motions to dismiss the action of Thomas and the counterclaim of Watson upon compulsory nonsuits under G.S. 1-183. They assert the action of Thomas should have been nonsuited for want of evidence of actionable negligence on the part of Dorman in the management of the tractor-trailer combination. They say their motions to dismiss the counterclaim of Watson ought to have been allowed either on the ground that there was no sufficient evidence of actionable negligence on the part of Dorman, or on the ground that Watson was contributorily

negligent as a matter of law. Furthermore, appellants have reserved exceptions to the refusal of the court to grant their prayers for instructions to the effect that there was no evidence of negligence on their part "in reference to the position of the truck on the highway at the time and place of the accident" and that Watson was guilty of contributory negligence as a matter of law.

We shall address ourselves initially to the inquiry of whether the court erred in refusing to nonsuit the action of Thomas. In passing upon this phase of the appeal, we must be guided by the accepted rule that the question of the liability of a defendant in an action for negligence can be taken from the jury and determined by the court as a matter of law by an involuntary nonsuit only in case the evidence is free from material conflict, and the only reasonable inference to be drawn therefrom is either that there was no negligence on the part of the defendant, or that the negligence of the defendant was not the proximate cause of the plaintiff's injury. *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246; *Montgomery v. Blades,* 222 N.C. 463, 23 S.E. 2d 844; *Mitchell v. Melts,* 220 N.C. 793, 18 S.E. 2d 406; *Luttrell v. Mineral Co.,* 220 N.C. 782, 18 S.E. 2d 412; *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Templeton v. Kelley,* 215 N.C. 577, 2 S.E. 2d 696; *Ferguson v. Asheville,* 213 N.C. 569, 197 S.E. 146; *Smith v. Sink,* 211 N.C. 725, 192 S.E. 108.

Both Thomas and Watson presented testimony on the trial tending to show that Dorman, who was admittedly acting within the scope of his authority as an agent of Thurston Motor Lines, operated the tractor-trailer combination upon the public highway on a dark, rainy, and sleety night without displaying thereon burning rear and clearance lights as required by G.S. 20-129, which was enacted by the General Assembly to minimize the hazards incident to the movement of motor vehicles upon the public roads during the nighttime. If Dorman did this, he was guilty of negligence *per se. Page v. McLamb,* 215 N.C. 789, 3 S.E. 2d 275; *Clarke v. Martin,* 215 N.C. 405, 2 S.E. 2d 10; *Cook v. Horne,* 198 N.C. 739, 153 S.E. 315. This would be so irrespective of whether the tractor-trailer combination was disabled on the paved portion of the highway within the meaning of subsection c of G.S. 20-161 at the time of the collision.

There was also testimony tending to show that the tractor and trailer were parked on the premises of the Tar Heel Service Station on the west of the highway just before the collision; that Dorman put the tractor into motion and attempted to pull the inert trailer and its cargo, weighing 22,500 pounds in the aggregate, across the pathway of the oncoming Plymouth with a view to reaching the northbound traffic lane and resuming his northward journey; and that Dorman did this notwithstanding

the fact that he saw the Plymouth "coming from the north" at the very moment he drove the tractor-trailer combination "out of the service station." This testimony was ample to warrant the conclusion that Dorman was negligent at the time and place in controversy in that he proceeded onto the highway and into the path of the approaching Plymouth coupe with the tractor and trailer when he knew, or by the exercise of reasonable care would have known that he could not cross in front of the Plymouth in safety. *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337; *Fowler v. Underwood*, 193 N.C. 402, 137 S.E. 155; 5 Am. Jur., Automobiles, section 306.

It has been noted that the only witness at the trial claiming any personal knowledge as to when, how or why the tractor-trailer combination came to a standstill on the paved portion of the highway was the defendant Dorman, who attributed the event solely to the unexplained stopping of the engine of the tractor. There was testimony on the trial indicating that the tractor-trailer combination was under the exclusive management of Dorman, the admitted agent of Thurston Motor Lines, when it stalled and obstructed the highway by reason of the unexplained stopping of the engine of the tractor; that such an engine does not stop in the ordinary course of things when according to its mechanical construction it ought to remain in operation except by reason of some defect in the machine or negligence in its operation; and that the engine and the other parts of this tractor-trailer combination were in perfect mechanical condition when the unexplained stopping of the engine took place. While they did not require any such conclusion, these circumstances were sufficient to permit an inference by the jury that the stopping of the engine and the resultant stalling of the tractor-trailer combination arose from a want of due care on the part of Dorman in the operation of the tractor. *Boone v. Matheny*, 224 N.C. 250, 29 S.E. 2d 687; *Etheridge v. Etheridge*, 222 N.C. 616, 24 S.E. 2d 477; *Howard v. Texas Co.*, 205 N.C. 20, 169 S.E. 832; *Springs v. Doll*, 197 N.C. 240, 148 S.E. 251; *Ramsey v. Power Co.*, 195 N.C. 788, 143 S.E. 861; *Ridge v. R. R.*, 167 N.C. 510, 83 S.E. 762, L.R.A. 1917E, 215; *Isley v. Bridge Co.*, 141 N.C. 220, 53 S.E. 841; *Liberatore v. Town of Framingham*, 315 Mass. 538, 53 N.E. 2d 561; *Glaser v. Schroeder*, 269 Mass. 337, 168 N.E. 809; *Doryk v. Perth Amboy Bottling Co.*, 104 N.J.L. 87, 139 A. 419; Blashfield's Cyclopedia of Automobile Law and Practice (Perm. Ed.), 6043; 45 C.J., Negligence, section 768; 38 Am. Jur., Negligence, section 295.

Furthermore, it cannot be said as a matter of law that Dorman acted as an ordinarily prudent person would have acted under the same or similar circumstances after the tractor and trailer came to a standstill on the paved portion of the highway. There was testimony indicating that the lighting system of the tractor-trailer combination was in perfect

mechanical condition, but that the rear and clearance lights were not burning. The jury might well have inferred that due care under the existing circumstances would have prompted Dorman to turn on the rear and clearance lights as a warning to approaching motorists of the impending peril, and that he failed to do so. *Pender v. Trucking Co.,* 206 N.C. 266, 173 S.E. 336.

Whether Dorman was negligent in any of these respects, and whether such negligence constituted the proximate cause or one of the proximate causes of personal injury to Thomas were fact questions. *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740; *Quinn v. R. R.,* 213 N.C. 48, 195 S.E. 85; *Yates v. Chair Co.,* 211 N.C. 200, 189 S.E. 500; *Thurston v. R. R.,* 199 N.C. 496, 154 S.E. 836. This is true even with respect to the testimony indicating a failure on the part of Dorman to display burning rear and clearance lights conforming to G.S. 20-129. The trailer was "jack-knifed" across the highway at "almost a 45 degree angle" with its left side in the pathway of the southbound Plymouth, and it cannot be asserted with dogmatism that there was no causal relation between the alleged unlighted rear and clearance lights and the collision. It follows that the court properly submitted to the jury the question of whether Thomas suffered personal injury as the proximate consequence of negligence on the part of Dorman. *Barrier v. Thomas and Howard Co.,* 205 N.C. 425, 171 S.E. 626. This conclusion would not be altered if Watson had been guilty of concurrent negligence constituting one of the proximate causes of the injury sustained by Thomas. Such negligence on the part of Watson would not be imputed to Thomas, an invited guest having no interest in the Plymouth and no control over its driver. *Sample v. Spencer,* 222 N.C. 580, 24 S.E. 2d 241; *Dillon v. Winston-Salem,* 221 N.C. 512, 20 S.E. 2d 845; *Harper v. R. R.,* 211 N.C. 398, 190 S.E. 750; *Gaffney v. Phelps,* 207 N.C. 553, 178 S.E. 231; *Keller v. R. R.,* 205 N.C. 269, 171 S.E. 73.

What has been said compels the adjudication that the court did not err in refusing to charge that there was no evidence of negligence on the part of Dorman and the Thurston Motor Lines "in reference to the position of the truck on the highway at the time and place of the accident," or in denying the motion to nonsuit the counterclaim of Watson upon the specific ground that there was no sufficient evidence of actionable negligence on the part of Dorman.

This brings us to a consideration of the question of whether the trial court ought to have nonsuited the counterclaim of Watson or directed a verdict thereon for appellants upon the ground that Watson, who occupied the status of a plaintiff in respect to his counterclaim, was contributorily negligent as a matter of law. Appellants invoke the long line of cases beginning with *Weston v. R. R.,* 194 N.C. 210, 139 S.E. 237, and

ending with *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623, declaring either expressly or impliedly that "it is negligence as a matter of law to drive an automobile along a public highway in the dark at such a speed that it cannot be stopped within the distance that objects can be seen ahead of it." The appellants assert on the basis of these decisions that the testimony as a whole compels the single conclusion that Watson proximately contributed to his own misfortune by outrunning his headlights.

Few tasks in trial law are more troublesome than that of applying the rule suggested by the foregoing quotation to the facts in particular cases. The difficulty is much enhanced by a tendency of the bench and bar to regard it as a rule of thumb rather than as an effort to express in convenient formula for ready application to a recurring factual situation the basic principle that a person must exercise ordinary care to avoid injury when he undertakes to drive a motor vehicle upon a public highway at night. The rule was phrased to enforce the concept of the law that an injured person ought not to be permitted to shift from himself to another a loss resulting in part at least from his own refusal or failure to see that which is obvious. But it was not designed to require infallibility of the nocturnal motorist, or to preclude him from recovery of compensation for an injury occasioned by collision with an unlighted obstruction whose presence on the highway is not disclosed by his own headlights or by any other available lights. When all is said, each case must be decided according to its own peculiar state of facts. This is true because the true and ultimate test is this: What would a reasonably prudent person have done under the circumstances as they presented themselves to the plaintiff? Blashfield's Cyclopedia of Automobile Law and Practice, sections 741, 751.

In ruling on a motion for nonsuit, the court takes it for granted that the evidence favorable to the plaintiff is true and resolves all conflict of testimony in his favor. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. When this is done in this litigation, it becomes plain that there was evidence on the trial sufficient to establish the matter stated in the next succeeding paragraph.

Watson unexpectedly encountered the rain and sleet en route home. He was not bound as a matter of law to stop and wait for the storm to subside or for daylight to come in order to escape the imputation of contributory negligence. Indeed, he might reasonably have inferred that even a temporary stopping of the Plymouth and the resultant partial blocking of the icy roadway would magnify rather than minimize existing perils. He elected to proceed homeward. In so doing, he acted with the utmost caution on account of the inclement state of the weather and road. He traveled exclusively upon his right-hand half of the highway

at a speed of only 20 miles per hour. As he approached the place of collision, Watson saw the headlights of the tractor shining along the northbound traffic lane in such a manner as to indicate that the tractor was moving northward on its own side of the road, and drew an inference from this fact and the other attending circumstances that he was meeting and about to pass another motor vehicle proceeding in the opposite direction along his left-hand half of the highway. Indeed, Watson's conclusion that the tractor was in motion may well have been in complete accord with actuality up to a split second before the collision for Dorman admitted that he saw the lights of the oncoming Plymouth as he "pulled out of the service station" to continue his journey to the north. As he had no notice of any kind to the contrary, Watson had a right to act on the assumption that Dorman would not operate a tractor-trailer combination on the highway at night without displaying thereon all the lights required by law. Since the descending rain and sleet impaired his vision, Watson drove with his headlights tilted downward in order to better his capacity to see and to avoid projecting a glaring light into the faces of the motorists he was meeting. As he neared the place of the accident, Watson could observe everything perfectly up to the headlights of the tractor, but he could not see anything beyond such headlights "except blackness which he took to be night." His inference that nothing except "night" lurked in his path beyond the headlights of the tractor was reasonable because the dark colored and unlighted trailer was spattered with mud, and covered with sleet, and blended with the surrounding darkness, rain, and sleet. These circumstances in combination with the falling rain and sleet and the 3 or 4 feet of space between the surface of the road and the bottom of the unlighted trailer prevented the headlights of the Plymouth from "picking-up" the trailer and disclosing its presence on the highway to Watson until the collision had become inevitable.

Manifestly, this testimony was sufficient to warrant a finding by the jury that Watson acted as a reasonably prudent person would have done under the circumstances as they presented themselves to him at the time and place of the accident. In consequence, the court properly denied the motions of the appellants to nonsuit his counterclaim on the theory that he was contributorily negligent as a matter of law. *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637; *Williams v. Express Lines,* 198 N.C. 193, 151 S.E. 197.

This conclusion compels the further ruling that the court rightly refused to give the jury the instruction requested by appellants to the effect that they would be entitled to contribution from Watson as a matter of law in case of any recovery against them by Thomas.

We have carefully considered the exceptions of appellants to the charge, and have concluded that none of them can be sustained.

The trial and judgment will be upheld for we find in law

No error.

BARNHILL, J., dissents only as to defendant Watson for the reason he is of the opinion said defendant was guilty of contributory negligence as a matter of law.

N. C. RHODES, ADMINISTRATOR OF THE ESTATE OF N. CECIL RHODES, JR., DECEASED, v. THE CITY OF ASHEVILLE, THE CITY OF HENDERSONVILLE, AND HENDERSON COUNTY.

(Filed 23 March, 1949.)

1. Municipal Corporations § 6—

All lawful enterprises of a municipal corporation must be engaged in for a public purpose, and the fact that a particular enterprise is for a public purpose does not determine whether such enterprise is a corporate or proprietary function, in the exercise of which the municipality is subject to tort liability, or a governmental function immune from such liability.

2. Same—

Activity of a municipality in the exercise of judicial, discretionary or legislative authority conferred by its charter for the better government of that portion of the people of the State who reside within its limits, is a governmental function, in the exercise of which no tort liability exists unless expressly provided by statute, while a commercial activity or one engaged in by the municipality in its ministerial or corporate character for the private advantage of the compact community, is a ministerial or proprietary function in the exercise of which it is subject to tort liability.

3. Municipal Corporations § 8—

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and G.S. 63-50, declaring such activity to be a public, governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability.

4. Counties §§ 2, 3, 24—

While ordinarily a county does not perform any function except in a governmental capacity, in the exercise of which it is not subject to tort liability, where a statute authorizes it to engage in a function which is proprietary or corporate in character, the county may be held liable in tort to the same extent as a municipality engaged in the same activity.

5. Same—

In operating and maintaining an airport a county engages in a proprietary or corporate function, in the exercise of which it is subject to tort liability. G.S. 63-57.

6. Pleadings § 17c—

Where a complaint alleges that plaintiff's intestate was shot and killed by a night watchman employed by a municipal airport, demurrer on the ground that the watchman was an airport guard and at the time was exercising police powers conferred by G.S. 63-53 (b), is bad as a "speaking demurrer" since the defect does not appear on the face of the complaint.

7. Municipal Corporations § 7: Counties § 24—

Where a night watchman at a municipal airport kills a person on the property at nighttime, the question of whether he was acting in his capacity as servant or agent of the airport or in his capacity as a police officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. G.S. 63-53 (b), G.S. 63-58.

APPEAL by defendant from *Pless, J.*, at Chambers in Marion, N. C., 27 December, 1948. From HENDERSON.

This is an action to recover damages from the defendants for the alleged wrongful death of the plaintiff's intestate at the Asheville-Hendersonville Airport, in Henderson County.

The complaint alleges that the Asheville-Hendersonville Airport is owned, operated, maintained, managed and controlled by the three defendants in their corporate character and capacity, and in the exercise of powers for their own advantage, and that it was so operated and managed at the time of the death of plaintiff's intestate.

It is further alleged that the Asheville-Hendersonville Airport Board, as the operating agency of the defendants, employed one J. R. Calton, who was required to be on duty at the airport at night, to watch the property and safeguard the facilities and to have general control over the property during the hours he was on duty and when the manager was not present; that plaintiff's intestate arrived at the airport about 2:30 a.m., 7 August, 1947, and almost immediately upon his arrival there, he was shot and killed by the said J. R. Calton, agent, servant and employee of the defendants, and that such killing was wrongful, negligent, unjustified, unnecessary and felonious.

This case was here on appeal at the Fall Term, 1948, from an order which disallowed the defendant's motion in part, to strike certain allegations of the complaint, and reported in 229 N.C. 355, 49 S.E. 2d 638. Thereafter defendants, in apt time, filed a demurrer to the complaint and challenged the sufficiency of the facts alleged to state a cause of action, for the reason that G.S. 63-50 declares that "the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment

and operation of airports and other navigation facilities and the exercise of any other powers herein granted to municipalities are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity . . ."

The defendants further demur on the ground that the defendant Henderson County cannot be held liable, for the reason that a distinction exists in law as between a county and a city, in that a county is not liable in tort for the wrongs of its officials and employees unless such liability is created by statute; and further that J. R. Calton at the time of the death of plaintiff's intestate, was an airport guard and police officer, and that the defendants, and each of them, in maintaining, regulating and operating the said Asheville-Hendersonville Airport, and in watching and safeguarding the same, through said guard and police officer, J. R. Calton, were exercising governmental functions and acting in a governmental capacity, and cannot be held liable to the plaintiff on the facts alleged.

The demurrer was overruled and the defendants appealed to the Supreme Court and assign error.

R. L. Whitmire for plaintiff, appellee.

Edwin S. Hartshorn, Arthur Shepherd, L. B. Prince, and Robt. W. Wells for defendants, appellants.

DENNY, J. We think the demurrer interposed by the defendants involves three questions which should be considered on this appeal. (1) In the operation of a municipal airport, pursuant to the authority contained in Chapter 63 of the General Statutes of North Carolina, Sections 63-1 to 63-58 inclusive, does a municipality act in a proprietary or governmental capacity? (2) If such an enterprise is a proprietary one, may a county participating therein pursuant to the authority contained in the above statutes, be held liable in tort? And (3) was J. R. Calton acting as the servant or agent of the defendants at the time he killed the plaintiff's intestate, or was he exercising police powers which G.S. 63-53 (b) provides may be exercised by airport guards?

A municipal corporation cannot legally engage in any enterprise in its governmental or proprietary capacity which does not come within the meaning or definition of a public purpose. *Nash v. Tarboro,* 227 N.C. 283, 42 S.E. 2d, 209.

And even though a municipal activity has been held to be for a public purpose, we may still have difficulty in determining whether such activity is a corporate or proprietry function, and is therefore subject to suits in tort, or a governmental function and immune from such suits.

These functions were defined by *Justice Barnhill,* in speaking for the Court, in *Millar v. Wilson,* 222 N.C. 340, 23 S.E. 2d 42, in the following language: "Any activity of the municipality which is discretionary, political, legislative and 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. 6 McQuillin, Mun. Corps. 2d, sec. 2792. 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," citing numerous authorities.

And in *Broome v. Charlotte,* 208 N.C. 729, 182 S.E. 325, *Justice Devin,* speaking for the Court, laid down the following distinctions between proprietary and governmental powers: "In its public or governmental character a municipal corporation acts as agent of the State for the better government of that portion of its people who reside within the municipality, while in its private character it exercises powers and privileges for its own corporate advantage. When a municipal corporation is acting in its ministerial or corporate character in the management of property for its own benefit, it may become liable for damages caused by the negligence of its agents subject to its control. But when the city is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its agents, unless some statute subjects the corporation to responsibility. *Moffitt v. Asheville,* 103 N.C. 237; *Parks-Belk Co. v. Concord,* 194 N.C. 134."

The defendants contend that the provisions of G.S. 63-50, which declares the construction, maintenance and operation of an airport by municipalities pursuant to the provisions of Chapter 63 of the General Statutes of North Carolina, "to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity," and the use of the property and equipment in connection with the construction, operation and maintenance of a municipal airport is "to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity" are controlling, and therefore, the acts of the officers, agents and employees of the municipalities operating such airport are immune from suits in tort.

The answer to the question raised is not that simple. Since this Court handed down the decision in 1903, in the case of *Fawcett v. Mt. Airy,* 134 N.C. 125, 45 S.E. 1029, the construction, maintenance and operation

of a water and light plant by a municipality, has been held to be a necessary governmental expense. Even so, it has been uniformly held that, except as to certain exempted services such as furnishing water to extinguish fires, *Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411; *Mabe v. Winston-Salem*, 190 N.C. 486, 130 S.E. 169; *Mack v. Charlotte*, 181 N.C. 383, 107 S.E. 244; G.S. 160-255, a municipality in operating a water or light plant or other business function does so in its corporate or proprietary capacity. *Fisher v. New Bern*, 140 N.C. 506, 53 S.E. 342; *Harrington v. Wadesboro*, 153 N.C. 437, 69 S.E. 261; *Terrell v. Washington*, 158 N.C. 281, 73 S.E. 888; *Woodie v. Wilkesboro*, 159 N.C. 353, 74 S.E. 924.

The construction and maintenance of streets by a municipality is a governmental and not a proprietary function, but since the decision in *Bunch v. Edenton*, 90 N.C. 431 (1884), it has been uniformly held in this jurisdiction that municipalities may be held liable in tort for failure to maintain their streets in a reasonably safe condition, and they are now required by statute to do so, G.S. 160-54. *Hamilton v. Rocky Mount*, 199 N.C. 504, 154 S.E. 844; *Speas v. Greensboro*, 204 N.C. 239, 167 S.E. 807; *Broome v. Charlotte, supra; Whitacre v. Charlotte*, 216 N.C. 687, 6 S.E. 2d 558; *Hunt v. High Point*, 226 N.C. 74, 36 S.E. 2d 694.

"Where a city maintains a wharf and charges wharfage for the use thereof, negligence relating thereto, resulting in injury, may create municipal liability. . . . The municipality is bound the same as a private individual to use ordinary care and diligence in keeping the wharf free and safe from obstructons, and is liable in an action at common law for damages done to a vessel, or person on the wharf, by reason of neglect of such duty." McQuillin, Municipal Corporations (2d Ed.), Section 2849, p. 1183, *et seq.* *Henderson v. Wilmington*, 191 N.C. 279, 132 S.E. 25.

We have cited the above decisions to show that a municipality may in certain instances, be liable in tort even though it may be engaged in a governmental function; and likewise may be held liable when engaged in a proprietary function which is considered such a *public necessity* that its activity is held to be for a *public purpose* and a *necessary governmental expense.*

We held in *Sing v. Charlotte*, 213 N.C. 60, 182 S.E. 693, that an airport is not a necessary governmental expense. It was also held in *Turner v. Reidsville*, 224 N.C. 42, 29 S.E. 2d 211, that the expenditure of funds for the construction and maintenance of an airport by the City of Reidsville was for a public purpose. This decision was cited and followed in *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E. 2d 703, *Cf. Nash v. Tarboro, supra.*

The identical question now before us is one of first impression with us, and in view of the numerous exceptions to the definitions that have been laid down in an effort to define what is a governmental function of a municipality and what is a corporate or proprietary one, we deem it proper to examine the decisions from other jurisdictions bearing on the question under consideration.

The overwhelming weight of authority is to the effect that the construction, operation and maintenance of an airport by a municipality is a proprietary function and that such municipality may be held liable in tort for the negligent operation thereof. *Mayor and City Council v. Crown Cork & Seal Co.* (C.C.A. Fourth Circuit 1941), 122 F. 2d 385; *Peavey v. City of Miami,* 146 Fla. 629, 1 So. 2d 614; *Pignet v. City of Santa Monica,* 29 CA 2d, Cal. 286, 84 P. 2d 166; *City of Blackwell v. Lee,* 178 Okla. 338, 62 P. 2d 1219; *Christopher v. City of El Paso* (Texas Civ. App.), 98 S.W. 2d 394; *Mollencop v. City of Salem,* 139 Ore. 137, 8 P. 2d 783; *Coleman v. City of Oakland,* 110 Cal. (q.) 715, 295 P. 59; *City of Mobile v. Lartigue,* 221 Ala. 36, 127 So. 257; Fixel on The Law of Aviation (3d Ed. 1948), p. 198; Aviation Accident Law by Rhyne (1947), p. 149.

In the case of *Abbott v. Des Moines,* 230 Iowa 494, 298 N.W. 649, 138 A.L.R. 120, the Court held the defendant could not be held liable in tort in connection with the operation of its airport, since the liability of a city or town in connection with the operation of an airport was fixed by statute to be "no greater than that imposed upon municipalities in the maintenance and operation of public parks." And the construction and maintenance of a park by a municipality in that State has been repeatedly held to be purely a governmental function. *Smith v. Iowa City,* 213 Iowa 391, 239 N.W. 29.

In Tennessee the operation and maintenance of an airport has been declared by statute to be "a public governmental function, and no action or suit shall be brought or maintained against any municipality, or its officers, agents, servants or employees, in or about the construction, maintenance, operation, superintendence, or management of any municipal airport." *Stocker v. Nashville,* 174 Tenn. 483, 126 S.W. 2d 339, 124 A.L.R. 345.

In the case of *Mayor, etc. of Savannah v. Lyons,* 54 Ga. App. 661, 189 S.E. 63, the City of Savannah constructed an airport pursuant to special legislative authority, and such airport being repeatedly referred to in the legislative acts as "landing field or park," the Court held the airport was a governmental institution in the nature of a park; and the City could not be held liable for the defective maintenance of a road inside the airport. The Court intimated, however, that if the petition had alleged that the airport was maintained "primarily for pecuniary profit to the

City," the result might have been otherwise, although the city did receive some revenue from the operation of the airport. The Legislature of Georgia passed, in 1933, a uniform airport act, Code Sections 11-201 to 11-209, which provides, among other things: "Any lands acquired, owned, leased, controlled, or occupied by such counties, municipalities, or other political subdivisions for the purpose or purposes enumerated in section 11-201, shall and are hereby declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes." The fact that this statute declares a municipal airport to be "for public, governmental, and municipal purposes," does not seem to have been considered as controlling on the question of immunity from a tort action.

We have found no decision, and the appellants have cited none, in which any Court of last resort in this country, has held that the construction, operation and maintenance of an airport by a municipality is a governmental function and that municipalities may not be held liable in tort for the negligent operation thereof, except where they have been expressly exempted from such liability by statute.

The interpretation we place on the language of the statute upon which the defendants are relying for immunity, leads to the view that it was the intent of the Legislature to declare that the acquisition, construction, operation and maintenance of an airport by a municipality was a governmental function in the sense that it was a public purpose. Note the language of the statute: "The acquisition, establishment, construction, maintenance . . . and the exercise of any other powers herein granted to municipalities are *declared to be public, governmental and municipal functions exercised for a public purpose* and matters of public necessity."

In the light of our own decisions and the other authorities cited herein, we are of opinion that our General Assembly did not exempt municipalities from tort liability in connection with the ownership and operation of airports by the enactment of G.S. 63-50, and we so hold.

The appellants take the further position that a county in this jurisdiction is empowered only to perform governmental functions and, therefore, cannot act in a proprietary capacity.

The duty to provide by general laws for the organization of cities, towns and incorporated villages is imposed upon the Legislature by our Constitution, Art. VIII, sec. 4, and this Court said, in *Murphy v. Webb,* 156 N.C. 402, 72 S.E. 460: "While in respect to cities and towns it is said that the power of the Legislature to control them, in the exercise of their municipal powers, is somewhat more restricted than in the case of counties, yet both are but instrumentalities of the State, for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature. *Lily v. Taylor,* 88 N.C. 490; *Jones v. Commissioners,* 137

N.C. 592; *Wharton v. Greensboro,* 146 N.C. 356; *Burgin v. Smith,* 151 N.C. 562." *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90.

We fully concur in the view, that a county when acting in its governmental capacity cannot be sued unless express authority to do so has been granted by statute. *Jones v. Commissioners,* 130 N.C. 451, 42 S.E. 144. Ordinarily a county does not undertake to perform functions except in a governmental capacity. But when it undertakes, with legislative sanction, to perform an activity which is proprietary or corporate in character, such a county may be liable in tort to the same extent as a city or town would be if engaged in the same activity. And our statutes authorizing municipalities to construct, operate and maintain airports are made applicable to counties by G.S. 63-57, which reads as follows: "(a) The purposes of this article are specifically declared to be county purposes as well as generally public, governmental and municipal. (b) The powers herein granted to all municipalities are specifically declared to be granted to counties in this state, any other statute to the contrary notwithstanding."

It might be wise to exempt municipalities from tort liability in connection with the construction, operation and maintenance of airports, if so, we think the exemption should be expressly granted by the Legislature, rather than by judicial decree. Airports are here to stay and will be used extensively by the public in the future. However, transportation by air has not been developed to a point so as to make the construction, operation and maintenance of the average airport a profitable enterprise. That is why private capital is not available for this purpose.

But until the General Assembly expressly exempts municipalities from tort liability in connection with the operation of airports, they may be held liable for their negligent operation to the same extent as they are now liable for negligence in connection with the construction, operation and maintenance of light plants, water works, wharves, and other corporate functions. The function of an airport is to maintain facilities for the use of the ships of the air, just as port terminals or wharves are maintained for the use of the ships of the sea.

The third ground upon which the defendants undertook to demur to the complaint invokes the aid of a purported fact which does not appear in the pleadings challenged by the demurrer and is in that respect a "speaking demurrer" and cannot be considered in passing on it. *Sandlin v. Wilmington,* 185 N.C. 257, 116 S.E. 733. It is not alleged in the complaint that J. R. Calton was appointed by the defendants or by their Airport Board as an airport guard with full police powers, or that he was exercising such powers at the time of the death of plaintiff's intestate. However, G.S. 63-53 (b) provides, among other things, that a municipality or municipalities operating an airport are given the author-

ity "to appoint airport guards or police with full police powers." And G.S. 63-58 gives to a municipality or municipalities operating an airport, subject to federal and state laws, rules and regulations, the exclusive jurisdiction and control of such airports and no other municipality "shall have any police jurisdiction of the same."

Whether J. R. Calton was acting in his capacity as a servant or agent of these defendants, as alleged in the complaint, or was acting in the capacity of an "airport guard with full police powers," at the time he shot plaintiff's intestate, is a question of fact to be determined by a jury on an issue raised by proper pleadings. *Tate v. R. R.*, 205 N.C. 51, 169 S. E. 816.

The judgment of the court below, in overruling the demurrer, is Affirmed.

W. A. INGOLD v. PHOENIX ASSURANCE COMPANY, LIMITED, AND ELI WINESETTE AND WIFE, MARY WINESETTE.

(Filed 23 March, 1949.)

1. Fixtures § 1—

Ordinarily, a building becomes a part of the realty, and though this rule is subject to the exception that the parties may provide to the contrary by express or implied contractual stipulation, the burden of proof is upon the party claiming that a building is personalty to show that under the contract it retained that character.

2. Same—

At the time of the lease there were two brick walls standing on the land. Lessee extended the walls and constructed a roof to provide a building for his business. The lease provided that if lessee discontinued his business and vacated the building before the expiration of the term, the building should automatically be turned over to lessor. Lessee joined as co-insurer with lessor in a policy of fire insurance on the premises. *Held:* It is apparent that the structure was erected for the better enjoyment of the premises and not as a trade fixture, and upon trial by the court under agreement of the parties, the court was not required to assume that the parties intended the structure to retain the character of personalty.

3. Insurance § 24d—

Lessor and lessee were jointly insured in a fire policy. Upon destruction of the premises by fire, lessee was unwilling to have the fund used to replace the building, but instead, abandoned his lease. *Held:* Lessee was entitled out of the proceeds of the insurance to the amount representing the use of the building during the remainder of the term.

4. Pleadings § 24c—

Evidence in support of an agreement not alleged in the pleadings is properly excluded, since proof without allegation is unavailing.

5. Insurance § 24d: Appeal and Error § 39c—

Insurer in a policy issued jointly to lessor and lessee was permitted to pro rate the loss with a prior policy issued by a different insurer to lessor, but lessee's recovery of the present cash value of the unexpired term was based on the full amount of the joint policy. Lessee offered evidence that lessor had agreed to cancel the prior policy when they obtained the joint policy sued on, but had wrongfully breached the agreement by failing to do so. *Held:* Since lessee recovered exactly the same amount to which he would be entitled had lessor complied with the agreement, the exclusion of evidence of the agreement could not be ground for a new trial or modification of the judgment.

6. Tender § 1—

Where tender of the amount due is made more than six months after the amount becomes payable, and interest on the amount from due date to date of tender is not included therein, the tender is ineffectual.

7. Same—

In order to constitute a valid tender, the party making the tender must not only allege his continuous readiness to pay the amount, but must also bring or deposit the amount into court.

8. Insurance § 24b (4)—

Where a fire policy provides that loss thereunder should be paid sixty days after proof of loss and ascertainment of the loss by agreement of the parties or by an award as provided in the policy, interest on the recovery cannot begin to run until sixty days after proof of loss was filed, and judgment awarding interest from date of the fire is error.

9. Same—

Where lessor and lessee are jointly insured under a fire policy which provides that loss should be paid 60 days after proof of loss, interest on the recovery should be allowed after 60 days from the date proof of loss is filed by either insured, and insurer's contention that interest could not begin to run until both had filed proof of loss is untenable.

10. Costs § 3a—

In an action at law the court has no discretion in apportioning the costs, and upon judgment awarding plaintiff at least a part of the amount claimed by him he may not be taxed with any part of the costs, and judgment apportioning the costs among the parties is error.

APPEALS by plaintiff and defendant insurance company from *Bone, J.*, October Term, 1948, WASHINGTON. Modified and affirmed.

Civil action on fire insurance policy.

Plaintiff and his brother leased from defendant Mary Winesette the lot known as the old Gulf Oil Company property in Plymouth, N. C., for a term of five years, with the right of renewal for an additional five years. Later, plaintiff became the sole owner of said lease.

The lease permits the lessees to remodel the brick walls standing on the property "into any type of building" they may desire and also to extend the building, either at the end or on the railroad side thereof. Pursuant to this authority the lessees, "utilizing the said brick walls as a part thereof, building same higher and longer," constructed a metal roof building on the premises for use as a place of business for the sale of tires and tubes and as a tire recapping plant.

On 24 January 1947, defendant insurance company issued its policy of insurance in the sum of $6,000 to the lessor and lessees, jointly, insuring them against the destruction of or damage to said building by fire. Later, plaintiff, having acquired the interest of his brother, J. R. Ingold, the policy was amended by endorsement so as to make him the sole lessee insured. At the time the Phoenix policy was issued, there was a policy in the sum of $5,000, issued by the Aetna Insurance Company, outstanding and in force, insuring defendant Winesette against loss by fire. Each policy contained a pro rata liability provision.

On 19 July 1947, said building, except the original side walls and a small portion of the additions made by plaintiff, was totally destroyed by fire. The agreed loss was $6,000.

Plaintiff filed proof of loss and demanded the payment to him of the full amount of the loss, to the exclusion of the lessor. Defendant insurance company acknowledged liability but declined to pay the full loss to plaintiff. Thereupon plaintiff instituted this action to recover said loss.

Defendant insurance company, answering, admitted the loss, pleaded the $5,000 policy issued by Aetna Insurance Company to defendant Winesette and the payment of $2,727.27, or five-elevenths of the loss thereunder, conceded liability for six-elevenths of the loss, and offered to pay the same, to wit, $3,272.73, to the insured under the policy.

The answer of defendant Winesette raises certain issues in respect to rent not material to this appeal.

When the cause came on for hearing in the court below, the parties waived trial by jury and agreed that the presiding judge should find the facts and render judgment thereon.

Thereupon, after hearing the evidence, the court found the facts and concluded that (1) defendant insurance company is liable to the insured in the sum of $3,272.73, with interest from 19 July 1947 (the date of the fire) and (2) plaintiff "is entitled to receive the present cash value of the income from $6,000" for the unexpired term of the lease and extension period, to wit, $1,762.56, with interest from 19 July 1947. It thereupon rendered judgment that plaintiff recover said sum of $1,762.56 and defendant Winesette recover $1,510.17, each with interest from 19 July 1947. Plaintiff and defendant insurance company each excepted and appealed.

Carl L. Bailey for plaintiff appellant.

Murray Allen and R. P. Upchurch for Phoenix Assurance Company, Limited.

Norman & Rodman for Eli Winesette and Mary Winesette.

BARNHILL, J. The appeal of the plaintiff poses two questions for decision: (1) Was plaintiff the sole owner of the building destroyed by fire and as such entitled to the proceeds of the fire insurance policy sued on, and if not (2) Did the court below make proper apportionment of the recovery on said policy?

Whatever is so firmly affixed or annexed to the freehold as to become thoroughly and substantially a part of the realty cannot afterward be removed except by him who is entitled to the inheritance. And so, as a general rule, a building on land is considered a part of the realty, or at least it is so presumed. *Feimster v. Johnson,* 64 N.C. 259; *Springs v. Refining Co.,* 205 N.C. 444, 171 S.E. 635; *Brown v. Ward,* 221 N.C. 344, 20 S.E. 2d 324; *Haywood v. Briggs,* 227 N.C. 108, 41 S.E. 2d 289; 22 A.J. 714, 778.

At common law all buildings become a part of the freehold as soon as they are placed upon the soil. *Kutter v. Smith,* 69 U.S. 491, 17 L. Ed. 830.

"The ownership of land is not confined to its surface, but extends indefinitely, downwards and upwards. *Cujus est solum, ejus est usque ad coelum.* 2 Black. Com. 18. It includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees and herbage, or by the hand of man, as houses and other buildings. Co. Lit., 4a." *Gilliam v. Bird,* 30 N.C. 280; *S. v. Martin,* 141 N.C. 832.

The trend of modern decisions has tended to relax the rigidity of this common law rule so that now, subject to certain limitations, the intent of the parties as evidenced by their contract, express or implied, is controlling. *Springs v. Refining Co., supra; Feimster v. Johnson, supra;* 22 A.J. 728; Anno. 77 A.L.R. 1400. But the burden of proof is upon the party who claims a building is personal property to show that it retains that character. 22 A.J. 778.

Here there was no express agreement that the building erected by plaintiff was to retain the character of a trade fixture removable by plaintiff at the end of his term. The facts and circumstances surrounding the execution of the lease and the erection of the building refute the suggestion that it was so intended by the parties. It is expressly stipulated in the lease agreement that in the event plaintiff should discontinue business and vacate the building before the expiration of the term of the lease plus the permissible renewal term, "the building will automatically be

turned over to" the lessors. The building was composed of two brick walls standing on the land at the time the lease was executed, raised and extended by plaintiff, the extension being of wood construction. It was erected for the better enjoyment of the land and not as a trade fixture, *Pemberton v. King,* 13 N.C. 376; *R. R. v. Deal,* 90 N.C. 110, and it could not be removed without injury to the freehold. 22 A.J. 724; *Frost v. Schinkel,* 77 A.L.R. 1381. The action of plaintiff in joining with the landlord as coinsurer was an acknowledgment of her insurable interest therein.

Plaintiff could have no right to remove the brick walls standing on the premises at the time the lease was executed. To attempt to remove the additions thereto would require him substantially to destroy the very thing he claims. The court below was not required to assume the parties so intended.

What then, as between the landlord and tenant, jointly insured, was the insurable interest of the tenant?

On this question this case is one of first impression in this jurisdiction. The parties have called our attention to no case from any other jurisdiction directly in point and we have found none.

We concur in the opinion of the court below that plaintiff's insurable interest under the circumstances here disclosed was the right to use the building during the continuance of his term. He did not purport to insure as the sole owner but joined with the landlord in so doing, thereby recognizing her property interest therein. Then when the loss occurred, he signified his unwillingness to have the fund used to replace the building. Instead, he abandoned his lease altogether. To have that which represents the use of the building during the term when he has disavowed his liability under the lease would seem to be all that he can justly claim.

This conclusion is in line with the decisions of this Court in analogous cases where the rights of tenants for life and remaindermen in and to the proceeds of fire insurance policies were at issue. *Graham v. Roberts,* 43 N.C. 99; *Campbell v. Murphy,* 55 N.C. 357, at p. 363; Anno. 16 A.L.R. 313.

The recovery by the tenant may be on a different basis when he alone insures. *Stockton v. Maney,* 212 N.C. 231, 193 S.E. 137; *Houck v. Insurance Company,* 198 N.C. 303, 151 S.E. 628; Anno. 126 A.L.R. 345.

The plaintiff tendered testimony tending to show that originally he obtained a policy in the sum of $6,000, insuring his interest alone, and defendant Winesette had a policy in the sum of $5,000, insuring her interest; that at the suggestion of the insurance agent it was agreed that they should cancel the outstanding policies and obtain jointly the policy sued on; that he had his outstanding policy canceled but the landlord, in

breach of her agreement, failed to have her $5,000 policy canceled. This evidence was excluded and plaintiff excepted.

For two reasons the ruling of the court below must be sustained. First, no such agreement is pleaded. Proof without allegation is as unavailing as allegation without proof. *Whichard v. Lipe,* 221 N.C. 53, and cases cited; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Suggs v. Braxton,* 227 N.C. 50, 40 S.E. 2d 470. Second, the court below allowed plaintiff to recover on the basis of $6,000 though his insurer paid only its ratable portion of the total. This is exactly what he would have recovered had the landlord complied with her agreement to cancel her individual policy.

On this record plaintiff's assignments of error fail to point out cause for a new trial or for modification of the judgment rendered.

APPEAL OF PHOENIX ASSURANCE COMPANY, LIMITED.

Proof of loss under the policy was filed by plaintiff on 3 September 1947 and by defendant Winesette on 1 May 1948. On 5 May 1948 defendant insurance company tendered to the insured its draft on the National City Bank of New York in the sum of $3,272.73 in full settlement of their claim for loss under its policy of insurance. Plaintiff declined to accept the tender for the reason it did not represent the full amount due, and defendant Winesette signified her willingness to accept.

Likewise, in its answer said defendant admitted that $3,272.73 is due the insured; renewed its tender thereof without producing either draft or money, and alleged that it "is ready and willing to bring said amount in money, together with any interest that may be due thereon, into Court to be paid to the party or parties entitled thereto."

Said insurance company excepts to the judgment for that the court failed and refused to recognize its tender before trial and in its answer as sufficient in law to stop interest and save costs. The assignment of error bottomed on this exception is untenable.

The original tender was made more than six months after the amount payable under the policy had become due. Interest on this amount had accrued, but the amount thereof was not included in the tender. While defendant alleges its willingness to pay said sum with accrued interest into court and prayed judgment that "it may be allowed to bring the money into Court," it never deposited in court either principal or interest. Thus, neither of said tenders was sufficient to stop interest and save costs.

To constitute a valid tender the offer must include the full amount the creditor is entitled to receive, including interest to the date of the tender. *Duke v. Pugh,* 218 N.C. 580, 11 S.E. 2d 868, and cases cited. "Mistake in tendering an amount less than the sum due is the misfortune of the

tenderer, and the position of the parties remains the same as if no tender had been made. 62 C.J. 661." *Duke v. Pugh, supra.*

It is the universal rule that in order to constitute a valid and effectual tender of money admitted to be due, the party who makes it must allege and show that since the refusal to accept the money he has always been ready to pay the same, and must bring the amount of the tender into court. *Cope v. Bryson,* 60 N.C. 112; *Parker v. Beasley,* 116 N.C. 1; *Bank v. Davidson,* 70 N.C. 118; *Lee v. Manley,* 154 N.C. 244, 70 S.E. 385; *DeBruhl v. Hood,* 156 N.C. 52, 72 S.E. 83; *Medicine Co. v. Davenport,* 163 N.C. 294, 79 S.E. 602; *Debnam v. Watkins,* 178 N.C. 238, 100 S.E. 336. "A plea of tender, not accompanied by *profert in curia,* is bad. *Saper v. Jones,* 56 Md. 503." *Parker v. Beasley, supra; DeBruhl v. Hood, supra.*

The judgment entered provides that the amount recovered shall bear interest from 19 July 1947. In this there was error. The policy provides that any amount of loss for which the insurer may be liable shall be payable sixty days after proof of loss and ascertainment of the loss is made either by agreement of the parties expressed in writing or by an award as provided in the policy. While the loss occurred 19 July 1947, proof of loss was not filed until 3 September 1947. November 2—sixty days thereafter—was the earliest date from which interest could begin to accrue.

Any contention that interest could not begin until notice of loss was filed by the defendant Winesette on 5 May 1948 is without merit. The proof filed by plaintiff, coinsured, put the insurance company on notice of the loss. The proof filed by defendant Winesette served only to give notice she was claiming an interest in the sum payable under the policy.

The court below taxed the costs one-third against plaintiff and one-third against each defendant. But this is not a proceeding in equity in which the court had the discretion to apportion the costs. It is an action at law in which the plaintiff has recovered at least a part of the amount claimed to be due. His recovery carries the costs as a matter of course. Hence the costs assessed against him must be taxed against the corporate defendant.

The judgment entered must be modified accordant with this opinion and as so modified it is affirmed.

Modified and affirmed.

G. B. SCHOLTENS v. ELIZABETH SCHOLTENS.

(Filed 23 March, 1949.)

1. 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.

2. Husband and Wife § 4—

The common law rights and disabilities of husband and wife are in force in this State except in so far as they have been abrogated or repealed by statute.

3. Husband and Wife § 11—

A husband may not maintain an action against his wife for a personal tort committed by her against him during coverture, since this common law disability has not been abrogated or repealed by statute. G.S. Chap. 52.

APPEAL by defendant from *Bone, J.*, at November Term, 1948, of NASH.

Civil action to recover damages for personal injuries allegedly sustained by plaintiff in automobile wreck as result of actionable negligence of defendant.

The complaint of plaintiff alleges that he and defendant are residents of Miami, Florida, and, by stipulation of parties, the complaint is amended to show that "plaintiff is now and was at the time of the happening of the events complained of and at the time of the commencement of this action the husband of the defendant."

The complaint also alleges, in substance, that while plaintiff was riding as a guest in automobile owned and operated by, and under the sole control of defendant on a certain public highway of North Carolina, U. S. Highway No. 301, at point about four miles north of Enfield, North Carolina, the automobile was wrecked by reason of acts of negligence of defendant in the respects enumerated, as the proximate result of which he, the plaintiff, sustained personal injuries to his great damage, for which he prays judgment.

Defendant demurred to the complaint of plaintiff "for that it appears upon the face thereof that

(a) The plaintiff has not legal capacity to sue; and

(b) The complaint does not state facts sufficient to constitute a cause of action," upon the ground that "It appears upon the face of the complaint, as amended by the stipulation filed herein, that, at the time of the happening of the events complained of and at the time of the commencement of this action and at the present time, the plaintiff was and is the husband of the defendant. It further appears upon the face of the complaint that this is an action in tort whereby the plaintiff seeks to

recover for injuries alleged to have been sustained because of the negligence of the defendant."

The cause came on for hearing before the Judge presiding at the November Term, 1948, of Superior Court of Nash County, upon the demurrer. And the court being of opinion that the demurrer is not well taken, ordered and adjudged that the demurrer be overruled, and gave defendant time in which to file answer.

Defendant appeals therefrom to Supreme Court, and assigns error.

Thorp & Thorp for plaintiff, appellee.

Spruill & Spruill for defendant, appellant.

WINBORNE, J. In this State may a husband maintain an action against his wife for a personal tort committed by her against him during coverture?

This question was adverted to in the case of *Shirley v. Ayers and Shirley,* 201 N.C. 51, 158 S.E. 840, but the Court expressly disavowed the necessity of deciding, and did not decide it. That action was instituted by the husband against his wife during coverture, but it was based upon a cause of action which arose prior to their marriage. He was permitted to maintain the action by virtue of the provisions of G.S. 52-14 by which the liability of a *feme sole* for damages incurred by her before marriage shall not be impaired or altered by such marriage.

So, the question is now before this Court for the first time. The trial court was of opinion that the question should be answered in the affirmative. But, in the light of the common law, effective in this State, except as abrogated or modified by statute, we are of opinion to the contrary, and hold that the husband is not authorized by law to maintain such action against his wife.

At common law the husband and wife were considered one,—the legal existence of the wife during coverture being merged in that of the husband, *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566, and they were not liable for torts committed by one against the other. *Thompson v. Thompson,* 218 U.S. 611, 31 St. Ct. 111, 54 L.Ed. 118, 30 L.R.A. (N.S.) 1153, 21 Ann. Cas. 921, affirming 31 App. D. C. 557, 14 Ann. Cas. 879. And 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. Among other cases see *S. v. Hampton,* 210 N.C. 283, 186 S.E. 251; *Merrell v. Stuart,* 220 N.C. 326, 17 S.E. 2d 458; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511; *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858; *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105; *Moche v. Leno,* 227 N.C. 159, 41 S.E. 2d 369; *S. v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458. And this applies to the common law in respect to rights and disabilities

of husband and wife. *Roberts v. Roberts,* 185 N.C. 566, 118 S.E. 9, and numerous other cases.

Since what is said by this Court in the *Roberts case, supra,* in opinion by *Adams, J.,* is such full treatment of the subject, we quote from it these excerpts: "In the absence of constitutional or statutory provision permitting a husband and wife to retain their separate legal identity after marriage, the rule still prevails that husband and wife are a legal unity, and therefore incapable of suing each other at law." And, "it is equally true, however, that the tendency of modern legal thought has been not entirely to displace the common law, but to enlarge the rights of married women even to the extent in some instances of abolishing the common law fiction," and "accordingly, the legislatures of the several States have enacted laws purporting to emancipate married women, the legal interpretation of each law depending upon its phraseology or particular provisions." Moreover, "We have said that certain rights, duties, and disabilities of husband and wife were produced by the joint operation of public policy and a common law fiction; and as it is the prerogative of the legislature to change or modify the common law, and to declare what acts shall be contrary to or in keeping with public policy, it is necessary to determine in what way, if any, and to what extent the relation of husband and wife has been modified in this jurisdiction by legislative enactment." Then after referring to statutory provisions then in effect in this State, the Court there declared: "By this legislation the relation which married women sustain to their husbands as well as to third persons has been materially affected. The unity of person in the strict common law sense no longer exists in this jurisdiction, because many of the common law disabilities have been removed," and "this change relates to remedies as well as to rights." And the Court there reiterated the holding made in the case of *Crowell v. Crowell,* 180 N.C. 516, 105 S.E. 206, that the wife could maintain an action against her husband to recover damages for injuries inflicted upon her person by him. This decision was based on the statutes then in effect, the first of which, C.S. 2513, provided: "The earnings of a married woman by virtue of any contract for her personal service, and *any damages for personal injuries, or other tort sustained by her,* can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate *property* as fully as if she had remained unmarried." This is the 1913 Act. P.L. 1913, Ch. 13. And the second of which, C.S. 454 (2), relating to civil actions, provided that "When a married woman is a party, her husband must be joined with her, except that . . . when the action is between herself and her husband she may sue or be sued alone."

But it is now noted that the statute C.S. 454 was deleted in the adoption of the General Statutes as being superseded by G.S. 52-1, *et seq.,*

that is Chapter 52 entitled Married Women. See Division XX, Appendix VIII, Comparative table, (2) Table of deleted Sections.

Therefore, when the several sections in Chapter 52 of the General Statutes are read, the provisions of C.S. 2513 appear as G.S. 52-10, but the provisions of C.S. 454 no longer appear, and there is no provision authorizing the husband to sue his wife in tort for injury inflicted upon him by her during coverture. Moreover, the provisions of this chapter, G.S. 52, in so far as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. *Helmstetler v. Power Co.*, 224 N.C. 821, 32 S.E. 2d 611.

And while it is urged that since the wife may sue the husband in such cases, he should be permitted the like right to sue her, sufficient answer for present purposes is, this Court does not make the law. That is in the province of the General Assembly. (*Roberts v. Roberts, supra.*) And the General Assembly has not seen fit to so modify the common law.

The judgment below is

Reversed.

T. M. MACKIE v. H. D. MACKIE AND WIFE, JENNIE MACKIE, K. L. MACKIE AND WIFE, VIOLET MACKIE, AND V. R. MACKIE AND WIFE, BLANCHE MACKIE.

(Filed 23 March, 1949.)

1. Deeds § 2b—

The provisions of G.S. 41-5 that an infant unborn, but *in esse*, is capable of taking by deed or other writing in the same manner as though he were born, gives the same capacity to an unborn infant to take property as such infant has under the law governing its right to take by inheritance or devise, which is from the time of conception.

2. Deeds § 6½—

Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. *Held:* The child was *in esse* at the time of the attempted revocation and therefore the revocation was ineffectual. G.S. 39-6.

3. Deeds § 2b: Descent and Distribution § 3c: Wills § 34d—

For the purpose of capacity to take under a deed and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary, that a child is *in esse* 280 days prior to its birth.

MACKIE *v.* MACKIE.

APPEAL by the defendants, K. L. Mackie and V. R. Mackie, from *Clement, J.*, at November Term, 1948, of YADKIN.

This is an action to try and determine the title to land, and to remove a cloud from the title of the plaintiff to an undivided one-fourth interest in a certain tract of land; the defendants claiming under deeds which the plaintiff alleges are null and void.

The facts were stipulated below, and may be briefly stated as follows:

1. On 16 July, 1894, John Mackie, Sr., "in consideration of love and affection and one dollar paid to him by John Mackie, Jr.," executed a deed to his son, John Mackie, Jr., "for life and then to his children and their heirs and assigns," conveying a certain tract of land in Liberty Township, Yadkin County, N. C., consisting of 113 acres more or less. This deed was duly filed for recording on 18 July, 1894.

2. Thereafter, on 15 January, 1898, John Mackie, the grantor in the above deed, and John W. Mackie (being the same person designated as John Mackie, Jr., the grantee in said deed) and his wife Mary E. Mackie, undertook to revoke the restrictive provision in the foregoing deed and to convey a fee simple title to the tract of land conveyed therein to one George Carter. This deed was filed for recording on 3 July, 1899.

3. The first child born to John W. Mackie, Jr., and his wife, Mary E. Mackie, was H. D. Mackie, one of the defendants, who was born 9 June, 1898. V. R. Mackie and K. J. Mackie (same as K. L. Mackie) also defendants, and T. M. Mackie, the plaintiff, were thereafter born of the marriage.

4. Mary E. Mackie obtained a deed to this 113 acre tract of land, on 16 August, 1917, and claimed title thereto through *mesne* conveyances from George Carter, the grantee in the instrument referred to in paragraph two above. She and her husband, John W. Mackie, Jr., are living separate and apart, pursuant to a separation agreement executed 16 August, 1917, and duly recorded 1 October, 1947.

5. On 17 March, 1948, Mary E. Mackie, in consideration of love and affection, executed three deeds, as follows: one to H. D. Mackie for 28 acres of land in question, one to V. R. Mackie and K. L. Mackie for 87 acres of the land, and one to the plaintiff for one acre of the land, reserving unto herself a life estate in each tract. These deeds were filed for recording the same day they were executed.

Upon these facts it was agreed his Honor should determine the rights of the parties and enter judgment accordingly.

The court below held that the attempted revocation of the deed from John Mackie, Sr., to John Mackie, Jr., was ineffective, "the remainder having vested in the child *in esse* and those born since," and that the deeds executed by Mary E. Mackie, on 17 March, 1948, are clouds upon the title of the plaintiff, the court being "of the opinion that they are

void," and entered judgment accordingly. The defendants, K. L. Mackie and V. R. Mackie, appealed from the judgment and assign error.

Hall & Zachary for plaintiff.

J. T. Reece and Allen & Henderson for defendants.

DENNY, J. The question involved on this appeal is whether or not H. D. Mackie, the son of John W. Mackie, Jr., who was born 9 June, 1898, was in being within the meaning of G.S. 39-6, when the deed of revocation was executed on 15 January, 1898.

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

When a child is in being and capable of taking by deed or other writing, has been fixed by statute in this jurisdiction. G.S. 41-5 provides: "An infant unborn, but *in esse,* shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born."

Under our decisions and applicable statutes, a conveyance made directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then *en ventre sa mere.* But where a life estate is given to the parent and there is a limitation over to the children, all the children who are alive, including a child in being but unborn, at the termination of the life estate, take thereunder. *Powell v. Powell,* 168 N.C. 561, 84 S.E. 860; *Roe v. Journegan,* 175 N.C. 261, 95 S.E. 495; *Cole v. Thornton,* 180 N.C. 90, 104 S.E. 74; *Johnson v. Lee,* 187 N.C. 753, 122 S.E. 839; *Jefferson v. Jefferson,* 219 N.C. 333, 13 S.E. 2d 745; *Beam v. Gilkey,* 225 N.C. 520, 35 S.E. 2d 641; *Pinkham v. Mercer,* 227 N.C. 72, 40 S.E. 2d 690.

It seems clear to us that G.S. 41-5 gives to an unborn infant the same capacity to take property by "deed or other writing," as such infant has under the law governing its right to take by inheritance or devise. "Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb, and in the law of inheritance this view is adopted, so that if one dies intestate, his unborn child, if eventually born alive, and not too soon after conception to be capable of living, inherits equally with its older brothers and sisters; and by analogy to this

rule, a devise or bequest to children or grandchildren includes a posthumous child or grandchild *en ventre sa mere* at the time of the testator's death. A child *en ventre sa mere* is also included in the phrase 'persons living at the death' of any person. By a legal fiction or indulgence, a legal personality is imputed to an unborn child as a rule of property for all purposes beneficial to the infant after his birth, but not for purposes working to his detriment. The interest taken by the child at birth dates back to the time of conception or to the later originating of the title, and cannot be defeated by intermediate proceedings to which he was not a party." 27 Amer. Jur. 747. Ordinarily a different rule or definition is applied as to when life begins, in tort actions and in criminal statutes. 27 Am. Jur. 748; *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842.

Applying the law to the facts in this case, it is presumed that the child of John W. Mackie, Jr., who was born on 9 June, 1898, was conceived 280 days, or ten lunar months, prior to the date of his birth, in the absence of evidence to the contrary, and was therefore in being at the time the purported deed of revocation was executed on 15 January, 1898. *S. v. Forte, supra; S. v. Bryant,* 228 N.C. 641, 46 S.E. 2d 847; 16. Amer. Jur. 852. The grantor in the original deed to John W. Mackie, Jr., was divested of the power to revoke the remainder which he had theretofore conveyed to the children of the grantee, the moment a child of the grantee came into being. Such remainder vested in the child, though unborn, subject to the rights of other children of the grantee who might be born thereafter. *Powell v. Powell, supra; Johnson v. Lee, supra.*

We think his Honor correctly interpreted the law applicable to the facts as stipulated, and the judgment entered in accord therewith is

Affirmed.

ROSCOE L. COX v. J. MILTON LEE.

(Filed 23 March, 1949.)

1. Automobiles § 8a—

While the driver of an automobile is not required to anticipate negligence on the part of others, he is under duty to keep a reasonably careful lookout at all times, and will be held to the duty of seeing what he ought to see.

2. Automobiles § 12a—

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle, G.S. 20-140, 141.

3. Automobiles § 8d—

One who operates a motor vehicle at night must take notice of the existing darkness and must not exceed a speed which will enable him to stop within the radius of his lights.

4. Same: Automobiles § 18h (3)—Evidence held to show contributory negligence as matter of law on part of driver hitting unlighted vehicle on highway.

Defendant's truck was standing without lights with its front 3 to 4.8 feet on the hard surface of the highway on the north side. A car was parked on the shoulder on the south side of the highway, twenty-five or thirty feet east of the truck. The driver of plaintiff's car, traveling west at about fifty miles per hour, struck the protruding portion of defendant's truck. The driver of plaintiff's car testified that there was nothing on the highway to obstruct his view, that the lights on the parked car did not blind him, and that he was looking at the parked car on his left side of the road and therefore did not see the truck on his right until he struck it. *Held:* The evidence discloses contributory negligence as a matter of law on the part of the driver of the car.

APPEAL by defendant from *Burgwyn, Special Judge,* November Term, 1948, JOHNSTON. Reversed.

Civil action to recover damages resulting from an automobile-truck collision.

The evidence most favorable to plaintiff tends to show that on the night of 24 December 1947, about 6:30 p.m., defendant's pick-up truck was standing without lights, backed up to his corn crib on the north side of the Newton Grove-Goldsboro highway. The front end of the truck was on the hard surface portion of the highway, 3 to 4.8 feet. Defendant was under the shelter unloading corn. Plaintiff's son, operating plaintiff's car at about fifty miles per hour, on his right-hand side, approached from the east. At the time another car was standing on or near the shoulder of the road on the south side, headed east, with its parking lights on. It was standing twenty-five or thirty feet to the east of defendant's truck. The road was straight to the east from three-fourths to one mile, and there was no other traffic on the road and no obstruction to prevent one traveling westerly from seeing at least one-half mile. The car collided with the front end of the truck and then traveled on down the highway for about 300 feet. It was badly damaged.

The defendant offered evidence tending to show that plaintiff's car was traveling seventy-five or eighty miles per hour, and that the other car standing on the south side was twenty-five or thirty feet off the highway at or near a grove.

When the cause came on for trial, the court below submitted issues of negligence, contributory negligence, and damages. The jury answered each issue in favor of the plaintiff. From judgment on the verdict, defendant appealed.

Wellons & Canaday for plaintiff appellee.

Lyon & Lyon for defendant appellant.

BARNHILL, J. The conclusion that the defendant committed an act of negligence in leaving his truck standing partly on the hard surface portion of the highway in the nighttime, unattended and without lights, would seem to be inescapable.

The question then is this: Does the evidence, considered in the light most favorable to plaintiff disclose negligence on the part of the driver of plaintiff's automobile which, as a matter of law, was a contributing cause of the collision and resulting damage? A careful review of the record leads us to the conclusion that we must answer in the affirmative.

The driver of an automobile is not required to anticipate negligence on the part of others, and his failure to do so does not constitute an act of negligence. *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312; *Hill v. Lopez,* 228 N.C. 433, 45 S.E. 2d 539.

But he is under the duty to keep a reasonably careful lookout. *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Reeves v. Staley, supra; Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Harper v. Harper,* 225 N.C. 260, 34 S.E. 2d 185; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 311; *Henson v. Wilson,* 225 N.C. 417, 35 S.E. 2d 245. "The requirements of prudent operation are not necessarily satisfied when the defendant 'looks' either preceding or during the operation of his car. It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

Likewise, he must at all times operate his vehicle with due regard to the width, traffic, and condition of the highway, and he must decrease speed and keep his car under control "when special hazard exists . . . by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any . . . vehicle, or other conveyance on . . . the highway . . ." G.S. 20-141. This requirement, as expressed in G.S. 20-140, 141, constitutes the hub of the motor vehicle law around which other provisions regulating the operation of motor vehicles revolve. *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915; *Brown v. Products Co., Inc.,* 222 N.C. 626, 24 S.E. 2d 334; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388; *Hoke v. Greyhound Corp.,* 226 N.C. 692, 40 S.E. 2d 345; *Garvey v. Greyhound Corp.,* 228 N.C. 166, 45 S.E. 2d 58; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251.

So then, one who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights. *Allen v. Bottling Co., supra; Lee v. R. R.*, 212 N.C. 340, 193 S.E. 395; *Caulder v. Gresham, supra; Sibbitt v. Transit Co.*, 220 N.C. 702, 18 S.E. 2d 203; *Tyson v. Ford, supra.*

Here the driver of plaintiff's automobile was operating his vehicle on a straight road. His headlights were in good condition. According to his own testimony there was nothing on the highway to obstruct his view, and the lights of the parked car did not blind him and did not prevent him from seeing the truck. Instead of looking in the direction he was traveling, he was looking to his left at the car parked on that side of the road "and that is why I did not see the truck until I struck it."

Thus it appears that he was not looking, or, looking, did not see the parked truck in time to stop or turn to the left and avoid the collision. In either event, his own negligence was one of the contributing causes of the unfortunate occurrence.

It follows that there was error in the refusal of the court below to grant the defendant's motion to dismiss the action as in case of nonsuit. For that reason the judgment below is

Reversed.

H. V. EDGERTON, N. L. EDGERTON, GLENN EDGERTON, GARLAND LEE EDGERTON, CARL JULIUS EDGERTON AND PAUL WESTEY EDGERTON v. WILLIAM O. HARRISON AND WIFE, EMMA HARRISON.

(Filed 23 March, 1949.)

1. Deeds § 11—

In construing a deed, the order and historic importance of the several parts and clauses have been given less emphasis in applying the rule that the intention of the grantor must be gathered from the four corners of the instrument.

2. Same—

Settled rules of law or of property as well as established public policy will be given effect when properly applicable regardless of intent or even in contravention of it.

3. Deeds § 13b—

The rule in *Shelley's case* is a rule of property and not of construction, and the rule will be applied where there is a limitation over after a freehold estate to the heirs general or heirs of the body of the first taker unless it is apparent that the word "heirs" is used to describe a class to take by purchase.

4. Same—

The deed in question conveyed to husband and wife a life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the *feme* grantee. *Held:* The husband took only a life estate, and the conveyance being to the wife and then to the heirs of her body, the rule in *Shelley's case* applies, and the estate in fee tail conveyed to the wife is converted by G.S. 41-1 into a fee simple absolute.

PLAINTIFFS' appeal from *Williams, J.*, October Term, 1948, JOHNSTON Superior Court.

Plaintiffs brought this action to recover of the defendant certain lands lying in Johnston County, alleging their ownership, and possession thereof by the defendant. The defendant denies that plaintiffs have any right to the lands in question and sets up sole title in himself.

The parties are agreed upon the documents, transactions and acts through which the title must be traced to the true owner, but disagree as to the proper interpretation thereof.

The title in dispute stems from a deed of conveyance, a copy of which is attached to the complaint, and admitted by defendant to be correct, and to constitute the title under which, by *mesne* conveyance, they both claim.

The deed in question was made by Sallie Wiggs, grantor, to her daughter, Sophronia Edgerton and husband, Fernando Edgerton, grantees, conveying to them a life estate in the premises with certain limitations noted below. Sallie Wiggs, Sophronia and Fernando Edgerton, the named grantees, are all dead, the husband predeceasing the wife. The plaintiffs, respectively are sons and grandsons of Sophronia and Fernando. The deed purports to "sell and convey to said F. C. Edgerton & Sophronia Edgerton a life estate in and to a certain tract or parcel of land" described, and immediately provides, "The grantor, Sallie Wiggs, reserves for herself a lifetime right in the above described land . . . And for a better understanding and the true intent of this conveyance I only intend to convey to F. C. Edgerton & Sophronia Edgerton a lifetime right to said above described land after my death. To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said F. C. Edgerton & Sophronia Edgerton during their natural life and then to the heirs of the body of Sophronia Edgerton, to their only use & behoof forever."

Fernando C. Edgerton and his wife, Sophronia, conveyed the lands in dispute to Edward E. Rhodes, Trustee, of the Mutual Benefit Life Insurance Company, and the deed of trust was afterwards foreclosed and deed of the trustee executed to the said Mutual Benefit Life Insurance Com-

pany, which latter corporation conveyed the same in fee to the defendant William O. Harrison, who now holds by virtue of the said deed.

When the case was called for trial the defendant moved for judgment upon the pleadings to the effect that he was the owner and entitled to the possession of the lands in dispute, and that the plaintiffs had no interest therein. The court being of the opinion that the pleadings raised no issues of fact but only the legal construction of the deed of Sallie Wiggs, granted defendant's motion and entered judgment accordingly. The plaintiffs objected, excepted and appealed.

Abell, Shepard & Wood—By: Larry F. Wood—for plaintiffs, appellants.

Moore & Brinkley and Battle, Winslow & Merrill for defendants, appellees.

SEAWELL, J. The one question posed on this appeal is whether the deed of Sallie Wiggs, by application of the rule in *Shelley's case,* conveyed to Sophronia Edgerton a fee simple estate in the disputed lands. The affirmative answer to this question given in the lower court must be affirmed.

The appellants stress the following declaration appearing immediately before the *tenendum* clause: "And for a better understanding and the true intent of this conveyance, I only intend to convey to F. C. Edgerton and Sophronia Edgerton the lifetime right to said land after my death." They urge that this intent be observed in the construction, citing *Triplett v. Williams,* 149 N.C. 394, 63 S.E. 79, and later precedents in accord. They insist that "the intention of the parties is the main object of all constructions," and particularly those applying to deeds.

It is true that rules of construction applied to deeds of conveyance have been greatly relaxed in modern practice, so that emphasis is no longer placed on the order of succession and relative historic importance of the several parts and clauses; and that the intention is to be gotten from the "four corners," as in other instruments.

The whole subject of estates in land, their creation and relationship, is highly technical, and the conveyancer may expect to meet with settled rules of law or rules of property and established public policy which operate in disregard, or even in contravention, of intent. In that event the collateral expression of intent will not avail.

Speaking of the rule in *Shelley's case,* it is said in *Nichols v. Gladden,* 117 N.C. 497, 501, 23 S.E. 459, "A declaration, however positive, that the rule shall not apply or that the estate of the ancestor shall not continue beyond the primary expressed limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule

. . . the rule is one of property and not of construction." In this the Court adopts the language of *Daniel v. Whortenby,* 17 Wall. 639. The opinion further says, (adopting the expression in 2 Wash. 273):

> "Whenever the rule does apply it is as a rule of the common law so imperative that though there be an expressed declaration that the ancestor shall only have a life estate it will not defeat its union with the subsequent limitation to his heirs."

In the instant case, however, the expressed intent that Sophronia should have no more than a life estate is not inconsistent with, but actually in aid of the limitation to the "bodily heirs," in creating an estate in fee tail, which the statute converts into a fee simple absolute. G.S. 41-1 (see stat. 1784, C. 204, S. 5).

The rule in *Shelley's case,* invoked by the defendant, obtains here and is controlling.

As understood here, it covers the situation where the limitation is to bodily heirs, (where there is nothing apparent to indicate that the expression refers to bodily heirs as a *"descriptio personarum,"* or a limited class who might take by purchase), as well as where the limitation is to heirs general.

In *Nichols v. Gladden, supra,* p. 500, the rule is stated as follows:

> "That when the ancestor by any gift or conveyance taketh an estate of freehold and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the words 'heirs' is a word of limitation of the estate and not a word of purchase. The definition is taken from 1 Coke, 104."

The very comprehensive opinion of *Chief Justice Stacy,* speaking for the Court in *Welch v. Gibson,* 193 N.C. 684, 687, 138 S.E. 25, (q. v.), adopts the rule as stated by Chancellor Kent in his Commentaries, (4 Kent Com. 215) as follows:

> "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Prest. Est. 263.

In the particular case it is to be noted that the limitation of the life estate is to Fernando Edgerton and Sophronia Edgerton, husband and

wife. This limitation of the life estate to two persons introduces no element to defeat the application of the rule. The effect would be only that Sophronia's estate in fee simple absolute would have been subject to the life estate of her husband, Fernando, and the record shows that she survived him.

In that respect and others, the factual situation in the instant case is on all fours with those in *Rawls v. Roebuck*, 228 N.C. 537, 46 S.E. 2d 323; and the succinct but ample opinion of *Mr. Justice Denny* in that case is controlling here.

The pleadings and admissions of the parties contain sufficient facts to make the issue entirely one of law, and the motion for judgment on the pleadings was properly allowed. The correct conclusion was reached, and the judgment is

Affirmed.

STATE v. RICHARD VANHOY.

(Filed 23 March, 1949.)

1. Automobiles § 29b—

The State's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway whereon several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain conviction of reckless driving, G.S. 20-140, and driving at a speed in excess of fifty-five miles per hour, G.S. 20-141.

2. Intoxicating Liquor § 9d—

Evidence that officers found two full bottles of nontax-paid whiskey in defendant's car upon their search immediately after arresting defendant for driving the car recklessly and at excessive speed, is sufficient to overrule defendant's motion to nonsuit and support conviction of illegal transportation of intoxicating liquor.

3. Criminal Law § 43: Constitutional Law § 19a—

The fact that evidence is obtained by unlawful means does not render such evidence inadmissible in this State in the absence of statutory provision to the contrary, and therefore testimony by officers that they searched and found a quantity of nontax-paid liquor in defendant's car is competent notwithstanding the search was made without a warrant.

4. Criminal Law §§ 54b, 60—

Where a general verdict of guilty is returned to indictment containing numerous counts, it will be presumed that the verdict relates to the counts supported by the evidence.

5. Criminal Law § 53d—

The charge of the court in this case, both as to the statement of the evidence and the law arising on the essential features of the evidence, *is held* to be in substantial compliance with the requirements of G.S. 1-180.

6. Intoxicating Liquor § 8—

Defendant admitted ownership of the car he was driving when arrested by the officers. Two bottles of nontax-paid whiskey were found in the car, but defendant denied that he had put any liquor in the car or had knowledge of its presence therein. *Held:* Verdict of the jury that defendant was guilty of unlawful transportation of intoxicating liquor is sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. G.S. 18-6, 18-48.

APPEAL by defendant from *Clement, J.,* September Term, 1948, of YADKIN. No error.

One of the bills of indictment under which defendant was tried contained various charges of violation of the statutes in regard to intoxicating liquor, G.S. 18-2, including the unlawful transportation of intoxicating liquor. In another bill the defendant was indicted for violation of several statutes regulating the operation of motor vehicles on the highway, including charges of reckless driving, G.S. 20-140, and driving at a speed in excess of 55 miles per hour. G.S. 20-141. Both cases were consolidated for trial.

There was a general verdict of guilty as charged. Judgments were rendered imposing sentence of six months in jail for unlawful transportation of intoxicating liquor, and four months for reckless driving, sentences to be served consecutively. There was an additional sentence of thirty days for speeding, but the last sentence was ordered to be served concurrently with the first sentence.

Judgment was also rendered that, defendant having been convicted for unlawfully transporting intoxicating liquor in his automobile, the vehicle in which the liquor was being transported and which was being used for that purpose be confiscated and sold in accordance with the statute.

Defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Moody and Forrest A. Shuford, II, Member of Staff, for State.

Allen & Henderson and A. T. Grant for defendant, appellant.

DEVIN, J. The defendant's motion for judgment of nonsuit as to the charges, or either of them, on which he was being tried was properly overruled. *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863. As no defect appears on the face of the record, motion in arrest of judgment was also properly denied. *S. v. McKnight,* 196 N.C. 259, 145 S.E. 281.

While the two bills of indictment under which the defendant was tried contained numerous counts, the general verdict of guilty as charged in both cases would be presumed to have been returned on the counts to which the evidence related, that is, unlawful transportation of intoxi-

cating liquor, reckless driving of an automobile, and driving at a greater rate of speed than 55 miles per hour. *S. v. Smith,* 226 N.C. 738, 40 S.E. 2d 63; *S. v. Snipes,* 185 N.C. 743, 117 S.E. 500. There was evidence to support the verdict on these counts, and to sustain the judgment rendered thereon. In the defendant's automobile which he was driving were found two full bottles of whiskey, in violation of G.S. 18-2, and the State's evidence showed he was driving at the rate of 80 to 90 miles per hour over a road whereon several other vehicles were moving at the time. *S. v. Steelman,* 228 N.C. 634, 46 S.E. 2d 845; *S. v. Holbrook,* 228 N.C. 620, 46 S.E. 2d 843.

Defendant contends, however, that the trial court erred in admitting evidence of Sheriff Moxley as to search of his automobile without a search warrant. It appears from the record that defendant excepted to the sheriff's statement that he searched defendant's car, but no objection appears to have been made to the sheriff's testimony as to the result of his search. Nor was objection made to similar testimony from another State's witness. However, we think the evidence was competent. The defendant was arrested about 1 a.m. for reckless driving and speeding, and placed in jail until bond could be arranged. The officers then immediately searched defendant's automobile and found in the glove compartment two full bottles of whiskey, "white, non-tax-paid." The defendant had a general reputation for "messing with liquor and bootlegging" and had previously been convicted of unlawful possession. The evidence of the presence of intoxicating liquor in the automobile in which it was being unlawfully transported was not rendered incompetent though the incriminating liquor was discovered without the aid of a search warrant as required by the proviso in G.S. 18-6, In Stansbury's North Carolina Evidence, sec. 121, it is said: "According to the traditional common-law view, evidence is not inadmissible because of the fact that it was obtained by unlawful means. The United States Supreme Court, followed by a large number of state courts, has departed from this previously settled rule, but in North Carolina it is still the law except as it has been expressly modified by statute." The holding on this point in the different jurisdictions will be found collected in 150 A.L.R. 566; 134 A.L.R. 829; 8 A.L.R. 348. See *McDonald v. U. S.,* 93 Law. Ed. Adv. Op. 144. In Wigmore, secs. 2183-2184, the Federal rule is criticized. The view that such evidence is not for that reason incompetent has been uniformly adhered to by this Court. *S. v. Shermer,* 216 N.C. 719, 6 S.E. 2d 529; *S. v. McGee,* 214 N.C. 184, 198 S.E. 616; *S. v. Hickey,* 198 N.C. 45, 150 S.E. 615; *S. v. Godette,* 188 N.C. 497, 125 S.E. 24; *S. v. Simmons,* 183 N.C. 684, 110 S.E. 591; *S. v. Wallace,* 162 N.C. 622, 78 S.E. 1. While we have a statute, G.S. 15-27, which renders evidence of facts discovered by the use of a search warrant issued without verification by the

oath of the complainant incompetent, the circumstances here are not such as to bring this case within the language of that statute. *S. v. McGee, supra.*

The defendant excepted "to the charge of the court as a whole," and assigns as error that the court did not state fully the evidence and explain the law arising thereon. While the defendant's exception is "broadside," and his assignment of error does not point out wherein the court failed to explain the law arising on the evidence, an examination of the charge leads to the conclusion that the trial judge substantially complied with the requirements of the statute (G.S. 1-180), both as to statement of the evidence and the law arising on the essential features of the evidence. *S. v. Graham,* 194 N.C. 459 (467), 140 S.E. 26; *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408; *S. v. Thomas,* 226 N.C. 384, 38 S.E. 2d 166. The case seems to have been fairly presented to the jury, and no prejudicial error has been shown. *S. v. Glatly, post,* 177.

The defendant also excepted to the order confiscating the automobile used in the unlawful transportation of intoxicating liquor as found by the jury.

The statute makes it obligatory upon officers, upon discovering any person transporting intoxicating liquor in violation of law, to arrest him and to seize the vehicle being used for such transportation, and authorizes the court, upon the conviction of the offender, to order sale of the vehicle for the benefit of the public school fund, with saving protection for the rights of a claimant of the vehicle who can show that the vehicle was used in the transportation of liquor without his knowledge or consent. G.S. 18-6; 18-48.

Here the defendant admitted ownership of the automobile in which two bottles of nontax-paid whiskey were being transported at the time of his arrest, but denied he had put any liquor in the car or had any knowledge of its presence therein. However, the jury resolved this issue of fact against the defendant and found him guilty of unlawfully transporting intoxicating liquor as charged. It appears therefore that all the essential facts necessary to authorize confiscation of defendant's automobile were before the court, and that the order appealed from was entered thereon in accordance with the statute. *S. v. Hall,* 224 N.C. 314, 30 S.E. 2d 158; *S. v. Maynor,* 226 N.C. 645, 39 S.E. 2d 833. The judgment will be upheld.

In the trial we find

No error.

C. G. GRADY ET AL. v. JAMES D. PARKER ET AL.

(Filed 23 March, 1949.)

1. Judgments § 39: Guardian and Ward § 14—

A successor guardian obtained judgment against the prior guardian and the surety on his bond, and at a later date recovered another judgment in a smaller amount against the prior guardian and his wife on a note signed by both and secured by deed of trust. *Held:* In a later action to renew the judgments, the holding of the trial court that plaintiff was not entitled to renew the second judgment because it and the first judgment represented one and the same indebtedness, must be held for error, since the effect is to release and relieve the *feme* defendant from any liability and the guardian is entitled and is under duty to hold to all security.

2. Reference § 4—

Where in an action to redeem land sold under foreclosure under order of court and for an accounting, defendants plead estoppel, laches and title by adverse possession for seven years under color, G.S. 1-38, it is error for the court to resolve the pleas in bar against defendant and order a compulsory reference, since defendants are entitled to an adequate hearing on their pleas in bar before reference can properly be ordered, G.S. 1-189. A prior decision of the Supreme Court that the foreclosure was void because the trustee was not a party to the action, in which the pleas in bar were not before the Court, or in view, has no bearing upon this matter.

APPEALS by plaintiff-defendant, First-Citizens Bank & Trust Company, Guardian of Henry A. Hodges, and defendants, Riverside Brick & Tile Co., J. H. Strickland and wife, Mabel Strickland, from *Williams, J.*, at September-October Term, 1948, of JOHNSTON.

Civil actions to renew judgments, to redeem and for an accounting and to determine priority of liens.

For convenience the numbers of the cases as they appear on the civil issue docket in the Superior Court will be retained here.

1. In C. I. D. No. 4019, C. G. Grady, guardian of Henry A. Hodges, incompetent, obtained judgment against James D. Parker at the September Term, 1935, Johnston Superior Court, and surety on his guardianship bond, for $8,023.81, with interest and costs. (This judgment was under consideration on appeal from motion to recall execution at the April Term, 1945, reported in 225 N.C. 480, 35 S.E. 2d 489.)

2. In C. I. D. No. 4237, C. G. Grady, guardian of Henry A. Hodges, incompetent, obtained judgment against James D. Parker and wife, Agnes A. Parker, at September Term, 1936, Johnston Superior Court, for $4,000 with interest and costs, and order of foreclosure of mortgage or deed of trust given to secure note signed by both defendants. (The foreclosure deed given pursuant to judgment in this case was held defective or void for failure to make the trustee a party on motion and de-

murrer filed at the April Term, 1947, reported in 228 N.C. 54, 44 S.E. 2d 449.)

3. In C. I. D. No. 5496, First-Citizens Bank & Trust Company, successor guardian of Henry A. Hodges, incompetent, brings suit to renew the judgment obtained against James D. Parker in C. I. D. No. 4019 for $8,023.81, with interest and costs, less certain credits.

4. In C. I. D. No. 5584, First-Citizens Bank & Trust Company, successor guardian of Henry A. Hodges, incompetent, brings suit to renew the judgment obtained against James D. Parker and wife, Agnes A. Parker, in C. I. D. No. 4237 for $4,000 with interest and costs, less certain credits.

5. In C. I. D. No. 5620, James D. Parker and wife, Agnes A. Parker, bring suit against First-Citizens Bank & Trust Company, Guardian, H. V. Rose, Trustee, and Riverside Brick & Tile Company, J. H. Strickland and wife, Mabel Strickland (purchasers and holders of deed for "37.5-acre tract" auctioned under foreclosure in C. I. D. No. 4237) to redeem and for an accounting. In the answers filed by the defendants they plead title by adverse possession, laches, estoppel *in pais* and by judgment, and the several statutes of limitations, all in bar of the plaintiffs' right to recover. (It is difficult to determine from the record, if, indeed, so discernible, as to how this case came, or was brought, into the hearing.)

There was also a question of priority of liens occasioned by the petition of Phyllis A. Parker and Daniel L. Parker, assignees of judgment in the case of "W. R. Denning *v.* J. D. Parker and others," C. I. D. 4064, execution on which was in the hands of the sheriff when the J. D. Parker lands were sold under execution in the case of C. I. D. No. 4237. Not knowing which execution was entitled to priority, the sheriff paid the money into the Clerk's office.

Upon the suggestion of the death of James D. Parker which occurred 10 February, 1948, his personal representative, Agnes A. Parker, executrix, was made a party to the above actions and she duly came in and adopted the respective pleadings filed by her testator in each of the cases.

The court found as a fact that the judgments in C. I. D. No. 4019, and C. I. D. No. 4237, "represented one and the same indebtedness"; and (1) allowed the judgment in the former to be renewed, deducting the admitted credits, and "subject to a further credit and payment to be made thereon as determined in the final judgment in or determination of the action for redemption and accounting" (C. I. D. No. 5620), and (2) held that the judgment in C. I. D. No. 4237 was not entitled to be renewed. Exception.

The pleas in bar were thereupon "overruled" or resolved against the defendants in C. I. D. No. 5620, compulsory reference ordered in the case, and the cause was retained for final judgment. Exception.

From these rulings, the First-Citizens Bank & Trust Company, Guardian, plaintiff in the 3rd and 4th cases and defendant in the 5th, and Riverside Brick & Tile Company, J. H. Strickland and wife, Mabel Strickland, defendants in C. I. D. No. 5620, appeal, assigning errors.

Lyon & Lyon for First-Citizens Bank & Trust Co., guardian, plaintiff-defendant, appellant.

Parker & Parker and Jane A. Parker for Agnes A. Parker, Executrix, Agnes A. Parker, plaintiff-defendant, and Daniel L. Parker and Phyllis A. Parker, petitioners, appellees.

Parker & Parker and Jane A. Parker for Agnes A. Parker, Executrix, and Agnes A. Parker in C. I. D. No. 5620, plaintiff, appellee.

Levinson, Pool & Batton for Riverside Brick & Tile Co., J. H. Strickland and Mabel Strickland in C. I. D. No. 5620, defendants, appellants.

STACY, C. J. The appeal presents a number of rulings which the appellants say were improvidently entered in the court below. Only two need be determined here, albeit all have engaged our attention.

1. The refusal to allow the judgment in C. I. D. No. 4237 to be renewed because it represents a part of the same indebtedness covered by the larger judgment in C. I. D. No. 4019, is to release and relieve the *feme* defendant from any and all liability incurred by her when she joined with her husband in the execution of the note and mortgage upon which the subject judgment was founded. This won't do. The guardian is entitled, and, indeed, required to hold to its security. Whether the payment of the subject judgment would inure to the benefit of the judgment debtor in C. I. D. No. 5496, or could be claimed as a credit on the judgment therein, is another matter, not presently presented.

2. There was also error in overruling or resolving the pleas in bar against the defendants in C. I. D. No. 5620 and referring the case in the present state of the record.

This last action is to redeem and for an accounting. The defendants plead, among other things, estoppel, laches and title by adverse possession for seven years under color. G.S. 1-38; *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6; *Layden v. Layden,* 228 N.C. 5, 44 S.E. 2d 340; *Lofton v. Barber,* 226 N.C. 481, 39 S.E. 2d 263; *Perry v. Bassenger,* 219 N.C. 838, 15 S.E. 2d 365; *Glass v. Shoe Co.,* 212 N.C. 70, 192 S.E. 899; *Potts v. Payne,* 200 N.C. 246, 156 S.E. 499; *Alsworth v. Cedar Works,* 172 N.C. 17, 89 S.E. 1008; *Bond v. Beverly,* 152 N.C. 56, 67 S.E. 55; *McFarland v. Cornwell,* 151 N.C. 428, 66 S.E. 454; *Ingram v. Colson,* 14 N.C. 520; *Tate v. Southard,* 10 N.C. 119. They are entitled to an adequate hearing on their pleas in bar before a reference can properly be ordered in the case. G.S. 1-189; *Graves v. Pritchett,* 207 N.C. 518, 177 S.E. 641;

Garland v. Arrowood, 172 N.C. 591, 90 S.E. 766; *Jones v. Wooten,* 137 N.C. 421, 49 S.E. 915. Where matters in bar of the right of action are well pleaded, the plea must be tried and determined before any reference to the master. *Douglas v. Caldwell,* 64 N.C. 372; *Dozier v. Sprouse,* 54 N.C. 152. If the plaintiffs are not entitled to recover at all, it is useless to ascertain what amount they might recover if they had an enforceable cause of action. *Bank v. Fidelity Co.,* 126 N.C. 320, 35 S.E. 588; *Grimes v. Beaufort County,* 218 N.C. 164, 10 S.E. 2d 640; *Reynolds v. Morton,* 205 N.C. 491, 171 S.E. 781.

Nothing was said in *Grady v. Parker,* 228 N.C. 54, 44 S.E. 2d 449, which could have any bearing upon the present pleas in bar. They were not then before the Court, or in view.

There are other exceptions worthy of consideration, especially those addressed to the rulings on the pleas of estoppel, but as they may not arise on another hearing in the form now presented, we omit any present determinations thereof or conclusions thereon. Nor do we reach the question of priorities, as these may be upset or disarranged on the further hearing.

The judgment will be vacated and the causes remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

STATE v. ROY CURTIS, ARNOLD McKINNEY AND VON AYERS.

(Filed 23 March, 1949.)

1. Health § 3—

A district board of health is a creature of the Legislature and has only such powers and authority as are given it by the Legislature, G.S. 130-66, as rewritten in Chap. 1030, Session Laws 1945.

2. Health § 4: Constitutional Law § 8c—

A district board of health established pursuant to G.S. 130-66 is without authority to prescribe criminal punishment for the violation of its rules and regulations promulgated under subsection 4 of the statute, since such district is without power and authority to make laws, and if the statute be deemed sufficiently broad to grant it such authority, the delegation of such power is unconstitutional.

APPEAL by defendants from *Alley, Emergency Judge,* at January Term, 1949, of McDOWELL.

Criminal prosecutions upon three separate warrants begun in a justice of peace court of Marion Township charging the defendants respectively

with violating "Section 3 of the Public Health Ordinance adopted by Burke, Caldwell and McDowell District Board of Health, by selling milk in McDowell without first obtaining a permit for such sale" as provided in said section of said ordinance,—heard in Superior Court, on appeal thereto, and consolidated for purpose of trial.

For a special verdict the jury found as a fact in each case that the defendant named in the warrant did sell milk or milk products without a permit as required by Section 3 of the Public Health Service Ordinance adopted by the District Board of Health of the Counties of Burke, Caldwell and McDowell.

Section 3 of the ordinance declares that "it shall be unlawful for any person to bring into or receive into (County of) Burke, Caldwell, McDowell, or its police jurisdiction for sale, or to sell, or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product defined in this ordinance, who does not possess a permit from the health officer of (Counties of) Burke, Caldwell, McDowell . . ." And Section 16 of the ordinance provides that "any person who shall violate any of the provisions of this ordinance shall, upon conviction, be fined not more than $50.00, or imprisoned not more than 30 days, or both, in the discretion of the court, etc. . . ."

Upon the facts found, the court ruled that each defendant is guilty of selling milk in McDowell County without a permit required by law, and entered judgment "that the defendants, and each of them, pay the costs of the action."

Defendants, and each of them, appeal therefrom to Supreme Court, and assign error.

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

Proctor & Dameron and Roy W. Davis for defendants, appellants.

WINBORNE, J. Appellants contend, and rightly so, that Sections 3 and 16 of the Public Health Ordinance in question exceeds any lawful authority vested in the District Board of Health of Burke, Caldwell and McDowell Counties, and are void.

The statute, G.S. 130-66, as rewritten in Chapter 1030 of 1945 Session Laws of North Carolina and designated G.S. 130-66, subsections 1, 2, 3, 4 and 5, provides that the State Board of Health of North Carolina is authorized to, and, under the rules and regulations established by it, may form, when certain conditions exist, district health departments or units including more than one county; and, in subsection 4 of the statute as rewritten it is provided that "The District Board of Health shall have the immediate care and responsibility of the health interests of its district

. . . It shall make such rules and regulations, pay all lawful fees and salaries, and enforce such penalties as in its judgment shall be necessary to protect and advance the public health."

Thus the District Board of Health is a creature of the Legislature, and has only such powers and authority as are given to it by the Legislature. *Utilities Comm. v. Greyhound Corp.*, 224 N.C. 293, 29 S.E. 2d 909. While it is given power and authority to make rules and regulations, and to enforce penalties, it is not given the power and authority to make laws. Thus in declaring it to be unlawful for any person to sell milk in the district without having first obtained a permit as required by Section 3 of the ordinance, and in prescribing criminal punishment for a violation of the requirement, the Distrct Board of Health exceeded its authority. Indeed, as was aptly said by *Agnew, J.*, for the Court in *Locke's Appeal*, 72 Pa. St. 491, "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend . . ." This principle is in keeping with the Constitution of North Carolina, Art. II, Section 1, and with decisions in many cases in this State. *Express Co. v. R. R.*, 111 N.C. 463, 16 S.E. 393; *S. v. R. R.*, 141 N.C. 846, 54 S.E. 294; *Provision Co. v. Daves*, 190 N.C. 7, 128 S.E. 593; *Efird v. Commrs. of Forsyth*, 219 N.C. 96, 12 S.E. 2d 889; *Pue v. Hood, Commr. of Banks*, 222 N.C. 310, 22 S.E. 2d 896. See also *Field v. Clark*, 143 U.S. 647, 36 L. Ed. 294.

Therefore, if the statute, G.S. 130-66, as rewritten as above stated, be deemed sufficiently broad in language as to show a grant of power and authority to the District Board of Health to enact Sections 3 and 16 of the said Public Health Ordinance, it would run counter to the principle that the Legislature cannot delegate its power to make a law.

And it may be noted, in passing, that the General Assembly of North Carolina, now in session, has passed an act, S.B. 110, effective on ratification 28 February, 1949, amendatory of subsection 4 of G.S. 130-66, by adding at the end thereof the following: "If any person shall violate the rules and regulations made and established by a district health department, he shall be guilty of a misdemeanor and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days." However, the act does not purport to be retroactive, and is not applicable to, and requires no consideration in, case in hand.

The defendants are entitled to an acquittal, and, hence, the judgment below is

Reversed.

STATE v. TROY FELTON IVEY.

(Filed 23 March, 1949.)

1. Criminal Law §§ 56, 83—

Where the warrant upon which defendant is convicted fails to charge a criminal offense the court acquires no jurisdiction of defendant, and its judgment will be arrested even if the Supreme Court must act *ex mero motu*.

2. Fornication and Adultery § 2—

The offense of fornication and adultery is statutory, and therefore the essential elements of the offense must be set forth in the warrant or bill of indictment. G.S. 14-184.

3. Fornication and Adultery § 1—

The statutory offense of fornication and adultery is the lascivious cohabitation by a man and a woman who are not married to each other, which implies habitual intercourse.

4. Fornication and Adultery § 2—

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant is arrested by the Supreme Court *ex mero motu*.

APPEAL by defendant from *Williams, J.*, at November Term, 1948, of HARNETT.

Criminal prosecution begun in the recorder's court of Dunn, North Carolina, upon a warrant based on affidavit charging that defendant (1) "did unlawfully and willfully lewdly and lasciviously associate with and did engage in an act of intercourse with Pauline Hodges, not being married to the said Pauline Hodges," and (2) "did have in his possession 3½ gallons of non-tax paid whiskey for the purpose of sale . . .," etc.

The record discloses:

(1) That in recorder's court of Dunn defendant pleaded not guilty as to each charge so made against him, but was found guilty. Pursuant thereto judgment was pronounced, and defendant appealed to Superior Court.

(2) That in Superior Court "defendant entered a plea of not guilty to fornication and adultery and illegal possession of non-tax paid liquor for the purpose of sale."

(3) That on trial in Superior Court the "jury for their verdict say the defendant is guilty of F & A as charged in the warrant and not guilty of illegal possession of non-tax paid liquor," upon which judgment was

pronounced,—sentencing defendant "to jail for a term of not less than 20 or more than 24 months to be assigned to work the roads."

Defendant appeals to Supreme Court and assigns error.

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

Everette L. Doffermyre for defendant, appellant.

WINBORNE, J. While the record on this appeal presents serious questions arising in the course of the trial in the Superior Court, a fatal defect as to the first count appears upon the face of the record proper. No crime is there charged against defendant. Hence in that respect the court has not acquired jurisdiction of defendant, and, in such case the judgment must be arrested. And even though there be no motion for the arrest of judgment, this Court will act *ex mero motu,* that is, of its own motion, where lack of jurisdiction is apparent on the face of the record. This was the procedure followed in *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166, where the subject is pertinently treated and authorities cited by *Barnhill, J.* The rule applies in both civil and criminal cases. In *Branch v. Houston,* 44 N.C. 85, *Pearson, J.,* said: "If there be a defect, *e.g.,* a total want of jurisdiction apparent upon the face of the proceedings, the Court will of its own motion, 'stay, quash, or dismiss' the suit. This is necessary to prevent the Court from being forced into an act of usurpation, and compelled to give a void judgment . . . So, *ex necessitate,* the Court may on plea, suggestion, motion, or *ex mero motu,* where the defect of jurisdiction is apparent, stop the proceeding." The principle is recognized and applied in *Henderson Co. v. Smyth,* 216 N.C. 421, 5 S.E. 2d 136; *McCune v. Mfg. Co.,* 217 N.C. 351, 8 S.E. 2d 219; *Edwards v. McLawhorn,* 218 N.C. 543, 11 S.E. 2d 562; *S. v. King,* 222 N.C. 137, 22 S.E. 2d 241; *Hopkins v. Barnhardt,* 223 N.C. 617, 27 S.E. 2d 644; *Ridenhour v. Ridenhour,* 225 N.C. 508, 35 S.E. 2d 617.

In connection with the warrant in the present case, it must be borne in mind that the offense of fornication and adultery is statutory in this State. Our statute, G.S. 14-184, declares that "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." Therefore, in order to constitute a valid charge under this statute the essential elements of the offense must be set forth in the warrant or bill of indictment. And, in reference to these, the Court in opinion by *Seawell, J.,* in the case of *S. v. Davenport,* 225 N.C. 13, 33 S.E. 2d 136, interprets the statute in this way: " 'Lewdly and lasciviously cohabit' plainly implies habitual intercourse, in the manner of husband

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

Thus when the sufficiency of the warrant under which defendant stands charged in the first count is tested by the language of the statute, so interpreted by the Court, "habitual intercourse" is expressly negatived by the words "and did engage in an act of intercourse."

Judgment arrested.

STATE v. RANSOM TYNDALL.

(Filed 23 March, 1949.)

1. Criminal Law § 53b—

Where at the beginning of the charge the court instructs the jury as to the common law presumption of innocence in defendant's favor and places on the State the burden of proving defendant's guilt beyond a reasonable doubt, and at the beginning of the instruction complained of, repeats the charge upon the burden of proof, it will not be held for reversible error that the court, in charging upon the question of manslaughter failed to charge again upon the burden of proof, since the charge will be construed contextually and it is not required that the court repeat the burden of proof each time it refers to any finding on the evidence.

2. Same—

The burden is on the State to establish the guilt of the accused beyond a reasonable doubt, and not on the defendant to raise a doubt as to his guilt, and therefore reasonable doubt may arise from lack or deficiency of evidence as well as on the evidence introduced.

APPEAL by defendant from *Williams, J.*, November Term, 1948, of HARNETT.

Criminal prosecution on indictment charging the defendant with the murder of one Fred Norris.

The defendant operates a barber shop, and his wife a cafe, known as Ju Bill's Place, in connection with their home on the Dunn-Erwin Highway in Harnett County. Around 7 o'clock on Sunday evening, 5 September, 1948, Fred Norris came to the cafe and wanted an order of fried chicken in which Mrs. Tyndall specialized. Norris was drinking and a controversy ensued between him and the defendant.

The State's evidence tends to show that the defendant struck Norris with his fist, knocked him to the ground in front of the cafe, kicked and stomped him about the face and head, causing brain hemorrhages which resulted in his death.

The defendant testified that he struck the deceased only with his fists, in self-defense; that he did not kick him while down, and that his death was unexpected. He was unable to account for the lacerations about the face and head of the deceased.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's Prison for not less than 15 nor more than 20 years.

The defendant appeals, assigning errors.

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

Wilson & Johnson and Neill McK. Salmon for defendant.

STACY, C. J. The only exceptive assignment of error discussed in appellant's brief is the one addressed to the following portion of the charge:

"If you find from evidence beyond a reasonable doubt, that on this night, the 5th of September 1948, the defendant unlawfully did assault and kill the deceased Norris with malice, it would be your duty to render a verdict of guilty of murder in the second degree; but if you have a reasonable doubt of that and (if you find that on the night in question, the 5th of September 1948, at Ju Bill's Place the defendant committed an assault upon the deceased and inflicted upon him wounds which caused his death, it would be your duty to return a verdict of guilty of manslaughter)." Defendant excepts to portion in parentheses.

The vice of this instruction, it is contended, consists not in its substantive features but in the failure to require the prosecution to establish the elements of manslaughter beyond a reasonable doubt.

At the outstart of the court's charge he told the jury that the defendant entered upon the trial with the common-law presumption of innocence in his favor and that the prosecution had the burden of establishing his guilt beyond a reasonable doubt. *S. v. Grass,* 223 N.C. 31, 25 S.E. 2d 193. Then again at the beginning of the instruction, here assigned as error, the prosecution was correctly assigned the burden of proof, with the proper intensity, and we apprehend the jury must have understood the same rule applied to both degrees of an unlawful homicide then under consideration, *i.e.,* murder in the second degree and manslaughter. True it is, that the instruction might have been clearer, but the *lapsus linguæ,* if, indeed it be such, appears too innocuous and the assignment of error too attenuate to work a new trial of the cause. *S. v. Orr,* 175 N.C. 773, 94 S.E. 721.

Speaking to a similar exception in *S. v. Killian,* 173 N.C. 792, 92 S.E. 499, *Walker, J.,* delivering the opinion of the Court, said: "The objection

to the charge is without real merit. The judge, in opening his charge, told the jury that the burden of proof was upon the State, and that they must be satisfied of the guilt of the prisoner beyond a reasonable doubt before they could convict him. It was not necessary that he should repeat this rule of law every time he referred to any finding from the evidence, as he had sufficiently instructed them as to the burden and the *quantum* of proof, and this applied to his charge throughout. We should construe the charge as a whole."

In defining a reasonable doubt the court instructed the jury as follows: "A reasonable doubt is not a vain, imaginary, fictitious or possible doubt, but it is a sane, rational doubt growing out of the evidence in the case supported by common sense and reason."

Reference is made to this definition because of the use of the expression "growing out of the evidence in the case." True it is, that a reasonable doubt may grow out of the evidence in the case. It is also true that it may arise from a lack of evidence, or from its deficiency. In a criminal prosecution the burden is on the State to establish the guilt of the accused beyond a reasonable doubt, and not on the defendant to raise a doubt as to his guilt. *S. v. Steele,* 190 N.C. 506, 130 S.E. 308; *S. v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

While not assigned as error in this case, attention is called to the expression because of its incompleteness and mayhap insufficiency. *S. v. Pierce,* 192 N.C. 766, 136 S.E. 121.

On the record as presented, no reversible error has been made manifest. Hence, the validity of the trial will be upheld.

No error.

ELLEN C. EDWARDS v. ARPHENIE EDWARDS AND PETER EDWARDS.

(Filed 23 March, 1949.)

Executors and Administrators § 15g: Pleadings § 31—

Upon petition for allotment of a widow's year's allowance, allegations in the answer to the effect that the widow did not need an allotment for her support, that deceased's will evidenced a desire that the widow should receive no part of the estate, and that defendants were the aged and infirm parents of deceased dependent upon the estate left them by the will, are irrelevant to the issues and could not be shown in evidence, and were properly stricken upon motion, since even the reading of the pleadings would be highly prejudicial to petitioner.

APPEAL by defendants from *Moore, J.,* August Term, 1948, YANCEY. Affirmed.

Petition before the clerk, under G.S. 30-27 *et seq.*, for the allotment of a widow's year's allowance, heard on motion to strike allegations contained in the answer.

The defendants filed answer to the petition of plaintiff in which they make certain allegations which may be summarized as follows: (1) Plaintiff has recently received a large sum as compensation for personal injuries sustained in an automobile collision and therefore does not need an allotment out of the property of deceased, left for the support of his aged parents; (2) as the widow of deceased, a chief aviation machinist mate in the United States Navy, she has received and will receive support from the United States Government; (3) the defendants, parents of the deceased, are aged and infirm, that the male defendant is paralyzed, blind, and helpless, and they are dependent upon the estate left by the deceased for their support; (4) that petitioner lives in Brooklyn, N. Y., is able to support herself without depriving the aged and disabled defendants of their means of livelihood; and (5) deceased in his will evidenced a desire that petitioner should receive no part of his estate.

There are other allegations in the answer which raise issues of fact for the jury.

The plaintiff appeared and moved to strike said allegations more fully set out in the answer. The motion was allowed and petitioners appealed.

J. Frank Huskins for petitioner appellee.

W. E. Anglin and C. P. Randolph for defendant appellants.

BARNHILL, J. The facts alleged in the answer, stricken by order of the court below, have no bearing on the issues raised by the pleadings. They could not be shown in evidence. To permit them to be presented to the jury, even through the reading of the pleadings, would be highly prejudicial to the petitioner. Hence the order striking same must be

Affirmed.

STATE v. RUDOLPH GLATLY.

(Filed 23 March, 1949.)

1. Criminal Law § 52b—

The charge in this case *is held* to have properly instructed the jury upon the presumption of innocence and placed the burden on the State to prove defendant's guilt beyond a reasonable doubt and to have correctly defined reasonable doubt.

2. Criminal Law § 53l—

The effect of defendant's evidence of good character is not an essential feature of the case, and the court is not required to charge thereon in the absence of a request.

3. Criminal Law § 78e (1)—

An exception to the failure of the court to declare and explain the law arising upon the evidence should point out wherein the charge is deficient.

4. Criminal Law § 53d—

The charge in this case *held* to have correctly instructed the jury as to the essential elements of the offense charged.

APPEAL by defendant from *Nettles, J.*, September Term, 1948, of MITCHELL. No error.

The defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating liquor (G.S. 20-138). From judgment on verdict of guilty as charged, the defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton, and John R. Jordan, Jr., Member of Staff, for State.

Charles Hutchins and W. C. Berry for defendant, appellant.

DEVIN, J. The defendant's appeal from an adverse result below is based upon exceptions noted to the judge's charge to the jury. It is argued that the court failed to charge that the defendant's guilt must be found beyond a reasonable doubt, and that the court did not apply the law to the facts in evidence, and omitted reference to the effect of the evidence of good character of the defendant. But upon examination of the record we find none of the exceptions noted and brought forward in defendant's appeal can be sustained. The court properly charged the jury that the defendant was presumed to be innocent, and that the burden was upon the State to satisfy the jury by the evidence beyond a reasonable doubt of the guilt of the defendant as charged. The court also defined reasonable doubt substantially as stated in numerous decisions of this Court. *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Boswell,* 194 N.C. 260, 139 S.E. 374; *S. v. Griffith,* 185 N.C. 756, 117 S.E. 586; *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466. In the absence of request, it was not incumbent upon the trial judge to charge specifically as to the effect of evidence of the good character of the defendant. This was not an essential feature of the case. *S. v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909; *S. v. Merrick,* 171 N.C. 788 (795), 88 S.E. 501. The defendant does not point out wherein the court failed to declare and explain the law arising upon the evidence. *S. v. Thomas,* 226 N.C. 384, 38 S.E.

2d 193. However, we think the case was fairly presented. *S. v. Britt,* 225 N.C. 364, 34 S.E. 2d 408. The jury was properly instructed as to what constitutes driving under the influence of intoxicating liquor in accord with the definition set out in *S. v. Carroll,* 226 N.C. 237, 37 S.E. 2d 688.

In the trial we find

No error.

DORA ALEXANDER HANKS, ADMX., v. NORFOLK & WESTERN R. R.

(Filed 30 March, 1949.)

1. Railroads § 4—

Evidence in this action for wrongful death resulting from a collision at a railroad grade crossing *is held* sufficient to be submitted to the jury and overrule the railroad company's motion to nonsuit.

2. Death § 8—

The measure of damages in an action for wrongful death is the present worth of the pecuniary loss suffered by those entitled to the distribution of the recovery, which is to be measured by the probable gross income of the deceased during his life expectancy less the probable cost of his own living and usual or ordinary expenses.

3. Same—

In an action for wrongful death, evidence relating to the age, health and life expectancy of deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had of earning money is competent.

4. Same—

In an action for wrongful death, authenticated copies of court records showing that the deceased had pleaded guilty and was sentenced for non-support of his minor children, with sentence suspended on condition that he pay into the clerk's office a stipulated sum weekly for their support, *is held* competent on the issue of damages, since it imports more than a single act of dereliction and reveals a serious defect of character.

5. Same—

In an action for wrongful death, complaint and order for temporary alimony in an action for reasonable sustenance theretofore brought by the deceased's wife against him, which had not been served on deceased because of his death, are properly excluded.

6. Same—

In an action for wrongful death, verified complaint in an action theretofore instituted by deceased against his wife for absolute divorce, alleging that he and his wife had entered into an agreement respecting custody and support of the minor children of the marriage, and setting forth the agree-

ment, is competent upon the issue of damages to show the attitude of the deceased toward his family.

7. Same—

In an action for wrongful death, the inventory of the estate of the deceased showing salary due decedent at the time of death and the present action for wrongful death as the total assets of the estate, is competent as an aid to the jury in arriving at a proper estimate of the pecuniary worth of the decedent to those entitled to the distribution of the recovery.

ERVIN, J., dissenting.

DEVIN and SEAWELL, JJ., concur in dissent.

APPEAL by defendant from *Gwyn, J.*, September Term, 1948, of FORSYTH.

Civil action to recover damages for death of plaintiff's intestate alleged to have been caused by the wrongful act, neglect or default of the defendant.

The record discloses that plaintiff, administratrix, is the widow of James Garfield Hanks, who was killed on the morning of 12 January, 1947, about 8:35 a.m., when a delivery truck of Southern Dairies, Inc., which he was driving, collided with the engine of defendant's passenger Train No. 34 at a grade crossing near Oak Grove Church in Forsyth County.

It is in evidence that the train approached the single-track crossing, with headlight burning, coasting down grade at a speed of 40 or 45 miles per hour. The morning was cold and foggy; the atmosphere hazy.

The deceased was delivering milk, and Lawrence Tuttle, a boy of fifteen years of age, was with him on the "step-in-drive" truck—a retail delivery truck in which the driver stands up to drive—and as they came to the crossing, with which they were familiar, the deceased brought the truck to a stop. Both looked and listened, but neither saw nor heard the approaching train, and the deceased then drove onto the crossing.

The engineer testified that he sounded the regular crossing whistle, two long and two short blasts, for the crossing in question, "and I was blowing the last short when I hit the milk truck. . . . I didn't see that truck."

As bearing upon the measure of damages the plaintiff was allowed to show the gross earnings of the deceased for the past several years and that he was being paid an average weekly wage of $74.40 per week as a swing man or substitute truck driver at the time of his death.

In reply or rebuttal the defendant sought to show what manner of man the deceased was by offering the following:

1. Judgment of Winston-Salem Municipal Court showing that on 7 October, 1943, Garfield Hanks "entered a plea of guilty" and was

adjudged guilty of nonsupport of his two minor children and sentenced to the roads for six months, execution against the person suspended for fifteen years on condition the defendant pay into the Clerk's office $10 per week for the support of his children.

As this judgment was a bar to Hanks' entrance into the Army, it was suspended on 24 February, 1944, "during the period the said defendant is in the Military Service of the United States," the original judgment to be in full force and effect upon the termination of such service.

2. Complaint and order for alimony *pendente lite* in action filed by Dora A. Hanks *v.* Garfield Hanks for maintenance and support, said complaint having been filed in the Superior Court of Forsyth County 29 January, 1944, and order signed 9 February, 1944.

3. Summons and verified complaint filed in the Superior Court of Forsyth County 11 January, 1947, in the case of Garfield Hanks *v.* Dora Alexander Hanks for absolute divorce on ground of two years' separation, it being alleged in the complaint that the plaintiff and defendant therein had entered into an agreement respecting the custody and support of their three minor children. The children were to remain in the custody of the mother, and the plaintiff agreed to pay, through the Clerk's office of the Municipal Court, for their maintenance, support and education, $25 per week until the oldest two, twin girls, reached the age of eighteen years, and thereafter to pay in the same manner and for like purpose $12.50 per week until the youngest child attained the age of eighteen years.

This complaint was filed on the day prior to the death of plaintiff's intestate. The summons was returned unserved due to "plaintiff's death."

4. The defendant offered the original inventory of the estate of Garfield Hanks, filed 25 July, 1947, showing "salary due decedent at date of death, $110.33," the instant action for wrongful death, and nothing more.

All the foregoing evidence offered by the defendant was excluded. Objection and exception in each instance.

The usual issue of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff, the jury assessing the damages at $27,500.00.

From judgment on the verdict, the defendant appeals, assigning errors.

Higgins & McMichael for plaintiff, appellee.

W. W. Coxe and Craige & Craige for defendant, appellant.

STACY, C. J. The appeal presents for review the rulings on the motions for nonsuit and the exception to exclusion of defendant's evidence offered to show the character of the deceased and his disinclination to provide for dependent members of his family.

The defendant stressfully contends that its motion for judgment of nonsuit should have been allowed, if not at the close of plaintiff's evidence, then certainly at the close of all the evidence. Authorities may be found which lend support to the rulings below, and others which seem to point in the opposite direction. It is clearly a border-line case. *Quinn v. R. R.*, 213 N.C. 48, 195 S.E. 85. Upon full consideration and careful perusal of the record, we are inclined to the view that plaintiff's evidence survives the demurrers and suffices to make it a matter for the jury. Anno. 162 A.L.R. 96. The rulings on the motions for judgment as in case of nonsuit will be upheld. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307; *Meacham v. R. R.*, 213 N.C. 609, 197 S.E. 189.

We are yet to consider, however, the exclusion of defendant's evidence offered to show the character and fiber of the deceased in dealing with dependent members of his family. Was any of this proffered evidence admissible or was its total exclusion correct? The answer lies in the type of questions to be decided and the pertinency of the evidence as a means to such decision.

It is provided by G.S. 28-174 that in an action for wrongful death the plaintiff may recover such damages "as are a fair and just compensation for the pecuniary injury resulting from such death." It is further provided in G.S. 28-173 that the amount recovered in such action is not liable to be applied as assets of the estate of the deceased, except as to burial expenses, "but shall be disposed of" according to the statute of distributions of personal property in case of intestacy.

The method established by the decisions for measuring the pecuniary loss resulting from the death of the deceased is to deduct the probable cost of his own living and usual or ordinary expenses from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. *Carpenter v. Power Co.*, 191 N.C. 130, 131 S.E. 400. In arriving at this assessment (the present worth of which alone may be awarded the plaintiff), the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money; the end of it all being, as expressed in *Kesler v. Smith*, 66 N.C. 154, to enable the jury fairly to fix upon the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus get at the pecuniary worth of the deceased to his family. *Burns v. R. R.*, 125 N.C. 304, 34 S.E. 495. It follows, therefore, that evidence to all these points was properly admissible on the hearing. *Burton v. R. R.*, 82 N.C. 505.

Was any of the excluded evidence conducive to one or more of these ends? We think so, especially as it was offered in reply to the evidence

of the plaintiff tending to show the gross earnings of the deceased over a period of time immediately preceding his death.

1. The defendant sought to show that the deceased entered a plea of guilty of nonsupport of his two minor children in the Winston-Salem Municipal Court on 7 October, 1943, and was sentenced to the roads, with execution against the person suspended on condition that he pay into the Clerk's office $10 a week for the support of his children, and that on 24 February, 1944, this judgment was ordered in abeyance during the period the deceased was in military service.

This was evidence of more than a single act of dereliction on the part of the deceased. It showed the neglect and disregard of a parent for his children which had necessarily continued for some time before he was hailed into court. Moreover, it revealed a serious defect of character—the will to "provide not for his own, and especially for those of his own house" (I Tim. 5:8)—and it was competent to be shown in evidence under authority of what was said in *Kesler v. Smith,* 66 N.C. 154. Dean Wigmore remarks in his valuable work on Evidence, Vol. I, Sec. 210a, 3rd Ed., ". . . it would seem that the particular bad acts of a deceased person would be receivable to evidence his moral character, as far as that character might be material in estimating the damages payable to next of kin in an action for loss of support due to death by wrongful act."

The evidence was admissible as bearing upon the moral fiber of the deceased and as tending to show what manner of man he was, especially in providing for those of his own household who were dependent upon him. *Hicks v. Love,* 201 N.C. 773, 161 S.E. 394; *Hill v. Erie R. Co.,* 232 N. Y. Sup. 66.

2. The defendant offered the complaint and order for temporary alimony in the wife's action against the deceased for reasonable subsistence and counsel fees, filed in the Superior Court of Forsyth County, 29 January, 1944, which on objection were excluded.

As the record fails to show any service of process on the deceased or that he ever had any notice of the pendency of the action or participated in any hearing therein, the ruling of the court below will not be disturbed. In this connection, however, reference is made to the cases of *Peterson v. Pete-Erickson Co.,* 186 Minn. 583, 244 N.W. 68; *Piland v. Yakima Motor Coach Co.,* 162 Wash. 456, 298 Pa. 419, and *Austin Gaslight Co. v. Anderson* (Texas, 1924), 262 S.W. 136, as bearing obliquely on the subject, if not directly in point. Anno. 90 A.L.R. 922.

3. The defendant sought to show that on the day before his death, the deceased filed suit against his wife in the Superior Court of Forsyth County for absolute divorce on the ground of two years' separation, alleging in his verified complaint that he and the defendant therein had entered into an agreement respecting the custody and support of their

three minor children and setting out the terms of the agreement. This was excluded presumably on the ground that the summons and complaint were returned unserved due to the death of the plaintiff therein.

It appears, however, that the deceased invoked the jurisdiction of the court and filed his verified complaint in the action, alleging matters which made manifest his attitude towards the support of his family. Indeed, the complaint spells out his attitude precisely. This was competent to be shown on the issue of damages. *Hicks v. Love, supra.*

In the case last cited, it was held competent for the administrator to show "that the deceased provided for his family, that he had a comfortable home, a 200-acre farm, and a plenty for his family to eat and wear." Clearly, then, if the plaintiff in an action for wrongful death is permitted to reveal the provident attitude of the deceased towards his family, the defendant cannot be denied the right to offer evidence tending to disclose a contrary attitude on the part of the deceased towards the same obligation. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348.

4. The defendant offered the original inventory of the estate of the deceased, filed 25 July, 1947, showing "salary due decedent at date of death, $110.33," the present action for wrongful death, and nothing more.

We have two cases bearing upon the question, the one upholding the exclusion of such evidence, *Cooper v. R. R.,* 140 N.C. 209, 52 S.E. 932, the other favoring its admission, *Witte v. R. R.,* 171 N.C. 309, 88 S.E. 435.

In the *Cooper case,* the evidence was first admitted and then withdrawn on the plaintiff's rebuttal showing that the "deceased had been taking care of five orphans, children of his deceased sister and her deceased husband; that he was taking care of his aged father over 80 years of age, and was taking care of an elder sister in addition to his own wife and child," as appears from the original transcript.

Here, no such complication is presented, at least not up to the present time. Such evidence has been admitted more often than excluded when it gave indication of accumulation by personal effort. *McClamrock v. Colonial Ice Co.,* 217 N.C. 106, 6 S.E. 2d 850. Where the jury is to determine "the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased," we think it should have the benefit of all available light on the subject. *Carter v. R. R.,* 139 N.C. 499, 52 S.E. 642. And in the absence of matters to complicate the question, it would seem that what the deceased left at death as a result of his own exertions ought to be of some help to the jury in arriving at a proper estimate of his pecuniary worth to the recipients or disposees of the recovery who take after the manner of distributees of deceased's personal estate. *Witte v. R. R., supra.*

It results, therefore, from what is said above that the defendant is entitled to another hearing. It is so ordered.

New trial.

ERVIN, J., dissenting: The defendant reserved exceptions to the exclusion of its Exhibits A, B, C, D, E, F, and G, and is now awarded a new trial by the majority of this Court on the specific basis that the rejection of Exhibits A, D, E, F, and G constituted error. I cannot agree with this decision.

It is a fundamental rule of appellate practice that a judgment will be upheld on appeal unless the appellant shows affirmatively by the record that some reversible, material, substantial, or prejudicial error was committed by the lower court. *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *Roberts v. Bus Co.,* 198 N.C. 779, 153 S.E. 398; *Hare v. Grantham,* 158 N.C. 598, 74 S.E. 102; *Biggs v. Waters,* 112 N.C. 836, 16 S.E. 921. Consequently, the burden devolves on defendant to establish by the record that the trial court erred in excluding the exhibits which it presented.

To be admissible, evidence must satisfy these two requirements: (1) It must be relevant to the issue; and (2) its reception must not be forbidden by some specific rule of law. Wigmore on Evidence (3d Ed.), Sections 9-10; *Peebles v. Idol,* 198 N.C. 56, 150 S.E. 665.

The documents offered in evidence by defendant as its Exhibits E and F are respectively the summons and complaint in an action for divorce which the intestate brought against the plaintiff in her individual character as his wife in the Superior Court of Forsyth County on 11 January, 1947, the day before his death. The complaint alleges that the decedent and his wife had entered into a specified contract with reference to the future support of their three children. Since the summons and the complaint were returned to the court unserved two days after the intestate's death and never formed the basis for any judicial action, they constituted at most mere admissions of the deceased, which the trial judge rightly rejected because their reception in evidence was barred by the specific rule of law excluding hearsay.

This conclusion is fully supported by *Dowell v. Raleigh,* 173 N.C. 197, 91 S.E. 849, and *Holmes v. Wharton,* 194 N.C. 470, 140 S.E. 93, recognizing and applying the rule which prevails in this jurisdiction that the admissions of the deceased are not competent against his personal representative in an action to recover damages for death by wrongful act. The reasons for the rule were thus stated in *Dowell v. Raleigh, supra:* "The declaration of the intestate as to the condition of the wagon was incompetent. It was not a declaration against interest, as at that time he had no interest to serve or disserve. He had no cause of action himself, as his death was instantaneous, nor did he even have any interest

in this cause of action. It is one not known to the common law, but created by the statute, and the beneficiaries take, not by any inheritance or succession from him, but solely because they are named in the statutes as the recipients of the fund recovered for the death caused by the defendant's negligent or wrongful act. The cause of action never arose until the death of the intestate, and then not to him, but to those who are designated by the statute to take the fund recovered. They acquire their right by the statute alone, and not because of any privity with the intestate, for none exists between them, in any proper sense of the term." Though not pertinent to this case, it is observed, in passing, that the rule under consideration is now subject to a single statutory exception created by the Legislature in 1919 providing that "the dying declarations of the deceased as to the cause of his death shall be admissible in evidence" in actions for wrongful death. G.S. 28-173.

Exhibits A and D are duly authenticated copies of records of the Municipal Court of Winston-Salem reciting that on 7 October, 1943, the intestate was tried in such court on the criminal charge of nonsupport of his first and second born children; that he "entered a plea of guilty" and was "adjudged guilty"; and that he was thereupon ordered to pay the sum of $10.00 per week to the clerk of the court during the next succeeding fifteen years for the support of his first and second born children. There is no evidence in the record tending to show that this judgment ever controlled the contributions of the decedent to the support of his family outside of an allegation in Exhibit B set out below that such was the case during the brief period beginning 7 October, 1943, and ending 29 January, 1944.

Exhibit B was verified by plaintiff on the date last mentioned and is the original complaint in an action for alimony without divorce brought about that time by the plaintiff in her individual character against her husband, the intestate, in the Superior Court of Forsyth County. In this complaint, the plaintiff averred that the deceased abandoned the plaintiff on 26 September, 1943; that thereafter, namely, on 7 October, 1943, he was convicted of nonsupport in the Municipal Court of Winston-Salem and ordered to make payment for the support of his children as set out above; that from the date of the judgment in the criminal action down to the time of the verification of the complaint the intestate paid $10.00 per week for the support of his first and second born children in conformity to the order of the Municipal Court of Winston-Salem; that the plaintiff was again pregnant by the decedent and that the sum of $10.00 per week was insufficient for the support of the plaintiff, and the first and second born children, and the defraying of the expense incident to the future birth of the third child with which the plaintiff was then pregnant; and that the court ought to award the plaintiff alimony both

pending the action and on final hearing sufficient for the support of plaintiff and the children of her marriage with the deceased. Exhibit C is the original of an order signed by Judge H. Hoyle Sink on 7 February, 1944, in the action for alimony, making findings of fact in harmony with the allegations of Exhibit B and ordering the intestate to pay to the clerk of the Municipal Court of Winston-Salem as alimony pending the action for the support of plaintiff and his children the sum of $25.00 weekly, which was to include the payment of $10.00 mentioned in the judgment in the criminal action. Nothing in the recitations in Judge Sink's order or elsewhere in the record reveals that any process or notice was ever served on the intestate in the action for alimony without divorce, or that he ever appeared therein either in person or by counsel, or that he ever acquired any knowledge of the institution or pendency of the action or the rendition of the order for temporary support. Furthermore, it does not appear that any proceedings were had in the action after 7 February, 1944, or that the contributions of deceased to the support of his family subsequent to that date bore any relation whatever to the allowance for support specified in the order.

Exhibit G is the inventory of the estate of the intestate. It was filed by plaintiff in her representative capacity on 6 May, 1947, and reveals that the deceased left personal property worth only $110.33.

Since it does not appear that the court ever acquired any jurisdiction of the deceased by service or appearance in the action for alimony without divorce, Exhibits B and C are not admissible in evidence as a judicial record. In consequence, Exhibit C, the order for temporary alimony, is barred from admission at all events. *Rainey v. Hines,* 121 N.C. 318, 28 S.E. 410; 32 C.J.S., Evidence, section 647. Likewise, it is plain that the contents of Exhibit B, the complaint, cannot be received as admissions of the plaintiff in her representative capacity as administratrix because the complaint was drafted before her appointment and qualification. *Coble v. Coble,* 82 N.C. 339; *May v. Little,* 25 N.C. 27. Furthermore, it cannot be received on the theory that the plaintiff is beneficially interested in the litigation in her individual character for the reason that she shares in any recovery as widow of the deceased, and that by reason thereof the contents of Exhibit B ought to be received in evidence against the plaintiff in her representative capacity as administratrix as admissions of the real party in interest. The cause of action for death by wrongful act was created by the Legislature. Under the pertinent statutes, the widow and three children of James Garfield Hanks share equally and in severalty any damages recovered for his death. G.S. 28-149, 28-173. Hence, there is no basis for any contention that the children are in privity with the mother or that they have any joint interest with her in the matter in suit in a legal sense. Moreover, there

can be only one finding as to the pecuniary injury resulting from the death of the deceased. This cannot be one thing to the widow and another thing to the children. The admissions of the widow contained in Exhibit B were made without any authority from the children, and cannot possibly be received in evidence to affect the interest of the widow without prejudicing the interests of the children. For these reasons, the trial judge properly excluded Exhibit B under the rule that declarations are not receivable in evidence even against the declarant if it is impossible to admit them without prejudicing the rights of nondeclarants who did not authorize the making of the declarations, and are not in privity with the declarant, and have no joint interest with the declarant in the matter in suit. *In re Casada,* 228 N.C. 548, 46 S.E. 2d 468; 31 C.J.S., Evidence, section 320. The plaintiff did not testify on the trial. Thus, the question of the competency of Exhibit B for the purpose of contradiction does not arise.

It is noted here that the opinion of the majority concedes that no error was committed in rejecting Exhibits B and C.

Since it appears that Exhibits B, C, E, and F were rightly excluded under specific rules of law, we now take up the question of whether Exhibits A, D, and G meet the other test of admissibility, to wit: relevancy, which is, in essence, a matter of logic rather than law. We doubt that a more illuminating criterion of relevancy can be devised than the one implicit in the following quotation from 31 C.J.S., Evidence, section 158: "An offer of a party to prove a fact in evidence involves an assertion by him that such a relation exists in reason as a matter of logic between the fact offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter, and the relation thus asserted is termed relevancy."

It is indisputably clear that Exhibits A, D, and G bear no logical relationship to the issues of negligence and contributory negligence. In determining whether they are relevant to the issue of damages, we must examine the legal rules governing that issue.

When the Legislature created a cause of action for death by wrongful act, it decreed that "the plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." G.S. 28-173. It has been settled by repeated adjudications that the measure of damages for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable costs of his own living and usual and ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy. *Rea v. Simowitz,* 226 N.C. 379, 38 S.E. 2d 194; *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341; *White v. R. R.,* 216 N.C. 79, 3 S.E. 2d 310; *Carpenter v. Power Co.,*

191 N.C. 130, 131 S.E. 400; *Purnell v. R. R.,* 190 N.C. 573, 130 S.E. 313; *Gurley v. Power Co.,* 172 N.C. 690, 90 S.E. 943; *Coley v. Statesville,* 121 N.C. 301, 28 S.E. 482. The cost of the deceased's own living and his usual and ordinary expenses under this rule do not include his contributions to the support of his dependents, and such contributions are not deducted from gross earnings in calculating the net pecuniary value of his life. *Rigsbee v. R. R.,* 190 N.C. 231, 129 S.E. 580; *Roberson v. Lumber Co.,* 154 N.C. 328, 70 S.E. 630; *Carter v. R. R.,* 139 N.C. 499, 52 S.E. 642.

It necessarily follows that a trial court should admit in an action for wrongful death any evidence not excluded by some specific rule of law having a logical tendency to show either the probable gross income which would have been derived from the deceased's own exertions, or the probable cost of the deceased's own living and ordinary and usual expenses during the period he would have continued to live if his life had not been cut off by the wrongful act of the defendant. *Hicks v. Love,* 201 N.C. 778, 161 S.E. 394; *Burns v. R. R.,* 125 N.C. 304, 34 S.E. 495.

It is evident that Exhibit G, the plaintiff's inventory of the deceased's personal estate, standing alone, has no intrinsic relevancy to the facts in issue on the question of damages. The observations made in *Cooper v. R. R.,* 140 N.C. 209, 52 S.E. 932, 3 L.R.A. 391, 9 Ann. Cas. 71, where similar evidence was rejected, seem appropriate here: "If these papers should show a large estate, there are so many ways by which it could be explained otherwise than by the capacity of the deceased to accumulate money, and if it is small, there are so many and various ways it could be accounted for, consistent with the highest capacity to earn and acquire, that these admissions, we think, would tend rather to confuse than aid the investigation, and would open up a field of inquiry entirely too extensive and often foreign to the issue. We hold the papers to be irrelevant, and affirm the ruling of the trial judge on that question."

The defendant's position is not improved by combining Exhibit G and Exhibits A and D. Exhibit B was barred from admission by specific rules of law, and no other evidence was presented on the trial tending to show that the criminal judgment mentioned in Exhibits A and D controlled or limited the contributions of the deceased to the support of his dependents even for a day. It does not appear from the record that Exhibits A, D, and G have any logical tendency to prove or disprove any fact in issue in respect to deceased's probable earnings, or probable personal expenses, or probable contributions to the support of his dependents. Indeed, they leave these matters to speculation.

Moreover, the isolated fact that the intestate was convicted of nonsupport on a single occasion as set forth in Exhibits A and D is not admissible to show his character or habits. *Edwards v. Griner,* 42 Ga.

App. 282, 155 S.E. 789; Stansbury: North Carolina Evidence, section 95; Wigmore on Evidence (3rd Ed.), section 376.

In my judgment, the appellant has failed to establish the admissibility of any of the rejected papers. Hence, my vote is for an affirmance of the judgment of the trial court.

I am authorized to say that *Mr. Justice Devin* and *Mr. Justice Seawell* concur in this dissent.

T. P. LEE v. MATTIE E. RHODES AND HUSBAND, H. W. RHODES.

(Filed 30 March, 1949.)

1. Trial §§ 44½, 48½—

While the trial court may set aside a verdict and may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues, the trial court may not remove an irreconcilable repugnancy in the verdict by vacating a part thereof.

2. Same—

The jury found that the paper writing at issue was not executed for the purpose of securing a debt, and at the same time found that a defeasance clause was omitted therefrom by mutual mistake. *Held:* The action of the trial court in setting aside the finding that the instrument was not executed for the purpose of securing a debt is error entitling appellant to a new trial when his rights are not precluded by answers to the other issues, since the court has no power to remove the irreconcilable repugnancy in the verdict, this being a matter for the jury exclusively.

3. Deeds § 3—

A married woman may attack the certificate of her acknowledgment and privy examination for (1) fraud, duress or undue influence known to or participated in by the grantee, G.S. 39-11, (2) nonappearance before the officer and no examination had, (3) forgery, (4) mental incapacity or infancy.

4. Same—

The attack by a married woman of the certificate of her acknowledgment and privy examination must be by direct action.

5. Same—

Where the appearance of a married woman before the probate officer is admitted or established, the certificate of the probate officer as to the acknowledgment and privy examination of the married woman is conclusive, when regular in form, as to all matters which the officer is required to certify.

6. Same—

Where a married woman admits her appearance before the probate officer, and the certificate of her probate and privy examination are regular

in form, her testimony that the officer did not comply with the formalities required by statute is insufficient to justify the submission of an issue in regard thereto, and in this case where the issue was submitted upon such evidence, it was error for the court to refuse appellant's motion for a directed verdict thereon in his favor.

7. Same: Evidence § 8: Trial § 30—

In an action in ejectment where the defendants plead want of proper acknowledgment of the *feme* defendant in the deed executed by herself and husband to plaintiff, the plea of want of proper acknowledgment is an affirmative defense upon which defendants have the burden of proof, and therefore a directed verdict thereon in favor of plaintiff would not constitute a peremptory instruction in favor of the party having the burden of proof.

APPEAL by plaintiff from *Williams, J.*, September Term, 1948, JOHNSTON. New trial.

Civil action in ejectment in which defendants seek a reformation of the instrument under which plaintiff claims title.

Plaintiff and *feme* defendant are brother and sister. On 14 March 1927, their father, Thomas Lee, conveyed the *locus* to defendant Mattie Rhodes, reserving, however, unto himself and his wife an estate for life. Thereafter, the male defendant became financially involved. *Feme* defendant became surety on his notes. Judgments were secured on the notes and executions were issued. Defendants appealed to plaintiff for assistance, and he agreed to advance the funds necessary to prevent a sale of the property. Thereupon, on 5 January 1931, defendants executed a paper writing, in form a deed, conveying the *locus* to plaintiff. Plaintiff asserts that he purchased the property and that said instrument was and is in fact a deed. Defendants allege that the fund advanced by plaintiff was a loan, and that it was agreed that they should execute a mortgage on the *locus* as security for the payment thereof, and that a defeasance clause was omitted therefrom by mutual mistake of the parties. They also allege that the private examination of *feme* defendant was not taken separate and apart from her husband as provided by statute.

When the cause came on for trial in the court below, an issue of tenancy bottomed on plaintiff's cause of action was submitted to and answered by the jury in favor of defendants. The court also submitted issues raised by defendants' cross action and plaintiff's plea of the statute of limitations as follows:

"4. Was the private examination of Mattie E. Rhodes to the aforesaid deed taken by Willis A. Powell, Notary Public, according to law?

"Answer: No.

"5. Was the instrument executed in the form of a deed from the defendants to T. P. Lee, intended for the purpose of securing a debt from the defendants to T. P. Lee, as alleged in the defendant's answer?

"Answer: No. (No. 5 set aside in discretion of Court. See M. D. 22, p. 459.)

"6. At the time of the execution of the said instrument was the defeasance clause omitted from said instrument by reason of the mutual mistake, ignorance, fraud or undue influence as alleged?

"Answer: Yes.

"7. If so, is the defendants' claim barred by the three-year statute of limitation as alleged in the further reply?

"Answer: No."

The jury having answered said issues as appears of record, the court, on motion of defendants, set aside the verdict on the fifth issue and then signed judgment on the verdict as amended. Plaintiff excepted and appealed.

J. Ira Lee and Jane A. Parker for plaintiff appellant.

Lyon & Lyon and A. M. Noble for defendant appellees.

BARNHILL, J. The jury, by their verdict, found that the paper writing at issue was not executed for the purpose of securing a debt. At the same time they found that a defeasance clause was omitted therefrom by mutual mistake. The answers to these issues are contradictory. If the instrument was not intended as security, a defeasance clause had no proper place therein. The court below undertook to reconcile the irreconcilable by setting aside the answer to the fifth issue.

Unquestionably the trial judge has authority to set aside a verdict. Likewise, he may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues. *Satterfield v. Eckerd's, Inc.*, 201 N.C. 599, 160 S.E. 828. He has no power, however, to remove an irreconcilable repugnancy in a verdict by vacating a part thereof, for to do so constitutes an amendment of the verdict as rendered by the jury. Had the inconsistency been called to the attention of the jury before the verdict was accepted, they could have reconsidered their verdict and removed the repugnancy. *Baird v. Ball*, 204 N.C. 469, 168 S.E. 667. But this was exclusively their prerogative. It was for them to decide in what manner the conflict in their verdict should be reconciled.

Nothing else appearing, the contradictory nature of the answers to the fifth and sixth issues would require a new trial. *Palmer v. Jennette*, 227 N.C. 377, 42 S.E. 2d 345; *Jernigan v. Neighbors*, 195 N.C. 231, 141 S.E. 586; *Supply Co. v. Horton*, 220 N.C. 373, 17 S.E. 2d 493; *Bottoms v. R. R. Co.*, 109 N.C. 72; *Porter v. R. R.*, 97 N.C. 66.

But defendants insist that the answer to the fourth issue is not affected by the action of the court in setting aside the verdict on the fifth issue

and is sufficient to sustain the judgment. This is conceded. Therefore, it is necessary to determine whether there was error in the trial in respect to this issue.

The plaintiff moved for a directed verdict on the fourth issue and, after verdict, moved to set aside the verdict thereon for that there was no sufficient evidence to sustain the same. The court denied each motion and plaintiff excepted. The assignments of error bottomed on these exceptions must be sustained.

A married woman may attack the certificate of her acknowledgment and privy examination respecting the execution of a deed or other instrument. The general grounds of permissible attack are (1) fraud, duress, or undue influence known to or participated in by the grantee, G.S. 39-11; *Marsh v. Griffin,* 136 N.C. 333; *Brite v. Penny,* 157 N.C. 110, 72 S.E. 964; *Lumber Co. v. Leonard,* 145 N.C. 339; *Butner v. Blevins,* 125 N.C. 585; (2) nonappearance before the officer and no examination had, *Boyett v. Bank,* 204 N.C. 639, 169 S.E. 231; *Davis v. Davis,* 146 N.C. 163; (3) forgery, *McKinnon v. McLean,* 19 N.C. 79; and (4) mental incapacity or infancy, *Jones v. Cohen,* 82 N.C. 75. It has been held, however, that the attack must be by direct action, *Ware v. Nesbit,* 94 N.C. 664, and that the certificate of the officer cannot be impeached collaterally in an action for the recovery of the land. *Woodbourne v. Gorrell,* 66 N.C. 82; *Wright v. Player,* 72 N.C. 94.

In this connection it must be noted that there is a wide distinction between proof that there was no appearance before the officer and the admission of an appearance before him but a denial of the material incidents recited in the certificate.

The person making the certificate of acknowledgment and privy examination is a public officer. He acts in a *quasi*-judicial capacity. Ordinarily when the certificate is regular in form, it is conclusive as to all matters which the officer is required to certify. *Best v. Utley,* 189 N.C. 356, 127 S.E. 337.

"The general rule in the absence of any statute providing otherwise, is that where a grantor has appeared and made some kind of acknowledgment before an officer having jurisdiction, a certificate regular in form, is conclusive as to all those matters which the officer is required by law to certify, and in the absence of any showing of fraud or imposition in the procurement of the acknowledgment cannot be impeached by merely denying that the acknowledgment was taken in the manner certified by the officer. 1 C.J., 886, and cases cited." *Best v. Utley, supra;* 1 C.J.S. 882; 4 Tiffany, Real Property, 3rd Ed., 193; 7 Thompson, Real Property, 520.

It has become settled that if a married woman appears before an officer for the purpose of making an acknowledgment and attempts to do,

in some manner, what the law requires to be done, the certificate is conclusive of the facts therein stated. 1 A.J. 391. Therefore, as against an assault on the ground that the officer did not fully perform his duties, as where it is claimed that he did not examine her separate and apart from her husband, the certificate is impregnable. *Best v. Utley, supra;* 1 C.J.S. 882; Anno. 54 Am. St. Rep. 153; 7 Thompson, Real Property, 522, 525.

That is to say, where a conveyance of a married woman's property has a certificate attached to it containing all material parts as required by statute and signed by the proper officer, it establishes the probate of the deed or other conveyance as a matter of judicial determination which cannot be attacked by extrinsic evidence showing a mere irregularity. *Brite v. Penny, supra; Best v. Utley, supra; Wester v. Hurt,* 130 S.W. 842 (Tenn.), Ann. Cas. 1912 C, 329; 1 A.J. 381, sec. 156, and authorities cited in notes. See also *Picetti v. Orcio,* 67 Pac. 2d 315, where numerous decisions to this effect are cited and discussed. 1 Devlin, Real Estate, 3rd Ed., 970, sec. 529.

The officer's certificate of acknowledgment is a necessary part of deeds and other instruments conveying an interest in real property. It is made at the time of the transaction of which it is a part. It becomes a part of the public records. Upon it the security of titles is made to rest. As against the slippery memory of an interested witness, the written word must abide. *Walker v. Venters,* 148 N.C. 388; *Insurance Co. v. Morehead,* 209 N.C. 174, 183 S.E. 606; 1 A.J. 381. For it is better as a matter of public policy to recognize the conclusiveness of the certificate and run the risk of an occasional wrong to married women than to produce the mischief of inviting *femes covert* to repudiate their instruments.

The *feme* defendant testified that she begged plaintiff to advance the money necessary to save her land from sale under execution. She not only alleges but also testified more than once that she executed the instrument in controversy. She did so before a proper officer who certifies that he took her acknowledgment in the manner prescribed by statute. If the instrument was intended as a mortgage, as she asserts, it enabled her to preserve her land during the depression years of the 1930's. Her effort now, fifteen years later, when the value of real property is materially enhanced, to repudiate the instrument altogether on the ground that the officer did not comply with the formalities required by statute, in contradiction of the officer's certificate made at the time, does not appeal to the conscience of the Court. Her testimony cannot avail to set aside the solemn certificate of the officer. To permit it to do so would create a condition of chaos in respect to titles which are too important to permit them to be swept aside on such flimsy testimony.

There was no sufficient evidence to justify the submission of the fourth issue. Having submitted it, the court should have directed the jury to answer the same in the affirmative. This would not constitute a peremptory instruction in favor of the party having the burden of proof. The plea of want of proper acknowledgment is an affirmative defense. Hence the burden of proof rested upon the defendants.

For the reasons stated there must be a

New trial.

H. S. PRECYTHE, TRADING AS SOUTHERN PRODUCE DISTRIBUTORS, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 March, 1949.)

1. Carriers § 11—

A shipper makes out a *prima facie* case by showing delivery of perishables to the carrier in good condition and delivery to the consignee at destination in bad condition.

2. Same: Trial § 23b—

A *prima facie* case takes the question to the jury and permits but does not compel a finding for plaintiff.

3. Carriers § 11: Evidence § 7e—

When plaintiff makes out a *prima facie* case, the burden of going forward with the evidence shifts to defendant, but if defendant elects to offer no evidence he merely assumes the risk of an adverse verdict.

4. Carriers § 11—

The original carrier is liable to the shipper for loss occasioned by negligence of its connecting carrier.

5. Same—

It is the duty of a common carrier to transport perishable goods in proper cars and to use reasonable care for their preservation and prompt delivery.

6. Same—Evidence held for jury on issue of carrier's negligence resulting in loss of shipment of perishables.

Plaintiff shipper offered evidence that perishables were delivered to defendant carrier in good condition for shipment uniform straight bill of lading, standard refrigeration, and were delivered by connecting carrier to the consignee in bad condition. Defendant's evidence as to the time consumed in transportation and care used for preservation of the shipment disclosed that the shipment was not made by the shortest route and that 43½ hours elapsed between the last re-icing of the car and its delivery on the consignee's private track, and that the car was not re-iced at the last terminal yard as required by the rules. *Held:* The evidence was sufficient

to go to the jury on the issue of the carrier's negligence, and the granting of its motion to nonsuit was error.

7. Same—

Defendant carrier's contention that its liability for care of a shipment of perishables ceased upon delivery of the car on consignee's private track is not determinative when there is evidence of negligent failure to exercise due care for the preservation of the shipment resulting in the damage prior to delivery of the car on the consignee's track.

APPEAL by plaintiff from *Williams, J.*, at October Term, 1948, of WAYNE.

This is a civil action to recover damages for the loss of a carload of cucumbers shipped by the plaintiff from Faison, N. C., on 13 July, 1944, to the Naval Supply Depot, Seawell's Point, Norfolk, Va.

The 550 bushel baskets of cucumbers were shipped in car FGEX No. 15336, freight prepaid, on a uniform straight bill of lading "Standard Refrigeration." The car was iced in Wilmington, N. C., 12 July, 1944, and arrived at Faison the next morning, and was loaded during the day and part of the night on the 13th. According to the records of the defendant, the car left Faison, N. C., at 4:30 a.m., 14 July, 1944, and arrived in Rocky Mount at 7:10 a.m., and was re-iced, the re-icing being completed at 12:34 p.m. The car was moved from Rocky Mount by the defendant at 7:10 p.m. on the 14th, and delivered to the Virginian Railway Company at Jarrett, Virginia, at 11:14 p.m. the same day. The Virginian Railway Company moved the car from Jarrett around 6:00 p.m. the next day and it arrived at Seawell's Point five hours later, on Saturday, 15 July, 1944, and was placed on the delivery track at 8:00 a.m., Sunday, 16 July. The consignee was not notified until Monday, 17 July, at which time an official U. S. Government Inspector found the condition of the car to be "hatch covers closed, plugs in, bunkers ice about 1½ feet deep at bottom" and the cucumbers decayed to such an extent they were rejected. The car was thereafter re-iced at Norfolk on the 18th or 19th and reconsigned by the Virginian Railway Company to a produce firm in Pittsburgh, which firm also rejected the shipment.

The evidence is conflicting as to the original instructions for routing this shipment. The plaintiff testified he gave the local agent of the defendant the name of the consignee and requested him to ship by "the nearest route," which would have been directly from Faison to Rocky Mount, thence to Norfolk, over the defendant's road, some 24 miles shorter than by way of Jarrett, Va. The defendant offered evidence tending to show the plaintiff gave the shipping instructions.

According to the testimony of the inspector for the State and Federal Departments of Agriculture, this shipment was in good condition when it left Faison, N. C., and according to the defendant's evidence, "this

being a Government car of produce, it was entitled to prompt delivery," and was supposed to be re-iced at all regular icing stations, and "to be looked after at destination until actually delivered."

Certain rules governing the shipment of perishable goods were introduced by the defendant, among them being Rule 225 governing Standard Refrigeration Service, and Section (B) reads, in part, as follows: "After arrival of car in terminal train yard serving destination, and up to the time car is in process of unloading on team track, or until private lock or seal has been applied to car, or until car has been placed on private track, carriers will examine bunkers or tanks daily and re-ice to capacity when necessary."

The motion of defendant for judgment as of nonsuit at the close of plaintiff's evidence, was overruled, but allowed when renewed at the close of all the evidence. The plaintiff appeals, assigning error.

Langston, Allen & Taylor for plaintiff.

Thomas W. Davis, V. E. Phelps, D. H. Bland, and W. B. R. Guion for defendant.

DENNY, J. We think the evidence adduced in the trial below is sufficient to warrant the submission of this case to the jury.

The burden of proving the carrier's negligence was upon the plaintiff, and he made out a *prima facie* case when he introduced evidence to show delivery of the shipment to the defendant in good condition and its delivery to the consignee in bad condition. *Chesapeake & Ohio Railway Co. v. Thompson Mfg. Co.*, 270 U.S. 416, 70 L. Ed. 659; *Fuller v. R. R.*, 214 N.C. 648, 200 S.E. 403; *Edgerton v. R. R.*, 203 N.C. 281, 165 S.E. 689; *Moore v. R. R.*, 183 N.C. 213, 111 S.E. 166; *Bivens v. R. R.*, 176 N.C. 414, 97 S.E. 213. Upon such showing a plaintiff is entitled to go to the jury, and the jury may, but is not compelled to find for him. However, in such cases, the burden of going forward with the evidence shifts to the defendant and if the defendant elects to offer no evidence he merely assumes the risk of an adverse verdict. *Vance v. Guy*, 224 N.C. 607, 31 S.E. 2d 766; *Star Mfg. Co. v. R. R.*, 222 N.C. 330, 23 S.E. 2d 32; *McDaniel v. R. R.*, 190 N.C. 474, 130 S.E. 208; *Speas v. Bank*, 188 N.C. 524, 125 S.E. 398.

Whether the defendant and its connecting carrier for whose negligence, if any, the defendant is liable, *Moore v. R. R., supra,* were negligent in failing to move this shipment from Faison to Seawell's Point more promptly, or in failing to re-ice the car, as required by the rules and regulations governing the shipment of perishable goods by standard refrigeration, or the damages were sustained by reason of the inherent

condition of the shipment, are questions of fact to be determined by a jury.

It is the duty of a common carrier to transport perishable goods in proper cars and to use reasonable care for their preservation and prompt delivery. *Bivens v. R. R., supra; Forrester v. Railroad,* 147 N.C. 553, 61 S.E. 524.

The defendant insists that the destination of this shipment was to a point on a private track owned by the Government of the United States, and that its liability ended the moment the car was placed on such track. Conceding this to be so, the car in question was not so placed until Sunday morning, 16 July, 1944, at 8:00 a.m., 43½ hours after its last re-icing in Rocky Mount. It appears from the record the car arrived at the terminal yards of the delivering carrier at Norfolk or Seawell's Point, at 11:00 p.m. the previous day, and according to Rule 225 set forth above: "After the arrival of the car in the terminal yards serving destination, and up to the time car is in process of unloading . . . or until car has been placed on private track, carriers will examine bunkers or tanks daily and re-ice to capacity when necessary."

We note from the defendant's evidence that when it made out its report to its connecting carrier on the exchange of cars, this particular shipment was listed as originating at Faison, N. C., and the final destination was given as Norfolk, Va. Therefore, we presume that Seawell's Point is just one of many delivery points in the Norfolk area, served by the terminal yards of the Virginian Railway Company in Norfolk.

We think the court committed error in sustaining the defendant's motion for judgment as of nonsuit, and the plaintiff's exception thereto will be upheld.

Reversed.

STATE v. ODELL SMITH.

(Filed 30 March, 1949.)

1. Perjury § 1—

Perjury as defined by common law and enlarged by G.S. 14-209, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question.

2. Same—

A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury.

3. Perjury § 7—Evidence held insufficient to show false statement as to matter material to the issue and nonsuit should have been granted.

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In this prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that defendant was the father of the child. *Held:* The proof of false testimony did not relate to matters determinative of the issue in the prosecution for willful failure to support his illegitimate child, and the evidence is insufficient to withstand nonsuit in the prosecution for perjury.

APPEAL by defendant from *Pless, J.,* November Term, 1948, of CALDWELL. Reversed.

The defendant was indicted for perjury. The bill charged that in the trial in the County Recorder's Court of a criminal action against the defendant he falsely swore that he had not had sexual intercourse with one Virginia Hamby, had not taken her to ride except to her work on two occasions, had only visited her to buy whiskey, had not hugged or kissed her, had not driven her to another county to pick cherries. It was alleged the defendant well knew these statements to be false.

On the trial on the bill the State offered evidence tending to show that defendant had testified under oath in the Recorder's Court "when charged with being the father of Virginia Hamby's baby," that he had only taken her to ride twice to her work, that he had been to her house only a few times to get whiskey, had not hugged or kissed her, had not given her presents; that he had not had sexual intercourse with her, and was not the father of her child.

The State also offered evidence that defendant had taken her to ride a number of times, and was a frequent visitor at her home; that on one occasion at Christmas she was seen sitting on his lap; that she and defendant were seen on one occasion together at a picture show; that defendant had directed a dealer where to deliver some wood and coal which she paid for. There was no competent evidence he had given her any presents. True, there was some evidence as to a locket which a witness said Virginia Hamby (who was not a witness) had told her was paid for by defendant, but this was admitted over defendant's objection and was apparently hearsay. There was no evidence that defendant had driven her anywhere to pick cherries. There was some evidence that Virginia Hamby had given birth to a baby, but there was no evidence when, or that defendant was the father. Virginia Hamby did not testify. There was no evidence that defendant had had sexual relations with her, other than the circumstances above recited. The warrant, if any, under which he was tried in Recorder's Court does not appear in the record.

There was verdict of guilty, and from judgment imposing sentence of imprisonment in State's Prison, defendant appealed.

Attorney-General McMullan and Assistant Attorney-General Bruton for State.

W. H. Strickland and Max C. Wilson for defendant, appellant.

DEVIN, J. The defendant assigns error in the rulings of the court below in several particulars to which exceptions were noted, but the question chiefly debated here was whether the State's evidence was sufficient to carry the case to the jury on the charge of wilful and corrupt perjury. It was contended that the proof offered by the State, as shown by the record in this case, only tended to show the falsity of statements made by the defendant on the previous hearing as to matters which were not material to the issue then being tried, and hence was insufficient to support a conviction for perjury.

The evidence according to the summary hereinbefore stated discloses that the defendant was "charged with being the father of Virginia Hamby's baby." This does not indicate a criminal offense, but if the warrant under which he was tried in the Recorder's Court charged violation of G.S. 45-2, the issue there was whether the defendant was the father of the child, and if so whether he had wilfully failed to support his illegitimate offspring. On the trial for perjury there was no evidence that he was the father of the child. There was failure of proof that he had sworn falsely as to that determinative issue. Virginia Hamby, the mother, did not go upon the witness stand to disprove his statement that he was not the father of her child and had not had sexual relations with her. If in his testimony in the Recorder's Court the defendant minimized unduly the number of his rides or his visits, the mere number was not of prime importance. These were not matters so connected with the issue being tried as to disprove defendant's testimony. In the absence of evidence that he was the father of Virginia Hamby's child, and had wilfully failed to support such child, or of evidence of sexual intercourse with her at such time as to engender the inference of his paternity, other than circumstances of association with her only partly admitted, defendant's statements previously made, if not in accord in all respects with the testimony now offered, should not be regarded as affording sufficient basis for conviction of perjury as that crime is defined by the statute and interpreted by the courts.

Our statute G.S. 14-209 does not specificially define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. 4 Blackstone, 137; *S. v. Cline,*

150 N.C. 854, 64 S.E. 591. In accord with the common law definition and the statutes extending its application, it has been uniformly held that the elements essential to constitute perjury are substantially these: a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. 41 A.J. 4, 9; 48 C.J. 833; *S. v. Webb,* 228 N.C. 304, 45 S.E. 2d 345; *S. v. Hill,* 223 N.C. 711, 28 S.E. 2d 100; *S. v. Cline, supra; S. v. Cline,* 146 N.C. 640, 61 S.E. 522; *S. v. Harris,* 145 N.C. 456, 59 S.E. 115; *S. v. Peters,* 107 N.C. 876 (885), 12 S.E. 74; *S. v. Lawson,* 98 N.C. 759, 4 S.E. 134; *S. v. Brown,* 79 N.C. 642; *S. v. Dodd,* 7 N.C. 226; *State v. Dunn,* 203 Ind. 265; *People v. Teal,* 196 N.Y. 372; *Sloan v. State,* 71 Miss. 459; *Goins v. U. S.,* 99 F. 2d 147; *People v. Patterson,* 64 Cal. App. 223 (229); 2 Wharton Cr. Law, sec. 1542; 1 Burdick Cr. Law, 331; 2 Cyc. Cr. Law, 867. To constitute materiality essential to sustain a charge of perjury the false testimony must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. *S. v. Cline,* 150 N.C. 854, 64 S.E. 591; *Goins v. U. S., supra; People v. Patterson, supra.* Applying this rule to the case at bar, we do not think the evidence offered by the State showed such circumstances as tended to prove the falsity of the defendant's testimony on the question at issue, which was whether he had wilfully failed to support his illegitimate child as charged in the warrant. *S. v. Sinodis,* 205 N.C. 603, 172 S.E. 190.

For the reasons stated, the defendant was entitled to have his motion of judgment of nonsuit allowed, and accordingly the judgment is

Reversed.

WOODIE C. ARMSTRONG, LIZZIE McCALLUM, CURTIS GEORGE, SARAH GEORGE, DICK GEORGE, AND DETLAW GEORGE, BY THEIR NEXT FRIEND, ADDELL MARTIN, AND HETTIE GEORGE, BY HER NEXT FRIEND, ADDELL MARTIN, v. ALICE ARMSTRONG.

(Filed 30 March, 1949.)

1. Tenants in Common § 2—

The testator devised to his minor granddaughter a certain number of acres out of the larger tract, and devised the balance thereof to his son and daughter. His widow was named executrix and trustee for the minor devisee. *Held:* The widow, as trustee, was a tenant in common in the said tract pending division thereof.

2. Injunctions § 2—

Injunction is available in proper instances to preserve the *status quo* and protect the parties from irreparable injury pending the final determination of the action provided there is no full, complete and adequate remedy at law.

3. Injunctions § 4c—

Defendant, as trustee for a minor devisee, was a tenant in common with the adult devisees. In partition proceedings, defendant was enjoined from cultivating the tract or removing timber therefrom. *Held:* Since defendant is not a trespasser and plaintiffs have an adequate remedy at law to recover possession by action in ejectment, it was error to enjoin her from cultivating the land, and the restraining order is thus modified.

4. Same—

A restraining order may not be used as a method of settling a dispute as to the possession of realty, title not being in dispute.

5. Trespass § 1a—

A trespass is a wrongful invasion of the possession of another, and therefore a tenant in common in possession cannot be a trespasser.

APPEAL by defendant from *Burney, J.*, in Chambers, 16 December 1948, COLUMBUS. Error.

Petition for partition of real property, heard on motion for injunction.

In 1939 William H. Armstrong, being then the owner of a number of small tracts of land in Columbus County, died leaving a last will and testament and codicil thereto in which he devised to his children and grandchildren each a certain number of acres of land to be cut off from designated tracts. He devised to his widow the home place nine acre tract and certain other property and named her executrix of his will and trustee for the infant devisees.

In particular, testator devised to his infant granddaughter Hettie George and to Lizzie McCallum five acres of land each, to be cut off from a 38½ acre tract known as the Sykes tract. The balance of said tract, less said ten acres, he devised to his son Woodie C. Armstrong.

The petitioners, devisees under said will, instituted this proceeding for a division of said real property as directed in said will.

It is expressly alleged in the petition that the defendant is in possession of all the land of which the testator died seized and possessed and is "collecting the rents for same and refuses to turn over to the minors their part of the rent . . ."

Pending the hearing on the petition, Woodie C. Armstrong applied for and obtained an order restraining defendant from entering upon or cultivating the said 38½ acre tract or cutting, damaging, or removing timber therefrom. When the cause came on to be heard on the rule to show cause, the court below continued the restraining order to the final hearing. Defendant excepted and appealed.

H. L. Lyon and Burns & Burns for plaintiff appellees.
Powell & Powell for defendant appellant.

BARNHILL, J. As testamentary trustee for Hettie George, the defendant, pending division thereof, is a tenant in common of the 38½ acre tract of land claimed by movant and is in possession thereof. She cannot be dispossessed in the manner here attempted. The movant's proper remedy is by an action in ejectment.

An injunction is available in proper instances to preserve the *status quo* and protect the parties from irreparable injury pending the final determination of the action. *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143; *Young v. Pittman,* 224 N.C. 175, 29 S.E. 2d 551. But it will not lie when there is a full, complete, and adequate remedy at law. *Whitford v. Bank,* 207 N.C. 229, 176 S.E. 740; *Newton v. Chason,* 34 S.E. 2d 70.

Nor may a restraining order be used as an instrument to settle a dispute as to the possession of realty or to dispossess one for the benefit of another. *Jackson v. Jernigan, supra; Young v. Pittman, supra.* The right of possession to real property, as against one in the wrongful possession, is enforceable in an action at law. Controverted issues in respect thereto must be decided as in other civil cases.

The contention that the defendant, by entering upon and cultivating said tract is a continuing trespasser cannot be sustained. A trespass is a wrongful invasion of the possession of another. *Frisbee v. Marshall,* 122 N.C. 760; *Gordner v. Lumber Co.,* 144 N.C. 110; *Tripp v. Little,* 186 N.C. 215, 119 S.E. 225; *Lee v. Stewart,* 218 N.C. 287, 10 S.E. 2d 804. Here it is expressly alleged in the petition that defendant herself is in possession. She is, as trustee, a tenant in common. Her cultivation of the soil works no irreparable injury to the freehold, and her action in so doing is not subject to injunctive restraint in this action.

It follows that there was error in so much of the order entered as undertakes to restrain defendant from cultivating the Sykes 38½ acre tract "during the agricultural year 1949." It must be modified accordingly.

Error.

STATE v. J. R. BOWMAN.

(Filed 30 March, 1949.)

1. Parent and Child § 2—

When conception occurs during the marriage of its mother, the child is presumed to be the legitimate offspring of the then husband of the mother, notwithstanding it is born after the termination of the marriage.

2. Same—

The presumption of legitimacy arising from conception during wedlock is not conclusive, but may be rebutted by evidence of impotency of the husband or nonaccess at the time the child was begotten.

3. Same—

Neither the husband nor the wife is competent to testify as to nonaccess of the husband to rebut the presumption of legitimacy arising from the fact of conception during wedlock.

4. Bastards § 5—

In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the admission of testimony by the prosecutrix as to the nonaccess of the husband at the time of conception is error entitling defendant to a new trial.

APPEAL by defendant, J. R. Bowman, from *Pless, J.*, and a jury, at the August Term, 1948, of CALDWELL.

Defendant is charged with violating G.S. 49-2 by willfully refusing to support and maintain an illegitimate child begotten by him upon the body of the prosecutrix, Irene Roberts Tramel. It appeared on the trial that the mother of the child and one Wesley Tramel were married on 17 July, 1944, and that their marriage lasted until May, 1947, when it ended in divorce. The child involved in the case was born 11 July, 1947. For the purpose of showing nonaccess of the husband when the child was begotten, the State offered the evidence of the prosecutrix to the effect that she had not lived with Wesley Tramel "as man and wife" since 28 October, 1944. The defendant reserved an exception to the ruling of the court admitting this testimony. The jury found the defendant guilty, and the court pronounced judgment against him on the verdict. He thereupon appealed, assigning error.

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

W. H. Strickland, L. M. Abernathy, and John C. Stroupe for the defendant, appellant.

ERVIN, J. When conception occurs during the marriage of its mother, a child is presumed to be the legitimate offspring of the then husband of the mother, notwithstanding it is born after the termination of the marriage. *Rhyne v. Hoffman,* 59 U.C. 335. The presumption of legitimacy arising in such case is not conclusive, but may be rebutted by evidence which proves that the husband could not have been the father because he was impotent or did not have access to the mother at the time the child was begotten. *Ray v. Ray,* 219 N.C. 217, 13 S.E. 2d 224; *S. v. Green,*

210 N.C. 162, 185 S.E. 670; *Ewell v. Ewell,* 163 N.C. 233, 79 S.E. 509, Ann. Cas. 1915 B, 373; *S. v. Rose,* 75 N.C. 239. The evidence of nonaccess, however, must come from third persons. This is true because under a well-established rule, which is said to be grounded on decency, morality and public policy, neither the husband nor the wife is competent to testify as to the nonaccess of the husband in a bastardy or other proceeding, where such testimony tends to bastardize or prove illegitimate a child of the wife either begotten or born during the existence of the marriage. *Ray v. Ray, supra; S. v. Green, supra; West v. Redmond,* 171 N.C. 742, 88 S.E. 341; *Ewell v. Ewell, supra; Boykin v. Boykin,* 70 N.C. 262, 16 Am. Rep. 776; *Rhyne v. Hoffman, supra; S. v. Herman,* 35 N.C. 502; *S. v. Wilson,* 32 N.C. 131; *S. v. Pettaway,* 10 N.C. 623. Hence, the court committed error in receiving the evidence of nonaccess given by the prosecutrix.

As this error requires the action to be tried anew, we refrain from any comment on the testimony, which was sufficient at the trial to overcome the motions for compulsory nonsuit.

New trial.

STATE v. JAMES PALMER, SR., AND JAMES PALMER, JR., ALIAS FOXY PALMER.

(Filed 13 April, 1949.)

1. Homicide § 16—

In a prosecution for homicide, the State has the burden of showing that deceased died by virtue of a criminal act and that such act was committed by the prisoner.

2. Homicide §§ 20, 25—

While evidence of motive is relevant as a circumstance to identify accused as the perpetrator of a homicide, such evidence, standing alone, is insufficient to take the case to the jury on the question of identity.

3. Criminal Law § 31e—

Evidence of shoeprints or tire tracks has no probative force to identify accused as the perpetrator of a crime unless it is shown that they were found at or near the place of the crime, were made at the time of the crime, and correspond respectively with the shoes worn by accused at the time of the crime or the car driven by accused at that time.

4. Same—

The opinion of a witness that a particular shoeprint is the track of a specified person is without probative force unless the witness describes unique characteristics upon which he bases his judgment of identity.

5. Homicide § 25—Circumstantial evidence as to the identity of defendants as perpetrators of crime held insufficient to be submitted to jury.

In this prosecution of one defendant for murder in the first degree and of the other defendant as an accessory after the fact to the murder, the State offered evidence of motive, and testimony as to automobile tire tracks and footprints found near the scene where the body was supposed to have been hidden in the woods some two days after deceased was last seen alive, and a track on the clay bank of a river near where the body was discovered and taken from the river some five days after deceased was last seen alive. There was no testimony, other than the bare opinion of witnesses, tending to identify the footprints as those of accuseds or identifying the tire tracks as those made by the car of the principal defendant, or evidence connecting the concealment of the corpse and the tire tracks found on the road. *Held:* The evidence raises merely a conjecture or speculation as to the identity of defendants as the perpetrators of the crime, and defendants' motions for a compulsory nonsuit are sustained in the Supreme Court on appeal. G.S. 15-173.

6. Criminal Law § 32c—

Testimony of an expert as to the similarity of strings taken from the trunk of defendant's automobile and strings of one of thirty-six different fabrics of an unidentified quilt is incompetent and without probative value when there is no evidence tending to identify the quilt as the one which was wrapped about the corpse when it was recovered from the river.

APPEAL by James Palmer, Sr., herein called Jim Palmer, and James Palmer, Jr., herein denominated Foxy Palmer, from *Williams, J.*, and a jury, at the August Special Term, 1948, of the Superior Court of LEE County.

It was alleged in one indictment that Jim Palmer murdered Otis McNeill, and in another that he was an accessory after the fact to the murder of Otis McNeill by an unnamed principal felon. Foxy Palmer, who is a son of Jim Palmer, was charged in a third indictment with being an accessory after the fact to the murder of Otis McNeill by his father. The three cases were tried together under an order of consolidation entered by the court over the objection of the accused.

Certain matters were not in dispute on the trial.

The accused and deceased resided in the vicinity of Tempting Church in Lee County. Tempting Church is a building devoted to public worship standing 60 feet northeast of the Loop Road, a soil surfaced highway, about five miles west of Sanford as a crow flies. This road has both of its termini in the northern edge of a highway, which runs from Sanford on the east to Carbonton on the west and which is known locally as the Carbonton Road. This highway is bitumized from Sanford to a point two-tenths of a mile east of its intersection with the eastern end of the Loop Road, and has a gravel surface from this point to the Plank Road,

which runs north and south and crosses the Carbonton Road virtually at right angles some three miles to the westward. The northern prong of the Plank Road is either of gravel or sand-clay, and runs northward from the Carbonton Road to Gulf, about four miles distant, where it intersects with United States Highway No. 421. It crosses Deep River, a natural watercourse, by bridge approximately half a mile south of Gulf. It is not possible to travel by vehicle from any point on the Loop Road to any other place without traveling on the Loop Road and either the eastern or the western branch of the Carbonton Road.

The Loop Road is of a total length of approximately a mile and a half. It winds in a northwesterly direction from its eastern terminus on the northern edge of the Carbonton Road, passing in succession the home of James McMillan, Tempting Church, the residence of Foxy Palmer, and the dwelling and store of Jim Palmer. It then curves abruptly, and proceeds southwesterly by the habitation of Andrew Woodard and Mrs. E. O. Wakefield to the place where its western end coalesces with the northern edge of the Carbonton Road. Tempting Church is not visible from the home of James McMillan to the southeast on account of intervening woods, but it can be seen from the dwelling of Jim Palmer standing on the south side of the Loop Road 500 yards to the northwest. A store building, where Jim Palmer sold groceries, is situated across the Loop Road from his dwelling. The residence of Foxy Palmer is located between Tempting Church and his father's home, but its exact distance from these structures is not disclosed by the testimony.

The house, where the deceased, Otis McNeill, resided, is in a *cul-de-sac* about half a mile northwest of the Loop Road. The only means of egress is a path leading to a dead-end road which passes at least six residences before merging with the northern edge of the Loop Road just west of the habitation of Andrew Woodard. Intervening woodlands render the Otis McNeill home invisible to persons at the Jim Palmer place.

Otis McNeill was about 5 feet, 8 inches in height, and weighed about 160 pounds. He was last seen alive by the State's witnesses about 6:00 o'clock on Monday morning, 15 March, 1948, 100 yards from his home walking south along the dead-end road which coalesced with the Loop Road west of the Andrew Woodard home. He was carrying a walking stick, and wearing an undershirt, an ordinary shirt, pants, coveralls, a blue coat, a felt hat, shoes, and overshoes. On the fifth day thereafter, namely, at 5:30 p.m. on Saturday, 20 March, 1948, his lifeless body was found afloat in Deep River south of Gulf near a place where the Plank Road runs within 25 or 30 steps of the river for a distance of approximately 300 feet. This spot is seven miles via the Loop Road, the Carbonton Road, and the Plank Road from Tempting Church, and about four miles as a crow flies from the Otis McNeill home.

The corpse was marked by five bullet wounds from a firearm which was never discovered, and had evidently been sunk in the river by weights attached to chains which were fastened around the neck and feet. An absence of water in the lungs indicated that the deceased had been shot to death before his body was put in the river. An examining physician had no opinion "about how long the body had been in the water," but concluded from its swollen and decomposed state that the deceased "had been dead six or seven days." When discovered, the corpse "was wrapped in a quilt," and all clothing was present, except the blue coat. The shirt and undershirt were perforated and bloody.

Both the prosecution and the defense presented testimony of great volume to sustain their respective positions as to the guilt or innocence of the accused. Indeed, the record in its entirety covers 381 pages. But no direct testimony was adduced on the trial as to when, where, or by whose hand Otis McNeill came to his death, or as to the whereabouts of his body before it was discovered in Deep River. The State bottomed its case on the theory that Otis McNeill was fatally shot by Jim Palmer in the woods directly across the Loop Road from Tempting Church soon after 6:00 a.m. on Monday, 15 March, 1948, and that his body lay in a "pressed down" place in such woods 92 feet south of the edge of the Loop Road until sometime between 7:30 and 8:00 p.m. on Wednesday, 17 March, 1948, when it was removed by Jim Palmer and Foxy Palmer and hauled by them in the trunk of Jim Palmer's blue Kaiser automobile by way of the Loop Road, the Carbonton Road, and the Plank Road to Deep River, where they submerged it in the water. To support this theory, the State relied on the circumstances set forth below.

Jim Palmer and Foxy Palmer had difficulties with the deceased in December, 1947, and January, 1948, resulting in charges of assault which were pending against them when the deceased disappeared. Moreover, Jim Palmer stated several weeks prior to the homicide that he would not harm Otis McNeill "for anything in the world," but that others would kill him "to get him out of the way the first chance they got" on account of a suspicion that he was reporting liquor law violations to the Sheriff.

The area southwest of the Loop Road in the immediate vicinity of Tempting Church belongs to the McMillan family, and is covered by trees and underbrush extending practically to the edge of the road. James McMillan, a witness for the State residing 450 yards southeast of Tempting Church, testified that he arose about 6 a.m. on Monday, 15 March, 1948, and soon thereafter heard six shots, which "sounded like a pistol" and "seemed to come from the direction of Tempting Church." Sometime after 8:00 p.m. on Wednesday, 17 March, 1948, searching parties examined the road and woods near Tempting Church. Two sets of shoeprints without distinctive features, one consisting of "big tracks" and

the other of "overshoe tracks," were noted directly across the Loop Road from Tempting Church, leading southward from the road up a clay bank to the edge of the woods at the top of the bank, where they ceased to be observable. The searchers proceeded in a southerly direction from this point into the woods and found Otis McNeill's blue coat, and a spot where "it looked like leaves had been pressed down over a space 2½ or 3 feet wide and about 5 or 6 feet long." The blue coat was 37 feet south of the edge of the Loop Road, and the "pressed down" spot was 92 feet south of the same place. Five days later Otis McNeill's walking stick was found 6 feet from the place where the blue coat had lain. The original searchers noted that the coat was "sprinkled with leaves" and that "two big footprints" without distinguishing peculiarities were impressed in a rotten log beside the "pressed down" place. After the body of the deceased had been removed from Deep River, to wit, on Monday, 22 March, 1948, the State's witness, Odie McBryde, noted a single "overshoe track" on the clay bank on the southwest side of the Loop Road directly opposite Tempting Church. He thereupon fitted an overshoe from the body of Otis McNeill into this track, and found that "it was a good fit."

The testimony of the State relating to these matters was to the effect, however, that the coat was intact and free from bloodstains when it was found; that nothing noteworthy was seen at or near the "pressed down" spot except the "two big footprints" in the rotten log; that no other tracks were discovered in the woods southwest of the Loop Road; that no visible trails of any character connected the "pressed down" spot with any other place; that rain fell in the locality in question at least twice between 6:00 a.m. on Monday, 15 March, 1948, and 7:30 p.m. on Wednesday, 17 March, 1948, and at least once between the last named hour and Monday, 22 March, 1948; that numerous peace officers and residents of the countryside tramped over the entire area in the vicinity of Tempting Church between 8:00 p.m. on Wednesday, 17 March, 1948, and Monday, 22 March, 1948; that both the overshoe of the deceased and the single "overshoe track" into which it was fitted on Monday, 22 March, 1948, lacked distinctive peculiarities; and that there was nothing to identify such single "overshoe track" as one of the "overshoe tracks" found on the bank on the night of Wednesday, 17 March, 1948.

About 7:30 p.m. on Wednesday, 17 March, 1948, Henry McNeill, the sexton, who was accompanied by his wife, Sarah McNeill, arrived at Tempting Church and turned on the lights in preparation for a "P. T. A. Meeting" being held there that night, thereby illuminating the church and the churchyard adjacent to the Loop Road for a "pretty good ways." As soon as this was done, a motor vehicle came from the northwest along the Loop Road and stopped in such road for approximately ten minutes

70 steps northwest of the driveway leading into the churchyard at Tempting Church. None of the State's witnesses avowed any knowledge of the identity of this automobile, or saw any person in its immediate vicinity. Sarah McNeill testified, however, that she heard a noise, which "sounded like somebody stepping on a brushpile," in the woods southwest of the Loop Road in proximity to the automobile just before it was put in motion and driven unlighted "right by the church when the lights were on and where people were" on its way to the eastern end of the Loop Road.

Subsequent to 8:00 p.m. on Wednesday, 17 March, 1948, imprints of automobile tires were found on the Loop Road where the automobile had stopped, and on the side of the Plank Road south of Gulf where the Plank Road runs within 25 or 30 steps of Deep River. The last mentioned imprints were evidently made by a motor vehicle which was turned around at the junction of the Plank Road and an old wagon road leading downhill towards Deep River. According to Sheriff A. G. Buchanan, a witness for the State, this old wagon road was a place "where people park and go fishing." There were no peculiarities about the tire tracks except that they appeared to be "fresh" and were similar "with respect to markings, ridges and grooves" to "6.50 x 15 Goodyear" tires having treads in good condition. The State's evidence was to the effect that Jim Palmer's blue Kaiser car was equipped with "6.50 x 15 Goodyear" tires with good treads; that manufacturers had made "millions" of such tires "just alike"; and that such tires were in general use in Lee County. While witnesses for the State testified generally that they observed imprints at the eastern intersection of the Loop Road and the Carbonton Road similar to those found where the automobile had stopped 70 steps northwest of Tempting Church and "followed those tracks to Deep River," a reading of the evidence in detail reveals that they meant simply that "every time they came to a side road they would get out and look up and down it with a flashlight" and that "those tracks did not turn off on any side road between there and the river." Besides, the State's evidence was to the effect that there were many automobile tracks upon all the roads in question, and that Jim Palmer's Kaiser car had been driven on the Loop Road upon several legitimate errands shortly before the imprints under scrutiny were found.

At the time of the examination of the imprints of the tires at the place on the Loop Road 70 steps northwest of the driveway leading into the churchyard in front of Tempting Church, it was noted that there were "six or seven different shoe tracks" in the Loop Road "where the car had stopped" and "seven or eight different sets of shoe tracks" in an old woods road nearby. Some of these shoeprints were "small and some large" and some were "coming and some going." [illegible] sets, to wit, "a large set"

apparently made by "size 10 or 11 shoes" and a "small set" apparently made by "size 7 shoes," were particularized by witnesses as "going" to the old woods road and as "coming" down the bank of the Loop Road to a point between the tire imprints. "There was no peculiarity about any of these tracks" and "they could have been there a day or two." When incompetent surmises of witnesses are eliminated, it clearly appears from the record that none of the shoe prints in the locality in question could be traced to any place in the woods.

About midnight on 17 March, 1948, peace officers discovered "two sets of tracks, or footprints that were fresh" beside a "head impression and a foot impression" on the bank of Deep River about 50 feet above the spot in the river where the body of the deceased was found three days later. There was no peculiarity in either of these sets of shoeprints, except that one was large and the other was small. These tracks were not traced to the tire imprints at the junction of the Plank Road and the old wagon road some 25 or 30 steps from the river.

The entire evidence adduced by the State with respect to shoeprints was thus summed up by its witness, Deputy Sheriff Odie McBryde: "I have no description or measurements of the tracks we saw at the river except that there was a large step and a small step. There were two large tracks near the log in front of the church, but I did not measure them. I didn't measure any of the lengths or widths of any of the tracks . . . I don't know what kind of shoe made the tracks, but it was not a heavy work shoe. There was no peculiarity about any of these tracks, other than that they were large and small. . . . They were just plain tracks."

Nevertheless, the State presented testimony over objection of the defense that "the track beside that overshoe track" on the bank right across the Loop Road from Tempting Church and the large shoeprints between the tire imprints "where the car stopped" were "made by the same shoe," and that the shoeprints at the river "were the same tracks" as those "seen at the church."

The State offered the testimony of Deputy Sheriff Ralph Matthews to connect Foxy Palmer with the small footprints. He testified over an objection of the defense that he saw Foxy Palmer pulling grass in a cornfield near his home about a week before the deceased disappeared; that at that time he saw a shoeprint, which "appeared to be a No. 7 shoe," in the cornfield near Foxy Palmer; and that the shoeprint in the cornfield and the "small tracks" which subsequently appeared between the tire imprints on the Loop Road "looked to be the same shoe." Foxy Palmer testified that he wore a "No. 7½ or 8 shoe."

Jim Palmer conceded that he wore a "No. 10 shoe." The State undertook to establish that he was the maker of the large shoeprints found between the automobile tracks on the Loop Road "where the car had

stopped" by the evidence of its witnesses Ed Hooker and C. B. Beck, who admitted that these shoeprints had no distinctive features and who were permitted to testify over the objection of the defense. Hooker was asked this question and returned this answer thereto, namely: "Q. Where, and whose track is it? A. I believe it was Jim Palmer's." The record sets out the evidence of Beck on this phase of the case as follows: "Q. Whose track was it? A. I just could not exactly say (witness looks around courtroom); it was really Mr. Jim's track."

The jury found Jim Palmer "guilty of murder in the first degree in the manner and form as charged in the bill of indictment" and Foxy Palmer "guilty of the felony of accessory after the fact to the crime of murder in the manner and form as charged in the bill of indictment." Under the charge, this verdict constituted an acquittal of Jim Palmer on the indictment charging him with being an accessory. Judgment of death was pronounced against Jim Palmer, and Foxy Palmer was sentenced to imprisonment in the State's Prison. Both of the accused thereupon appealed, assigning errors.

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

E. L. Gavin, R. L. Gavin, Neill McK. Salmon, and Douglass & McMillan for the prisoner, Jim Palmer, appellant.

H. M. Jackson, H. W. Gavin, and D. E. McIver for the defendant, Foxy Palmer, appellant.

ERVIN, J. The appellants place their chief emphasis in this Court upon their exceptions to the refusal of the trial court to allow their motions for involuntary judgments of nonsuit made when the State rested its case and renewed when all the evidence was concluded.

When the State undertook to prosecute the prisoner, Jim Palmer, for the slaying of the deceased, Otis McNeill, it necessarily assumed the burden of producing evidence sufficient to prove two things: (1) That the deceased died by virtue of a criminal act; and (2) that such criminal act was committed by the prisoner. *S. v. Howell,* 218 N.C. 280, 10 S.E. 2d 815; *S. v. Redman,* 217 N.C. 483, 8 S.E. 2d 623; *S. v. Johnson,* 193 N.C. 701, 138 S.E. 19. Undoubtedly, the testimony of the prosecution was sufficient to establish the first of these propositions.

The defense insists, however, that the indictment for homicide ought to have been nonsuited in the court below for the reason that the State's evidence fails to identify the prisoner, Jim Palmer, as the person who did the killing. Furthermore, the defendant, Foxy Palmer, asserts that the testimony of the prosecution is equally defective in respect to the charge against him in that it fails to show that he participated in the hiding

of the body of the deceased. *S. v. White,* 208 N.C. 537, 181 S.E. 558; *S. v. Simms,* 208 N.C. 459, 181 S.E. 269.

The State was compelled to resort to circumstantial evidence in its effort to connect the prisoner, Jim Palmer, with the homicide, and the defendant, Foxy Palmer, with the concealment of the corpse. In final analysis, this testimony consisted simply of circumstances which tended to show a motive for the commission of the crimes charged, and evidence of shoeprints and automobile tracks in the vicinity of Tempting Church and Deep River.

Evidence of motive is relevant as a circumstance to identify an accused as the perpetrator of an offense. *S. v. Artis,* 227 N.C. 371, 42 S.E. 2d 409; *S. v. Ham,* 224 N.C. 128, 29 S.E. 2d 449; *S. v. Hudson,* 218 N.C. 219, 10 S.E. 2d 730; *S. v. Lefevers,* 216 N.C. 494, 5 S.E. 2d 552; *S. v. Wilkins,* 158 N.C. 603, 73 S.E. 992; *S. v. Green,* 92 N.C. 779. But such evidence, standing alone, is not sufficient to carry a case to the jury, or to sustain a conviction. 23 C.J.S., Criminal Law, section 1139; 44 C.J.S., Homicide, section 321. Consequently, we must determine whether the State's testimony relating to shoeprints and automobile tracks in the vicinity of Tempting Church and Deep River, either of itself or in combination with the evidence as to motive, reasonably tends to point out the prisoner, Jim Palmer, as the murderer of the deceased, or the defendant, Foxy Palmer, as one who assisted in concealing his corpse. *S. v. Heglar,* 225 N.C. 220, 34 S.E. 2d 76; *S. v. Oldham,* 224 N.C. 415, 30 S.E. 2d 318; *S. v. McLeod,* 198 N.C. 649, 152 S.E. 895; *S. v. Satterfield,* 121 N.C. 558, 28 S.E. 491.

In the nature of things, evidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) That the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime. *S. v. Ragland,* 227 N.C. 162, 41 S.E. 2d 285; *S. v. Walker,* 226 N.C. 458, 38 S.E. 2d 531; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *S. v. Cromer,* 222 N.C. 35, 21 S.E. 2d 811; *S. v. Jones,* 215 N.C. 660, 2 S.E. 2d 867; *S. v. McLeod, supra; S. v. Weston,* 197 N.C. 25, 147 S.E. 618; *S. v. Young,* 187 N.C. 698, 122 S.E. 667; *S. v. Griffith,* 185 N.C. 756, 117 S.E. 586; *S. v. Fain,* 177 N.C. 120, 97 S.E. 716; *S. v. Spencer,* 176 N.C. 709, 97 S.E. 155; *S. v. Martin,* 173 N.C. 808, 92 S.E. 597; *S. v. Lowry,* 170 N.C. 730, 87 S.E. 62; *S. v. Thompson,* 161 N.C. 238, 76 S.E. 249; *S. v. Taylor,* 159 N.C. 465, 74 S.E. 914; *S. v. Freeman,* 146 N.C. 615, 60 S.E. 986; *S. v. Hunter,* 143 N.C. 607, 56 S.E. 547; *S. v. Adams,* 138 N.C. 688, 50 S.E. 765; *S. v. Daniels,* 134 N.C. 641, 46 S.E. 743; *S. v. Morris,* 84 N.C. 756; *S. v. Reitz,* 83 N.C. 634; *S. v.*

Graham, 74 N.C. 646. Similar criteria apply to evidence of automobile tracks offered to identify the owner of a motor vehicle as the perpetrator of an offense. *S. v. Young, supra.*

Moreover, the bare opinion of a witness that a particular shoeprint is the track of a specified person is without probative force on the question of identification. *S. v. Reitz, supra;* Wharton's Criminal Evidence (11th Ed.), section 934. The great master, Dean Wigmore, had this to say on this phase of the law of evidence: "No doubt a witness to identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate detail to be ascribed to each feature and of the unique distinctiveness to be predicated of the total combination. Testimony not based on such data of appreciable significance should be given no weight." Wigmore on Evidence (3rd Ed.), section 415.

The State's evidence may beget suspicion in imaginative minds. But when it is laid side by side with law and logic, it does not rise to the dignity of proof. It leaves to conjecture the place and time of the homicide, and the relation of the shoeprints and automobile tracks to these all-important matters. It refers to speculation the problem of whether any connection existed between the concealment of the corpse and the tire prints found on roads constantly used by the general public for lawful objects. Likewise, it commits to surmise the question of whether these imprints were made by an automobile belonging to the prisoner, Jim Palmer, or by any one of numberless other motor vehicles equipped with exactly identical tires. Over and above these considerations, it lacks probative force in pointing toward the accused as the makers of the footprints near Tempting Church and beside Deep River. It makes the identity of Jim Palmer as the maker of shoeprints to rest solely on the bare belief of Ed Hooker that one set of "large tracks" without distinctive features observed on the Loop Road on Wednesday night, 17 March, 1948, were Jim Palmer's tracks, and the dubious testimony of C. B. Beck, which reads as follows with the parentheses, the parenthetic phrase "witness looks around courtroom," and the semicolon expunged: "I just could not exactly say it was really Mr. Jim's track." The attempt to connect Foxy Palmer to the shoeprints is based on even more tenuous circumstances.

When all is said, the State's testimony as a whole returns no answers to the baffling questions it asks except these resounding echoes: When, where, and by whose hand was Otis McNeill murdered? Who consigned his body to Deep River? Since the record leaves these crucial matters unsolved and shrouded in mystery, the State must suffer defeat for want of proof.

This brings to remembrance a far-away day in ancient Rome when another prosecution failed for a like reason. The incident is recounted in *Coffin v. United States,* 156 U.S. 432, 15 Sup. Ct. Rep. 394, 39 L. Ed. 481, in these words:

"Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' "

In reaching the conclusion that the testimony did not make a case for the jury, we have neither overlooked nor ignored the evidence of the State which tended to show that on Monday, 22 March, 1948, 17 cotton strings of varying lengths were found in the trunk of Jim Palmer's automobile "on the wood rests which the spare tire lies on," and that these strings and a quilt composed of 36 different fabrics were submitted to the State's witness P. T. Bachinger, an expert in the field of textile goods, who compared the 17 cotton strings with sample strings from each of the 36 fabrics in the quilt and, found that one of the cotton strings taken from the automobile and one of the sample strings from one of the fabrics in the quilt were apparently similar in twist, size, color, and pix. Although this testimony was employed by the State with telling power on the trial in support of its assumption that the body of the deceased was hauled from Tempting Church to Deep River in the trunk of Jim Palmer's automobile, it was incompetent and destitute of probative value because no evidence was adduced by the State tending to identify the quilt submitted to the witness Bachinger as the quilt wrapped about the corpse.

For the reasons given, the convictions and the sentences in the Superior Court are vacated and reversed, and the motions of the appellants for judgments of compulsory nonsuit are sustained on this appeal. Under G.S. 15-173, this ruling has the force and effect of a verdict of not guilty as to each of the accused.

Reversed.

ALICE E. SIMMONS AND RAYMOND L. SIMMONS v. DALTON LEE.

(Filed 13 April, 1949.)

1. Appeal and Error § 6c (3)—

Exceptions to findings of fact made by the referee in a compulsory reference are not presented on appeal when there are no exceptions to the findings of fact set out in the judgment confirming the report of the referee.

2. Appeal and Error § 40a—

A sole assignment of error to the signing of the judgment presents only whether the facts found by the trial court are sufficient to support the judgment, and whether error of law appears upon the face of the record.

3. Reference § 14a: Constitutional Law § 22—

While a compulsory reference, G.S. 1-189, does not deprive either party of his constitutional right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. Constitution of N. C., Art. IV, Sec. 13.

4. Reference § 14a—

In order to preserve right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered.

5. Same—

A party should not tender issues as to questions of fact presented by his exceptions to the findings of the referee, but should tender issues of fact arising on the pleadings and relate his issues of fact to his exceptions and to the findings of fact by number, and demand a jury trial as to each of such issues.

6. Boundaries § 7: Quieting Title § 2—

Where defendant in a processioning proceeding denies petitioners' title and pleads twenty years adverse possession as a defense, G.S. 1-40, the proceeding is assimilated to an action to quiet title, and the clerk should transfer the cause to the civil issue docket for trial upon the issues of whether petitioners own the land described in the petition and as to the location of the land so described. G.S. 1-399.

7. Reference § 14a—

Where compulsory reference is ordered in a processioning proceeding upon defendant's denial of petitioners' title and plea of title by twenty years adverse possession, defendant's exception to the order of reference and exceptions to findings of fact made by the referee do not entitle him to a jury trial when he tenders issues which relate only to questions of fact based upon his exceptions and fails to tender issues of fact which

arise upon the pleadings and to relate such issues to his exceptions and to the findings by their respective numbers.

8. Adverse Possession § 7—

Where the deed under which a party immediately claims fails to embrace within its description a contiguous strip of land, such party may not tack the possession of his predecessors in title as to such strip.

APPEAL by defendant from *Frizzelle, J.,* at November Term, 1948, of CRAVEN.

Special proceeding begun 13 April, 1945, before Clerk of Superior Court of Craven County under provisions of Chapter 38 of General Statutes to determine the true boundary between lands of petitioners and of defendant. Upon defendant denying petitioner's title to land described in petition, the proceeding was converted into an action in the nature of an action to quiet title. G.S. 1-399. G.S. 41-10.

Petitioners allege in their petition that they are the owners of certain described land in Craven County, conveyed to F. E. Simmons, their husband and father, respectively, by a certain deed, and that defendant owns certain land adjoining the land of petitioners, and that defendant disputes the correctness of the boundary lines of petitioners as set out in said deed,—particularly a certain specified line.

Defendant, in answer to said petition, denies the paragraph of the petition in which petitioners allege that they are the owners of the land therein described, but admits that he is the owner of land adjoining the land of petitioners, and that he disputes the correctness of the boundary line of the land as claimed by the petitioners.

And *for a further defense,* defendant avers: (1) What he contends to be the dividing line between the two tracts of land, that is the Marshall ditch; (2) that prior to the bringing of this proceeding he and his predecessors have had adverse possession of the lands up to and on his side of the dividing line as he contends it to be, "using, occupying, cultivating and enjoying the land for the full term of twenty years"; (3) that petitioners and their predecessors in title have always recognized and admitted the Marshall ditch as the boundary line, and for many years petitioners' ancestors in title have admitted and acknowledged defendant's title to the lands up to and abutting the Marshall ditch, and have rented from defendant the cleared land thereon and cultivated the same as tenant of, and paying annual rent therefor to defendant up to and including the year of his, F. E. Simmons', death; that petitioner Raymond L. Simmons has admitted and acknowledged defendant's title, right and possession of said land up to and abutting the Marshall ditch, and has rented from defendant the cleared land thereon up to said ditch during the years 1943 and 1944, during which two years he had paid to

defendant rent therefor; (4) that defendant admits that the petitioners are owners of so much of the land described in the petition as lies southeast of the Marshall ditch; and (5) that petitioners are estopped from claiming or asserting any right or title to any of the lands north or northwest of the Marshall ditch. Thereupon defendant prays that the Marshall ditch be declared the boundary line, and that he be declared the owner of all the lands abutting said Marshall ditch and to the north or northwest side thereof, and for such other relief as he may be entitled to, and for costs.

Petitioners, replying to the further defense of defendant, deny each and all of the averments.

The record next shows that at the October Term, 1946, of Superior Court of Craven County, the presiding judge entered an order of compulsory reference, to which both petitioners and defendant excepted.

The report of the referee shows that pursuant to the order of reference hearings were had and testimony of witnesses was taken and transcribed, —a copy of which was filed with the report. (It does not appear in record on this appeal.) Then after stating the claims of petitioners as to location of the land they claim to own, as shown on map in evidence, and the claim of defendant as to location of his land as shown on the map, the referee described the land in dispute as shown on the map, as containing 10.8 acres. The report shows:

(1) That petitioners claim under deed made by H. A. Marshall to A. D. Marshall 13 October, 1919, filed for registration 15 October, 1919, and registered, in which the land conveyed is described (in pertinent part) as follows: Beginning at the 9th corner of a grant to James Keith . . . an iron stob . . . running with Keith's line of marked trees north 45 deg. east 112 poles to another iron stob *in the line of ditch cut by C. C. Cannon; thence with said ditch and its courses continued 100 poles; thence south 65 deg. west to Dogwood Branch;* thence down the various courses of said run of branch to the Beginning, containing 40 acres; and

(2) That defendant claims under deed made by Ila Lee to her husband, Dalton Lee, 18 April, 1944, and registered, in which the land conveyed is described (in pertinent part) as follows: *"Beginning on James Keith's patent line with ditch cut by C. C. Cannon; running thence with said ditch and courses continued northwestwardly 100 poles to Simmons' corner;* thence south 65 west *with Simmons' line to the James Keith's patent line,* etc. . . . to the Beginning" being the same land conveyed by W. W. Griffin, Trustee, to Ila Lee, 20 March, 1928, by deed recorded . . ., and on back through *mesne* conveyance to a deed from H. A. Marshall and Eleanor Marshall to E. W. Bryan, dated 21 November, 1919, and filed for registration 22 November, 1919, and registered.

The report then contains eighteen separate and specific findings of fact, and seven conclusions of law, to the effect: (1) That the parties claim and derive title from a common source,—the deed therefrom under which petitioners claim ante-dating in execution and registration that under which defendant claims and derives title; (2) that the deed under which petitioners claim covers the land in dispute, and the deed under which defendant claims does not cover the land in dispute; and (3) that defendant and those under whom he claims have not had adverse possession of the land in dispute for twenty years; and so on, all to the conclusion that the land in question is the property of the petitioners.

The defendant filed exceptions to thirteen of the findings of fact. And further excepted to the report of the referee: (1) For that the referee did not find that defendant and his predecessors in title had been in adverse possession of the land in question for more than 20 years; (2) for that the defendant "set up by answer and pleaded title to the land in controversy through adverse possession"; and (3) for that all of the evidence tended to show and did show that defendant and his predecessors in title were in adverse possession of the land in controversy under known and visible lines and boundaries, within the enclosure of a fence, and up to and along the line of the Marshall ditch.

Thereupon defendant demanded that the issues raised and presented by the pleadings and on the exceptions to the findings thereinbefore set forth be submitted to a jury, and to that end submitted these issues:

"1. Has the respondent Dalton Lee and his predecessors in title been in the open, peaceful, uninterrupted, adverse and notorious possession of the lands abutting and on the north side of the Marshall ditch, and within the fence for more than 20 years preceding the bringing of this proceedings, actually possessing and claiming the same as alleged?

"2. Have the petitioners and their predecessors in title recognized and admitted the said Marshall ditch as the location of the boundary line between the lands of the petitioners and respondents?

"3. Did the petitioners and their ancestors in title point out to the respondent or his predecessors the Marshall ditch as the common boundary line?

"4. Have the petitioners or their ancestors in title at any time within 20 years before the bringing of this proceeding claimed or asserted any right or title to any part of the lands in controversy to the north of said Marshall ditch or at any time denied to the respondent his right and title up to said ditch?

"5. Have the petitioners or their ancestors in title rented from the respondent the land to the north of said Marshall ditch and within the presently disputed area, and if so, have they paid the rent therefor in

recognition of the respondent's right and title thereto during the several years before bringing of this proceedings?"

Defendant further excepted to each of the conclusions of law as set out in the report of the referee.

Thereafter, when the cause came on for hearing upon the exceptions of the defendant, the presiding judge found "as a fact that the purported exceptions of the defendant were not in form and manner a compliance with the requirements of the laws of North Carolina as in such cases made and provided and not in accordance with the course and practice of the courts in respect to the filing of such exceptions." And "the court, in order to make a determination of the matter despite the above finding, having fully considered the alleged exceptions upon the merits of the cause, and . . . finding as a fact that said exceptions are without merit and the same should be overruled, and the referee's report confirmed," ordered and adjudged that the report of the referee be confirmed both as to his findings of fact and his conclusions of law, and such findings of fact and conclusions of law being incorporated in and made a part of the judgment. And pursuant thereto the court adjudged that the petitioners are the owners of and entitled to the possession of the land described in the petition,—located as delineated on the court map to include the area in question.

Defendant appeals therefrom to the Supreme Court and assigns error.

R. E. Whitehurst for plaintiffs, appellees.

W. H. Lee and Guion & Rodman for defendant, appellant.

WINBORNE, J. While the record on this appeal discloses that defendant filed numerous exceptions to the findings of fact made by, and appearing in the report of, the referee, it fails to show any assignment of error based on exception to the findings of fact as made by the trial judge before whom the report of the referee came for consideration on the exceptions filed. Hence the exceptions to the findings of fact made by the referee are not presented on this appeal. *Hughes v. Oliver,* 228 N.C. 680, 47 S.E. 2d 6.

And the only assignment of error presented on the appeal is to the signing of the judgment from which the appeal is taken. Such assignment of error raises only the questions (1) as to whether the facts as found by the judge are sufficient to support the judgment, *Vestal v. Machine Co.,* 219 N.C. 468, 14 S.E. 2d 427; *Hylton v. Mt. Airy,* 227 N.C. 622, 44 S.E. 2d 51; *Smith v. Davis,* 228 N.C. 172, 45 S.E. 2d 51; *Artis v. Artis,* 228 N.C. 754, 47 S.E. 2d 21; *Russos v. Bailey,* 228 N.C. 783, 47 S.E. 2d 22; *Hardee v. Mitchell,* 230 N.C. 40, 51 S.E. 2d 884, and numerous other cases; and (2) whether error in matters of law

appears upon the face of the record. *Query v. Ins. Co.,* 218 N.C. 386, 11 S.E. 2d 139; *Rader v. Coach Co.,* 225 N.C. 537, 35 S.E. 2d 609; *Smith v. Smith,* 226 N.C. 506, 39 S.E. 2d 391; *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555.

As to the first: That the findings of fact are sufficient to support the judgment is not debated in this Court.

But as to the second: Defendant contends that the judgment is erroneous in that it appears upon the face of it that the trial judge found as a fact and ruled as a matter of law that the exceptions filed by defendant to the report of the referee are "not in form and manner a compliance with the laws of North Carolina as in such cases made and provided, and not in accordance with the course and practice of the courts in respect to the filing of such exceptions." The challenge to this ruling brings into focus this question: Has defendant preserved his right to a trial by jury?

In this connection it is provided by statute in this State, G.S. 1-189, that compulsory reference, under the provisions of the statute, does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings. But the right to trial by jury in civil actions may be waived, Const. of N. C., Art. IV, Sec. 13. *Chesson v. Container Co.,* 223 N.C. 378, 26 S.E. (2d) 904. And "a party who would preserve his right to a jury trial in a compulsory reference must object to the order of reference at the time it is made, and on the coming in of the report of the referee, if it be adverse, he should seasonably file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out in the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered,"—*Stacy, C. J.,* in the case of *Cotton Mills v. Maslin,* 200 N.C. 328, 156 S.E. 484. See also *Booker v. Highlands,* 198 N.C. 282, 151 S.E. 635; *Brown v. Clement Co.,* 217 N.C. 47, 6 S.E. 2d 842; *Cheshire v. First Presbyterian Church,* 225 N.C. 165, 33 S.E. 2d 866; *Penland v. Church,* 227 N.C. 699, 41 S.E. 2d 654; *Cherry v. Andrews,* 229 N.C. 333, 49 S.E. 2d 641, and numerous other cases.

In *Brown v. Clement Co., supra,* on the subject of the requirements of the rule as to preserving right to trial by a jury in a compulsory reference case, *Barnhill, J.,* speaking for the Court, had this to say: "Notwithstanding an order of reference, a determination of the issues of fact raised by the pleadings and the evidence in the case remains as the primary purpose. A jury trial does not extend to every finding of fact made by the referee and excepted to by the parties, but only to issues of fact raised by the pleadings and passed upon by the referee. McIntosh, Sec. 525. Questions of fact may not be substituted for issues merely because there is a controversy, as disclosed by the exceptions, as to what the facts are. McIntosh, Sec. 525 (4). Every fact found by the referee, if perti-

nent, relevant and material, necessarily relates to one of the controverted issues of fact. Correctly interpreted, the rule simply requires the litigant, who seeks to preserve his right to trial by jury to tender issues raised by the pleadings based on the facts pointed out in the exceptions, and, as to each issue, to definitely and specifically demand a jury trial thereon, and, further, by specific reference, to relate the issue to his exceptions to the findings of fact which bear upon and relate to that particular issue."

Indeed, in the case of *Cherry v. Andrews, supra,* reference to the record on appeal there presents this manner of practical application of the rule so spelled out in *Brown v. Clement Co., supra.* There, for example, in stating exceptions, defendant again excepted to the order of reference, and to certain of the findings of fact and conclusions of law of the referee, and "upon the foregoing objections and exceptions to the referee's report, the defendants tender the following issues and demand trial by jury on each objection and exception covered by the issues herewith submitted: 1. Are the plaintiffs the owners of, and entitled to the possession of lands lying East of a line . . . ?", followed by the statement that "said issue is more particularly raised by the defendants' exceptions Nos. 1, 2, 3, 4, 5 and 8," and so on.

When the present case is tested by the rule, as thus interpreted by this Court, it is seen that defendant objected to the order of reference at the time it was made, and on the coming in of the report of the referee, it being adverse, he filed exceptions to particular findings of fact made by the referee, and tendered issues he contends arise upon the pleadings, and demanded a jury trial thereon. But it is seen that the exceptions taken are not expressly related to any special issue,—as suggested in *Brown v. Clement Co., supra.* And the issues of fact submitted by defendant are not the issues arising on the pleadings.

In this connection, where in a special proceeding under Chapter 38 of General Statutes, formerly C.S. 361 and 362, Revisal 325 and 326, Laws 1893, Chapter 22, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads the twenty years' adverse possession under G.S. 1-40, as a defense, the proceeding is assimilated to an action to quiet title and the Clerk, as directed by G.S. 1-399, formerly C.S. 758, Revisal 717, should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions originally instituted in that court. *Woody v. Fountain,* 143 N.C. 66, 55 S.E. 425. See also *Smith v. Johnson,* 137 N.C. 43, 49 S.E. 62; *Davis v. Wall,* 142 N.C. 450, 55 S.E. 350; *Brown v. Hutchinson,* 155 N.C. 205, 71 S.E. 302; *Hill v. Young,* 217 N.C. 114, 6 S.E. 2d 830; *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796; *Roberts v. Sawyer,* 229 N.C. 279, 49 S.E. 2d 468.

In such case the issues raised by the pleadings are (1) whether petitioners own the land described in his petition, and (2) as to the location of the land so described. In the present case defendant did not tender issues pertinent thereto. Therefore he has waived his right to a trial by jury.

But in any event, it would seem that in accordance with defendant's claim asserted before the referee his plea of twenty years adverse possession is unavailing to him. The report of the referee indicates that defendant claims immediately under a deed from Ila Lee, his wife, dated 18 April, 1944. And the referee finds that that deed conveyed no part of the land in dispute. In such case defendant, as grantee in that deed, would not be entitled to tack the adverse possession of his predecessor or predecessors in title as to a parcel of land not embraced within the description in his deed. See *Boyce v. White,* 227 N.C. 640, 44 S.E. 2d 49; *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E. 2d 476, and cases therein cited.

For reasons hereinabove stated, no error is made to appear on this appeal, and, hence, the judgment below is

Affirmed.

STATE v. C. D. BARNHARDT.

(Filed 13 April, 1949.)

1. Criminal Law § 62f—

Where defendant consents to the suspension of sentence on a particular count, he waives and abandons his right to appeal in regard thereto.

2. Intoxicating Liquor § 2—

Even though the Alcoholic Beverage Control Act, G.S. Chap. 18, Art. 3, is of Statewide operation, it does not repeal the Turlington Act, G.S. Chap. 18, Art. 1, but the Turlington Act remains in full force and effect except as modified by the later law, and as thus modified is the primary law in territory which has not elected to come under the A.B.C. Act.

3. Intoxicating Liquor § 4a—

The possession of nontax-paid liquor in any quantity anywhere in the State is unlawful. G.S. 18-48, G.S. 18-50.

4. Intoxicating Liquor § 6—

It is unlawful to purchase in this State any alcoholic beverage except from an A.B.C. Store; a person may purchase outside the State and transport herein for his own personal use not more than one gallon of alcoholic beverage at a time. G.S. 18-49, G.S. 18-58.

5. Intoxicating Liquor § 4a—

The provisions of the Turlington Act making the possession of any quantity of intoxicating beverage *prima facie* evidence that the possession is unlawful, with the burden on accused to show that such possession is legal within the exceptive provisions of G.S. 18-11, has been modified by the A.B.C. Act so that the possession in one's dwelling even in dry territory of not more than one gallon of liquor upon which the tax has been paid raises no presumption that the possession is unlawful. G.S. 18-49.

6. Same—

Upon proof of defendant's possession of more than one gallon of tax-paid liquor in his dwelling in territory which has not elected to come under the A.B.C. Act, the burden is upon defendant to rebut the *prima facie* evidence by showing that such possession not only comes within the exceptive provisions of G.S. 18-11, but also that it was legally acquired and transported to his dwelling and kept there for family uses only, G.S. 18-49, G.S. 18-58.

7. Intoxicating Liquor § 4a—

Testimony that defendant frequently slept in the house in which officers found more than one gallon of intoxicating liquor is insufficient to show that the house was defendant's private dwelling within the meaning of G.S. 18-11 and G.S. 18-58.

8. Intoxicating Liquor §§ 4a, 9f—

Evidence tending to show that more than one gallon of intoxicating liquor upon which the tax had not been paid was found in a house owned by defendant in dry territory justifies an instruction to the effect that it is unlawful to possess at any one time more than one gallon of intoxicating liquor even in the possessor's home when defendant offers no evidence tending to show that the liquor was acquired from an A.B.C. Store in this State or was purchased in another state and legally transported to his residence in quantities of not more than one gallon at any one time.

APPEAL by defendant from *Coggin, Special Judge,* September Term, 1948, ROWAN. No error.

Criminal prosecution on warrant charging that defendant did unlawfully (1) have in his possession intoxicating liquors, and (2) have in his possession certain intoxicating liquors for the purpose of sale.

On or about 20 March 1948 officers armed with a search warrant went to an old house belonging to defendant and located in Rowan County, about one mile from Enochville. It was locked. They requested a deputy sheriff of Cabarrus County, where defendant was, to get him and bring him to the scene. The defendant was brought to the house, and he then unlocked the door. The officers found a case of bonded liquor in pint containers under the bed. It bore no evidence that the State tax had been paid. Defendant said it was his liquor. They also found a trap door in the floor of the well house. Underneath this floor was an open

space six by eight feet in size and about four or five feet deep. In this space they found several empty whiskey cases.

There was a bed in the house, having the appearance of having been used, and also a set of bedsprings leaning against the wall. There was no other furniture or household equipment found except a coffee pot.

The defendant offered evidence tending to show the liquor belonged to him and one Clifford Connell; that they had it to drink; that Connell slept in the old house to look after rabbit dogs; that the house was not used for anything but sleeping; and that when they worked late, defendant "sleeps there too, he stays there quite a bit."

There was a verdict of guilty as charged in the warrant. Thereupon, the court pronounced judgment on the first count. It also, on the second count, pronounced judgment of imprisonment for a term of two years, suspended "with the consent of the defendant in open court" for five years on the conditions therein stated. To the pronouncement of judgment defendant excepted and appealed.

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

Bernard W. Cruse for defendant appellant.

BARNHILL, J. The defendant does not bring forward and discuss his exceptions to the refusal of the court below to sustain his demurrers to the evidence. In this he was well advised, for the evidence was amply sufficient to require its submission to the jury.

All the exceptions relied on relate to alleged error in the charge. Those which bear directly on the second count are not before us for consideration for the reason the defendant, by consenting to the suspension of the sentence on that count, waived and abandoned his right to appeal on the principal issue of his guilt or innocence of the crime therein charged. *S. v. Miller,* 225 N.C. 213, 34 S.E. 2d 143, and cases cited; *S. v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706.

The court instructed the jury that the only way a person can possess legally in his home any intoxicating liquor is "to have transported it legally to his home, and to have it in his own dwelling used and occupied by him as such . . . and used therein only for the purpose of drinking himself and of entertaining his *bona fide* guests while in his home. That is the only way in this dry county that whiskey can be legally possessed under the Turlington Act." And again, "It is unlawful to possess at any one time more than one gallon of intoxicating liquor, even though it is possessed in one's home."

The general provisions of the Alcoholic Beverage Control Act of 1937, Chap. 49, P.L. 1937, G.S. Chap. 18, Art. 3, are State-wide in operation.

S. v. Davis, 214 N.C. 787, 1 S.E. 2d 104; *S. v. Lockey,* 214 N.C. 525, 199 S.E. 715; *S. v. Epps,* 213 N.C. 709, 197 S.E. 580.

Even so, the Turlington Act of 1923, now G.S. Chap. 18, Art. 1, was not thereby repealed. Its provisions, as modified by the general provisions of the Alcoholic Beverage Control Act, are still in full force and effect. *S. v. Wilson,* 227 N.C. 43, 40 S.E. 2d 449; *S. v. Carpenter,* 215 N.C. 635, 3 S.E. 2d 34. In territory wherein A.B.C. stores have not been established—conveniently referred to as nonconforming territory—the former is the primary law, and the inconsistent or modifying provisions of the latter constitute exceptions thereto.

Thus, to ascertain the exact status of the law regulating the possession, transportation, and sale or possession for the purpose of sale, of intoxicating beverages in nonconforming territory, the two acts must be read together. When so read, as heretofore construed and applied by this Court, definite modifications of the Turlington Act are made to appear.

Under the Turlington Act it is unlawful to manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as therein authorized. G.S. 18-2. Likewise, under said Act, proof of the possession of any quantity of intoxicating beverage is *prima facie* evidence of the purpose of the possessor to sell, barter, or otherwise unlawfully dispose of the same, subject to the provision that possession of intoxicating liquor in one's private dwelling, while the same is used and occupied by him as his dwelling only, is not unlawful, provided such liquor is for the personal consumption of the owner thereof and his family residing in said dwelling and of his *bona fide* guests when entertained by him therein—which for the sake of brevity are referred to as family uses. G.S. 18-11. Under this section no distinction is made between tax-paid and nontax-paid liquor, and the quantity of liquor which may be possessed in one's private dwelling for personal consumption and family uses is unlimited.

Now the possession of nontax-paid liquor in any quantity anywhere in the State is, without exception, unlawful. G.S. 18-48, 50. *S. v. McNeill,* 225 N.C. 560, 35 S.E. 2d 629.

It is likewise unlawful to purchase in this State any alcoholic beverage from any source, except from a store operated in accordance with the Alcoholic Beverage Control Act of 1937, "except a person may purchase legally outside this State and bring into the same," in the manner provided by G.S. 18-49, "for his own personal use not more than one gallon of such alcoholic beverage." G.S. 18-58. For other exceptions not pertinent here see G.S. 18-49, G.S. 18-49.1, and G.S. 18-49.2.

On the other hand, a person living in nonconforming territory may lawfully transport, in sealed containers, to his own private dwelling for family uses, not in excess of one gallon of tax-paid liquor at any one

time, provided it is acquired from an A.B.C. store in this State or legally purchased in another State, G.S. 18-49, and he may there keep and possess the same for family uses. Such possession in a quantity not in excess of one gallon raises no presumption against him. *S. v. Suddreth,* 223 N.C. 610, 27 S.E. 2d 623; *S. v. Watts,* 224 N.C. 771, 32 S.E. 2d 348; *S. v. Wilson, supra.*

If the State can establish nothing more than that the defendant had in his private dwelling not in excess of one gallon of liquor upon which the tax has been paid, the presumption of lawfulness prevails and a verdict of not guilty should be directed. That is to say, where it appears that not more than one gallon of tax-paid liquor was found in the private dwelling of the defendant, the State, to convict, must establish by independent evidence, unaided by any presumption, that the possession is unlawful.

In such case, in the absence of evidence of possession of nontax-paid liquor or more than one gallon of tax-paid intoxicating beverage, *prima facie* evidence of the violation of the statute is wanting. *S. v. Watts, supra.*

Subject to this exception, possession within nonconforming territory of any quantity of liquor, however acquired, unless in transit in a manner permitted by the statute, is *prima facie* evidence that it is possessed for the purpose of sale, barter, etc., in violation of G.S. 18-11. *S. v. Hege,* 194 N.C. 526, 140 S.E. 80; *S. v. McAllister,* 187 N.C. 400, 121 S.E. 739; *S. v. Wilson, supra.*

This rule applies even when the liquor is in a private dwelling, and the burden rests upon the defendant to bring himself within the exceptive provision of the statute. G.S. 18-11; *S. v. Dowell,* 195 N.C. 523, 143 S.E. 133; *S. v. Epps, supra; S. v. Davis, supra; S. v. Watts, supra; S. v. Wilson, supra; S. v. Holbrook,* 228 N.C. 582, 46 S.E. (2d) 842.

Even so, the Turlington Act, as heretofore noted, does not restrict the quantity of intoxicating beverages a person may possess in his private dwelling for family uses. Neither does the Alcoholic Beverage Control Act limit the frequency with which a gallon of tax-paid liquor acquired from an A.B.C. store in this State or legally purchased in another State may be transported by a person to his private dwelling for family uses. If he possesses in his private dwelling more than one gallon of tax-paid liquor, what then?

He is protected against the presumption of illegality or the rule of evidence created by G.S. 18-11 only so long as he does not possess more than one gallon. Proof of the possession of more than one gallon, even though it is found in the private dwelling of defendant and the tax thereon has been paid, is *prima facie* evidence that such liquor is unlawfully possessed and is being kept for the purpose of sale. G.S. 18-11.

If he would rebut this *prima facie* evidence, the burden is on him to establish not only that the possession thereof comes within the exceptive provisions of G.S. 18-11, but also that it was legally acquired and transported to his private dwelling and there kept, not for sale, but for family uses only. *S. v. Davis, supra; S. v. Suddreth, supra; S. v. Wilson, supra; S. v. Watts, supra; S. v. Holbrook, supra.* The burden rests on him to bring his case within the exceptive provisions of G.S. 18-11 and also within the provisions of the Alcoholic Beverage Control Act authorizing the purchase and transportation of liquor under the limitations therein prescribed. *S. v. Holbrook, supra.*

Rowan County has not elected to come under the Alcoholic Beverage Control Act. Therefore, if there was any evidence tending to show that the defendant had in his possession in his private dwelling not more than one gallon of liquor upon which the tax had been paid, the quoted instruction would give us reason to pause and consider. But under the circumstances here disclosed it may not be held for prejudicial error. This, for two reasons.

First. There is no sufficient evidence to support a finding that defendant had the liquor in his private dwelling for family uses. The testimony tends to show merely that defendant frequently slept there. This falls short of proof that the house was his private dwelling—his home where he and the members of his family maintained their residence.

Second. Even if we concede, *arguendo,* that the liquor was in his private dwelling, there was more than one gallon, and there is no evidence tending to show that it was acquired from an A.B.C. store in this State, or legally purchased in another State, and lawfully transported to his residence in quantities of not more than one gallon at any one time. Indeed, defendant's own evidence tends to prove the contrary. It was acquired from an unknown truck driver-vendor on the premises of defendant. Having been unlawfully acquired, the possession was unlawful. This is the law as it is now written.

A careful consideration of the record leads us to the conclusion that in the trial below there was

No error.

J. VAN HANFORD AND J. VAN HANFORD, JR., TRADING AS PARTNERS UNDER THE TRADE NAME OF "SALISBURY FLORISTS' SUPPLY COMPANY," AND "J. VAN HANFORD & SON," v. ERNEST P. McSWAIN AND G. OLEN WACASTER, INDIVIDUALLY AND TRADING AS PARTNERS UNDER THE FIRM NAME OF "DAVIDSON GREENHOUSE."

(Filed 13 April, 1949.)

1. Judgments § 27a—

Movant must show not only excusable neglect but also a meritorious defense in order to be entitled to have a judgment against him set aside for excusable neglect. G.S. 1-220.

2. Same: Appeal and Error § 40d—

Upon motion to set aside a judgment under G.S. 1-220, the findings of the court as to excusable neglect and meritorious defense are conclusive when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light.

3. Appeal and Error § 40a—

A sole assignment of error based upon exception to the judgment presents only whether the facts found are sufficient to support the judgment and whether error in matters of law appears upon the face of the record.

4. Partnership § 6c—

Where a partnership exists or there has been a course of dealing leading the creditor to believe a partnership exists, actual notice to the creditor prior to the extension of the credit sued on that the person upon whose credit he had theretofore relied had withdrawn from the business, relieves such person of liability thereon.

5. Judgments § 27a—

Movant sought to have a judgment obtained against him on a partnership liability set aside for surprise and excusable neglect upon allegations in his answer and his motion that the creditor had actual notice of his withdrawal from the business prior to the extension of the credit sued on. *Held:* The conclusion of the trial court that movant had failed to show a meritorious defense was made under a misapprehension of the law and the facts, and the cause is remanded for further proceedings.

APPEAL by defendant Ernest P. McSwain from *Rousseau, J.*, at November Term, 1948, of ROWAN.

Civil action to recover for florists' supplies, flowers, and other items of merchandise allegedly sold on order of defendants,—heard upon motion to set aside judgment rendered therein.

Plaintiffs, in their complaint, make these allegations, briefly stated: That defendant Ernest P. McSwain is a resident of Lee County, North Carolina; that defendant G. Olen Wacaster is a resident of Burke County, North Carolina; that on or about 17 December, 1945, defendants formed

a partnership under the trade name of Davidson Greenhouse, or Davidson Greenhouses, and as such began operation of their business in the city of Lexington, North Carolina, on said date; that on or about 9 February, 1946, upon order of defendant, plaintiffs extended credit to defendants for merchandise sold and delivered, which merchandise was paid for by defendants in due course,—defendants at the time holding themselves out and representing themselves to be partners as aforesaid; that thereafter and between 14th and 24th days of September, 1946, plaintiffs, trading as Salisbury Florists' Supply Company, sold to defendants, upon their order, florists' supplies in the sum of $201.75, for which defendants after demand have failed and refused to pay; that between 30 August, 1946, and 24 October, 1946, plaintiffs, trading as J. Van Hanford & Son, sold to defendants, upon their order, flowers and other items of merchandise of the value of $358.98 for which defendants, after demand, have failed and refused to pay; and that the aforesaid articles of merchandise, referred to in last two preceding clauses, were sold to defendants upon their original representation that they were engaged in business as partners, and as such partners were conducting the business hereinbefore referred to as Davidson Greenhouse, or Davidson Greenhouses. And upon these allegations plaintiffs prayed judgment.

The defendant Ernest P. McSwain, alone, answering the complaint of plaintiffs, admits that he is a resident of Lee County, North Carolina, and that credit was extended to him about February, 1946, for merchandise sold and delivered,—which merchandise was fully paid for. However, this answering defendant denies all other allegations of the complaint, and avers that on or about 10 June, 1946, he sold and conveyed to Olen Wacaster all of his interest, right and title to said business operated in the city of Lexington, North Carolina, "and that plaintiffs had actual notice of said sale." This averment is repeated in answering specific allegations of the complaint.

And, this answering defendant, for further defense, avers: That in December, 1945, he organized and purchased a retail florist business in the city of Lexington, North Carolina; that in connection therewith he engaged the co-defendant Olen Wacaster to operate said business for him,—Wacaster "to receive a salary plus a percentage of the profits of the business for his management services, but that all of the investment was made by" this answering defendant, McSwain, and "the business and property were wholly owned by" him,—which he avers, on information and belief, "does not constitute a partnership"; that about 10 June, 1946, this answering defendant sold and conveyed all of said business to Olen Wacaster, and "that thereafter he retained no management or control or interest in said business except some unpaid notes of Wacaster for the purchase price"; "that plaintiffs had actual notice of said sale shortly

after said sale and before the transactions alleged as causes of action herein"; and that he "had no knowledge of said transactions, nor any responsibility therefor. Wherefore the answering defendant prays that plaintiff take nothing by this action," etc.

At October Term, 1948, the case was submitted to a jury upon the following issues, which the jury answered as shown:

"1. Are the defendants Ernest P. McSwain and G. Olen Wacaster, trading as Davidson Greenhouse, and Ernest P. McSwain, individually, indebted to the plaintiffs, as alleged in the complaint? Answer: Yes.

"2. If so, in what amount? Answer: $627.89 with interest."

Judgment was entered at said term in accordance with the verdict,—specifying, however, that plaintiffs have no recovery against G. Olen Wacaster—the court finding as fact that summons issued for him was returned without service.

On 18 October, 1948, defendant Ernest P. McSwain entered a motion, in writing and verified, to set aside the judgment so entered and for a new trial, and "thereunto relating and as grounds therefor" showed unto the court:

"(1) That by the printed calendar set by the Rowan County Bar, this case was set as the first case on Tuesday, October 12th, there being ten contested cases on the calendar for Monday.

"(2) That by custom the court meets at 9:30 a.m.

"(3) That the defendant and his attorney left Sanford, N. C., at 7:30 a.m., which in the usual course of events would allow them, traveling by automobile, to arrive in Salisbury by 9:30 a.m.

"(4) That due to re-surfacing of the highway between Asheboro and Lexington, where traffic was halted, the defendant was delayed and arrived in the Courtroom at Salisbury at 10:00 a.m.

"(5) That, arriving at the Courtroom at 10:00 a.m., the defendant was informed that the trial was over and that verdict had been rendered against him.

"(6) That the defendant has a meritorious defense in that he terminated his business relationship with his co-defendant Olen Wacaster before the merchandise sued for was sold and that the plaintiff or its agents had notice that McSwain was no longer responsible for the debts issued by Wacaster.

"(7) That said judgment injuriously affects the rights of the defendant."

The hearing of the motion so made was, upon motion of plaintiffs at said October Term, 1948, continued to the next term of Superior Court of the county,—formal order to this effect being signed 19 October, 1948, by the presiding judge.

At the November Term, 1948, a judgment was signed in which it is recited that this action came on for hearing on motion of the defendant Ernest P. McSwain to set aside the judgment rendered herein at October Term, 1948, upon the grounds appearing in said motion, and the court, after argument of counsel, and upon statements in open court made by counsel, finds the following facts:

"(1) That this action was instituted by plaintiffs against the defendants, plaintiffs alleging in paragraph three of their complaint that the defendants, on or about the 17th day of December, 1945, created a partnership under the firm name of Davidson Greenhouse, doing business in Lexington, North Carolina, said partners being indebted to the plaintiffs for merchandise sold and delivered upon order.

"(2) That the defendant Ernest P. McSwain filed answer denying said partnership.

"(3) That defendant's counsel, in the argument upon the motion to set aside said judgment, has admitted in open court facts which in the opinion of the court are equivalent to an admission of said partnership as alleged by plaintiffs, and said Ernest P. McSwain has further in paragraph six of his motion admitted original liability for the debts created by said partnership.

"(4) That the defendant Ernest P. McSwain has failed to allege or show to the satisfaction of the court any notice to the plaintiffs of the alleged dissolution of said partnership, or notice to any agent or representative of plaintiffs authorized to bind them by such notice, plaintiffs having relied upon such partnership in delivering the merchandise and extending the credit which is the basis of this action.

"The court being of the opinion that the defendant Ernest P. McSwain, individually and as a partner in said Davidson Greenhouse, has failed to show a meritorious defense to plaintiffs' action";

Thereupon, on motion of attorneys for plaintiff, the court "Ordered and adjudged, in the exercise of the court's discretion, that the motion of the defendant Ernest P. McSwain to set aside said judgment be, and the same is denied, and said defendant is taxed with the costs," . . . and "further ordered that judgment in this action be satisfied out of the funds deposited by said defendant in the office of the Clerk of the Superior Court of Rowan County, North Carolina, in lieu of a stay bond."

The defendant Ernest P. McSwain appeals therefrom to Supreme Court, and assigns error.

Linn & Shuford for plaintiffs, appellees.

Warren F. Olmsted for defendant, appellant.

WINBORNE, J. The decisions of this Court uniformly hold that a party, moving in apt time under the provisions of G.S. 1-220, to set aside a judgment taken against him, on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. *Dunn v. Jones,* 195 N.C. 354, 142 S.E. 320; *Hooks v. Neighbors,* 211 N.C. 382, 190 S.E. 224; *Johnson v. Sidbury,* 225 N.C. 208, 34 S.E. 2d 67; *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525; *Whitaker v. Raines,* 226 N.C. 526, 39 S.E. 2d 266, and numerous other cases.

The findings of fact made by the court in respect to the elements so required, excusable neglect and meritorious defense, when supported by evidence, are conclusive on appeal, and binding on this Court. *Craver v. Spaugh, supra.*

But facts found under misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light. *McGill v. Lumberton,* 215 N.C. 752, 3 S.E. 2d 586. See also *S. v. Fuller,* 114 N.C. 886, 19 S.E. 797; *S. v. Casey,* 201 N.C. 620, 161 S.E. 81; *Tickle v. Hobgood,* 212 N.C. 763, 194 S.E. 474; *Bullock v. Williams,* 213 N.C. 320, 195 S.E. 291; *Farris v. Trust Co.,* 215 N.C. 466, 2 S.E. 2d 363; *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9; *Stanley v. Hyman-Michaels Co.,* 222 N.C. 257, 22 S.E. 2d 570; *S. v. Williams,* 224 N.C. 183, 29 S.E. 2d 744; *Coley v. Dalrymple,* 225 N.C. 67, 33 S.E. 2d 477; *Troitino v. Goodman,* 225 N.C. 406, 35 S.E. 2d 277; *S. v. Gause,* 227 N.C. 26, 40 S.E. 2d 463; *Whitted v. Palmer Bee Co.,* 228 N.C. 447, 46 S.E. 2d 109.

Indeed, in *Calaway v. Harris,* 229 N.C. 117, 47 S.E. 2d 796, the principle has been aptly restated in this manner: "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," citing *McGill v. Lumberton, supra.*

Moreover, the only assignment of error brought forward for consideration on this appeal is based upon exception to the judgment from which appeal is taken. Such assignment of error, as recently restated in *Simmons v. Lee, ante,* 216, and in numerous cases there cited, raises only the questions (1) as to whether the facts as found by the judge are sufficient to support the judgment, and (2) as to whether error in matters of law appears upon the face of the record.

In this connection it is apparent, from a reading of the pleadings and of the motion of defendant McSwain to set aside the judgment originally taken against him in this action, that the facts found by the court in respect to a show of meritorious defense, were made under misapprehension of both the law and the facts.

The defense set up by defendant McSwain in his answer is that prior to the dates of alleged transaction on which suit is based, plaintiffs had actual notice of his retirement from the business referred to as Davidson Greenhouse. This is an averment of a meritorious defense, even though it be found as a fact that McSwain and Wacaster were partners trading as Davidson Greenhouse. *Straus v. Sparrow,* 148 N.C. 309, 62 S.E. 308; *Jenkins v. Renfrow,* 151 N.C. 323, 66 S.E. 212. See also *Scheiffelin v. Stevens,* 60 N.C. 105; *Ellison v. Sexton,* 105 N.C. 356, 11 S.E. 180, 180 Am. St. 907; *Alexander v. Harkins,* 120 N.C. 452, 27 S.E. 120; *Bynum and Paschal v. Clark,* 125 N.C. 352, 34 S.E. 438; *Supply Co. v. Lynn,* 173 N.C. 445, 92 S.E. 145.

And it would be the averment of a meritorious defense if it be found that McSwain, as he avers, had been trading under the name of Davidson Greenhouse, with Wacaster as the manager of the business, and he, McSwain, had sold the business to Wacaster. Compare the principle enunciated in *Sibley v. Gilmer,* 124 N.C. 631, 32 S.E. 964.

Also in the findings of fact made by the judge it appears as a fact "that this defendant McSwain has failed to allege . . . any notice to plaintiffs of the alleged dissolution of said partnership . . ." This is patently a misapprehension of the averments appearing in the answer, and stated in the motion, and upon the face of the record.

For reasons pointed out, the findings of fact and ruling thereon made by the judge below will be and are set aside, and the cause is remanded for further proceedings as to justice appertains and the rights of the parties may require.

Error and remanded.

T. P. DWIGGINS AND W. W. SMITH, TRADING AS SMITH-DWIGGINS MOTOR COMPANY, v. PARKWAY BUS COMPANY, INC.

(Filed 13 April, 1949.)

1. Abatement and Revival § 6—

Where a prior action is pending between the same parties, involving substantially the same subject matter, the second action will be dismissed upon demurrer if the pendency of the prior action appears on the face of the complaint, G.S. 1-127, or upon answer which alleges the facts, treated as a plea in abatement, if the pendency of the prior action does not so appear, G.S. 1-133.

2. Partnership § 6d—

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. G.S. 59-43.

3. Partnership § 7—

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, but the court at any time before judgment may direct that such other partner be brought in and made a party. G.S. 1-73.

4. Abatement and Revival § 9—

One partner was sued individually for damages resulting in a collision occurring while the partner was driving a partnership vehicle in the course of the partnership business. Thereafter the individual partners instituted suit in another county against the plaintiff in the first action to recover damages resulting to them out of the same collision. *Held:* The parties to the two actions are identical for the purposes of a plea in abatement, and the second action is abated in the Supreme Court upon the plea, the remedy in the second action being by counterclaim in the first.

APPEAL by defendant from *Clement, J.*, at December Term, 1948, of DAVIE.

Civil action to recover damage to plaintiff's automobile allegedly resulting from actionable negligence of defendant.

These facts are uncontroverted:

I. On 6 January, 1948, an automobile, a Plymouth sedan, property of T. P. Dwiggins and W. W. Smith, trading as Smith-Dwiggins Motor Company, a partnership engaged in business at Mocksville, Davie County, North Carolina, plaintiffs in this action, operated by said T. P. Dwiggins, came into collision with a passenger bus, property of Parkway Bus Company, a corporation whose principal office and place of business is in Wilkes County, North Carolina, defendant in this action, operated by its driver, J. Ervin Tutterow, resulting in damage to the automobile, and to the bus, and in personal injury to T. P. Dwiggins.

II. On 14 January, 1948, Parkway Bus Company, Inc., instituted an action in Superior Court of Wilkes County against T. P. Dwiggins and Smith-Dwiggins Motor Company, Inc., to recover damage done to its bus, in said collision, allegedly resulting from actionable negligence of T. P. Dwiggins, agent and employee of Smith-Dwiggins Motor Company, a corporation. Summons in this action was duly served on T. P. Dwiggins, individually on 21 January, 1948—and a copy of summons, and of complaint were left at the principal place of business of Smith-Dwiggins Motor Company in Mocksville, Davie County, N. C. The plaintiff, in its complaint filed in this action, in Wilkes County, alleged on information and belief that the Smith-Dwiggins Company was a corporation, but under date of 9 February, 1948, filed an amendment to its complaint as a matter of right, and before time for answering had expired, inserting in lieu of the above allegations that Smith-Dwiggins Motor Company

is a partnership composed of W. W. Smith and T. P. Dwiggins; and that T. P. Dwiggins is a partner, agent and employee of said partnership, and on 6 January, 1948, he was driving the Plymouth sedan, referred to above, and, at the times alleged, was acting as an agent, servant and employee of said partnership, and in the furtherance of the partnership's business.

III. In the meantime on 30 January, 1948, T. P. Dwiggins and W. W. Smith, trading as Smith-Dwiggins Motor Company, a partnership, as plaintiffs, instituted the present action in the Superior Court of Davie County, North Carolina, against Parkway Bus Company, Inc., as defendant, for the purpose of recovering for damage done to their automobile in said collision, allegedly resulting from the actionable negligence of J. Ervin Tutterow, driver of the passenger bus of the Bus Company. Summons in this action was served on 2 February, 1948.

IV. Thereafter the Parkway Bus Company, upon special appearance, moved to dismiss the present action for that the pending action in Wilkes County involved the same transaction, etc. This motion was denied on the ground that the relief sought must be taken advantage of by demurrer or answer. And the Parkway Bus Company answered, and pleaded the pendency of the action in Wilkes County in bar of right of the present plaintiff partnership to maintain this action in Davie County, and attached as a part of its answer a copy of its complaint, and amendment to complaint filed in the Wilkes County case. And upon the call of the present case for trial, defendant, Parkway Bus Company, moved that the case be dismissed on the ground of a prior pending suit between the same parties in Wilkes County. The motion was overruled, and defendant excepted. Exception No. 2.

V. The case proceeded to trial on two issues: "1. Was the plaintiff's automobile damaged by the negligence of the defendant as alleged in the complaint?

"2. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," and the second, "$1,500.00."

From judgment in favor of plaintiff, on verdict so rendered, defendant appeals to Supreme Court, and assigns error.

A. T. Grant and Whicker & Whicker for plaintiff, appellee.

Larry S. Moore for defendant, appellant.

WINBORNE, J. Did the court below err in denying motion of defendant Parkway Bus Company for dismissal of present action on the ground that there is another action pending between the same parties for the

same cause? G.S. 1-127. This is the determinative question on this appeal, and the answer is "Yes."

"Where an action is instituted, and it appears to the court by plea, answer or demurrer, that there is another action pending between the same parties and substantially on the same subject matter, and that all the material questions and rights can be determined therein, such action will be dismissed," *Faircloth, C. J.,* in *Alexander v. Norwood,* 118 N.C. 381, 24 S.E. 119. See also *Emry v. Chappell,* 148 N.C. 327, 62 S.E. 411; *Allen v. Salley,* 179 N.C. 147, 101 S.E. 545; *Construction Co. v. Ice Co.,* 190 N.C. 580, 130 S.E. 165; *Morrison v. Lewis,* 197 N.C. 79, 147 S.E. 729; *Underwood v. Dooley,* 197 N.C. 100, 147 S.E. 686, 64 A.L.R. 656; *Johnson v. Smith,* 215 N.C. 322, 1 S.E. 2d 834; *Thompson v. R. R.,* 216 N.C. 554, 6 S.E. 2d 38; *Moore v. Moore,* 224 N.C. 552, 31 S.E. 2d 690.

If the fact of the pendency of such prior action appears on the face of the complaint, it is ground upon which defendant may demur to the complaint. G.S. 1-127. But if the fact does not so appear, objection may be raised by answer, G.S. 1-133, and treated as a plea in abatement. *Cook v. Cook,* 159 N.C. 47, 74 S.E. 639; *Allen v. Salley, supra; Thompson v. R. R., supra.*

Indeed, in *Alexander v. Norwood, supra,* the Court went so far as to say: "The plaintiff has no election to litigate in the one or bring another action (*Rogers v. Holt,* 62 N.C. 108), and the Court will *ex mero motu,* dismiss the second action, as the parties even by consent, cannot give the court jurisdiction. *Long v. Jarratt,* 94 N.C. 443." To like effect are these cases: *Emry v. Chappell, supra; Construction Co. v. Ice Co., supra.*

Moreover, it is said that the entire spirit of our Code procedure is to avoid multiplicity of actions. Hence where an action for damages arising by tort from a collision between automobiles has been instituted by one of the parties, he may successfully plead the pendency of this action in bar to a later action brought against him by the opposing party in another county, and have it dismissed. *Allen v. Salley, supra; Boney v. Parker,* 227 N.C. 350, 42 S.E. 2d 222. The remedy open to defendant in the prior action, plaintiff in second action, is by way of counterclaim set up in the prior action.

In such case as in the present instance the causes of action in the respective cases arise out of, and are bottomed on the same collision,—each alleging actionable negligence against the other.

The only question remaining is whether the parties to the action in Superior Court of Wilkes County are the same as the parties to the present action in Superior Court of Davie County.

In this connection, at common law the liability of members of a partnership for a tort committed in the course of its business is joint and

several. *Hall v. Younts,* 87 N.C. 285; *Mode v. Penland,* 93 N.C. 292. Annotations 175 A.L.R. 1310.

In *Hall v. Younts, supra,* in opinion by *Ruffin, J.,* it is said: "But partners, like individuals, are responsible for torts committed by their agents under express commands under the maxim *qui facit per alium facit per se,* and a partner acting in the name of the firm, touching its business and with a knowledge of the other members must be regarded as the agent of all. In all such cases, says Collyer on Partnership, Sec. 457, the tort is looked upon as the joint and several tort of all the partners, and they may be proceeded against in a body, or one may be sued for the whole of the injury done."

The holding in *Mode v. Penland, supra,* is to like effect. There *Merrimon, J.,* for the Court, declared: "Although all the partners are liable in such cases and *may* be sued, it does not follow that all of them *must* be sued. The law treats all torts as several, as well as joint, and the party injured may, at his election, sue all of the partners, or any one or more of them, for the injury done him . . . So that the plaintiff, if he suffered the injury complained of, could maintain his action against the defendant alone, or against him and his partners . . ."

And the common law rule of joint and several liability of partners for a tort committed by one of the members of the partnership is incorporated in the Uniform Partnership Act, adopted by the General Assembly of this State. See P.L. 1941, Chapter 374, now Article 2 of Chapter 59 of the General Statutes.

This Uniform Partnership Act provides: That a partnership is an association of two or more persons to carry on as co-owners a business for profit, G.S. 59-36; that every partner is an agent of the partnership for the purposes of its business, and the act of every partner for apparently carrying on in the usual way the business of the partnership of which he is a member ordinarily binds the partnership, G.S. 59-39; that where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act, G.S. 59-43; and that all partners are liable jointly and severally for everything chargeable to the partnership under G.S. 59-43.

Therefore it is not necessary that all members of an alleged partnership should be served with summons. A partnership is represented by the partner who is served, and as to him a judgment in the action in which he is served would be binding on him individually, and as to the partnership property. But as to a partner not served with summons, the judgment would not be binding on him individually. Nevertheless even

after judgment such partner could be brought in and made a party. The court may, before or after judgment, direct the bringing in new parties to the end that substantial justice may be done. G.S. 1-73. *Bullard v. Johnson,* 65 N.C. 436; *Walker v. Miller,* 139 N.C. 448, 52 S.E. 125, 1 L.R.A. (N.S.) 157, 111 Am. St. Rep. 805; *Daniel v. Bethell,* 167 N.C. 218, 83 S.E. 307; *Johnston Co. v. Stewart,* 217 N.C. 334, 7 S.E. 2d 708.

Applying these principles to the case in hand, it would seem that T. P. Dwiggins, one of the partners in Smith-Dwiggins Motor Company, having been made a party individually to the action as originally instituted in Superior Court of Wilkes County before the action was commenced in Superior Court of Davie County, the case is staked out, so to speak, in Wilkes County. The rights and liabilities of the partnership arising out of the collision are dependent upon the acts of T.P. Dwiggins in connection therewith. Therefore, whatever rights of action T. P. Dwiggins, individually and his partnership, whose automobile it is alleged in the present action he was operating at the time of the collision involved, may have against the Parkway Bus Company, arising out of the collision, can be determined in the action in Wilkes County, and, therefore, must be litigated in that action. *Allen v. Salley, supra.*

Hence the judgment from which this appeal is taken will be set aside. The action abates.

Action abated.

STATE V. TOM SUDDRETH.

(Filed 13 April, 1949.)

1. Criminal Law § 57a: Jury § 1—

One of the jurors, while the prosecution for homicide was pending, had the sister of the dead man as one of his passengers in a four mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. *Held:* Exception to the refusal of the motion is not reviewable, since the court's ruling upon the competency of jurors is conclusive unless accompanied by some imputed error of law. G.S. 9-14.

2. Homicide § 27b—

The omission of the word "intentional" in stating the presumptions arising from an intentional killing with a deadly weapon will not be held for prejudicial error when the fact that the killing was intentional is not controverted and it appears from defendant's own testimony that he intentionally shot deceased but claimed that he did so in self-defense.

3. Homicide § 27f—

The court's charge upon murder in the second degree will not be held for error as taking away from the jury the right to consider defendant's plea of self-defense when immediately after giving the charge complained of the court gave a full and proper charge on the plea of self-defense.

4. Homicide § 27b—

Where the State's evidence shows an intentional killing with a deadly weapon, the failure of the court to reiterate the *quantum* of proof resting upon the State in one instance while stating the facts upon which the jury might find the defendant guilty of manslaughter upon defendant's evidence in mitigation, does not constitute reversible error, the charge being construed contextually.

APPEAL by defendant from *Pless, J.*, at November Term, 1948, of CALDWELL.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Horry Crisp, Jr.

The defendant and the deceased were brothers-in-law, having married sisters. They lived within one-half mile of each other, and it is apparent from the record that there had been some bad feeling between the two families because the wife of the defendant had been talking about the deceased as a result of some information she had received in a letter.

The State's evidence tends to show that on 23 October, 1948, the deceased and his wife left home together about 5:00 p.m., for the purpose of contacting a colored man on some business matter. They had to go by the home of the defendant on their way to see the colored man. When they reached the home of the defendant, the wife of the deceased expressed a desire to see the letter her sister had received which contained the uncomplimentary statements about the deceased. The wife of the defendant was not at home, but the defendant sent one of his children for her. She came home and got the letter; and the defendant's wife, and the deceased and his wife were standing in front of the house in the public road, and the wife of the defendant was reading the letter when "all of a sudden she turned and started up the road and Horry glanced up and took about two steps backward and the gun fired." The defendant fired the gun from his porch and between 100 and 150 shot took effect in the back of the deceased. The deceased died before reaching the hospital in Lenoir, which was about four or five miles from the home of the defendant.

According to the State's evidence, the deceased was armed with a pistol but made no attempt to use it. Neither did he threaten the defendant's wife or make any statement to the defendant about killing him or being killed.

The defendant testified that on the day of the killing, the deceased had been by his house between one and two o'clock and had shot at some of his chickens; that when he came back around five o'clock the deceased had been drinking and they had some words and he begged him to leave; that the deceased said "Tom I came here to kill or be killed; I had just as soon die now as any other time and had just as soon die in the electric chair as any other place"; that he was on his porch leaning against the door, while his wife and the deceased and his wife were in the road talking and looking at the letter . . . "I didn't go in the house to get the shotgun . . . It was setting right beside the door and I just had to reach in and get it. While he was cursing I reached in like that (indicating) and got the gun and came out with it . . . I . . . had loaded it just before that. I figured maybe I could scare him off without having to kill him . . . When I stepped out and he saw my gun, he made a dive and I had to do something . . . He went backwards with his gun pointed at me and I had to shoot or do something, and I shot just as he turned. He had his gun on me. It was cocked and it was loaded. He was looking right at me at the time I shot and he wheeled . . . I shot him because I saw him going down into that bridge or culvert or ditch and I thought he wanted to barricade himself and shoot me."

The bridge was across the road from the defendant's house, and there was a rock wall about five and a half feet below the bridge.

The jury returned a verdict of guilty of manslaughter and from the judgment imposed, the defendant appeals, assigning error.

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

W. H. Strickland and Max C. Wilson for defendant.

DENNY, J. After verdict and before judgment was imposed, the defendant moved to set aside the verdict because Elijah Bentley, one of the jurors, had permitted Mrs. Mabel Crisp Whisnant, sister of the deceased, Horry Crisp, Jr., to ride in his car while the case was pending. The court made a thorough investigation of the matter and found as a fact that the juror did permit Mrs. Whisnant to ride in the back seat of his car with her husband, for a distance of some four miles on the afternoon of Thursday, 2 December, 1948, while the case was in progress; that Carl Gilbert sat on the front seat of the car with the juror, who drove the car, and that the case was not discussed during the time Mrs. Whisnant and her husband were in the car. The juror also stated upon oath that he did not know Mrs. Whisnant was a sister of the dead man.

The court being of the opinion that the result of the case had not been affected by the association alleged and shown, declined to set aside the

verdict either as a matter of law or in its discretion. The defendant excepted.

It is provided by statute, G.S. 9-14, that the judge "shall decide all questions as to the competency of jurors," and his rulings thereon are final and "not subject to review on appeal unless accompanied by some imputed error of law," *S. v. DeGraffenreid,* 224 N.C. 517, 13 S.E. 2d 523; *S. v. Hill,* 225 N.C. 74, 33 S.E. 2d 470; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. This exception presents no reviewable question of law and will not be sustained.

The court charged the jury that "there is a presumption where a killing is done with a deadly weapon, that it is done with malice, and . . . an unlawful killing with malice is murder in the second degree." And the court further charged: "Stated another way, Gentlemen, the State does not have to prove anything more than a killing with a deadly weapon in this case. If it does that beyond a reasonable doubt, then it has no further burden. The burden is then upon the defendant to reduce it by satisfying you of a lack of malice, or to absolve himself by satisfying you that the killing was done in self-defense."

Exceptions 11 and 12 are directed to the above portions of the charge. It is contended his Honor committed reversible error in omitting the word "intentional" in connection with the charge on the presumption raised by a killing with a deadly weapon.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. And an intentional killing with a deadly weapon raises two presumptions: first, that the killing was unlawful; and second, that it was done with malice. *S. v. Robinson,* 188 N.C. 784, 125 S.E. 617.

There are circumstances under which it would be error to charge that a killing with a deadly weapon raises the presumption that the killing was unlawful and that it was done with malice. *S. v. Burrage,* 223 N.C. 129, 25 S.E. 2d 393; *S. v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562; *S. v. Gregory,* 203 N.C. 528, 166 S.E. 387. It must be noted, however, that his Honor instructed the jury that "the State does not have to prove anything more than a killing with a deadly weapon *in this case.*" The defendant had stated to numerous persons that he shot the deceased, he so testified on direct and cross-examination, but claimed he did so in self-defense; and the case was tried on that theory. *S. v. Davis,* 223 N.C. 381, 26 S.E. 2d 869; *S. v. Utley,* 223 N.C. 39, 25 S.E. 2d 195. When one kills another with a deadly weapon, in the absence of evidence to the contrary, it will be presumed "that he did so intentionally, since all persons are presumed to intend the consequences of their acts." *S. v. Wallace,* 203 N.C. 284, 165 S.E. 716. Therefore, upon the facts in this case the exceptions are feckless.

The defendant also excepts and assigns as error the following portion of the charge: "The Court instructs you further, Gentlemen of the Jury, that if you find beyond a reasonable doubt that defendant shot and killed the deceased but find that at the time of so doing that the defendant was not actuated by malice towards the deceased but that he was acting hastily and without just cause, that he then inflicted the wound that caused the death of the deceased, then, Gentlemen of the jury, upon that finding, the defendant would be guilty of manslaughter."

The defendant contends this instruction took away from the jury the right to consider his plea of self-defense. This contention is untenable; for immediately after giving the above instruction, the court gave a full and proper charge on the defendant's plea of self-defense.

Likewise, the defendant assigns as error the following excerpt from the charge: "If you find, Gentlemen of the Jury, and you are satisfied that the defendant acted with malice in the matter, and that it was not necessary for him to shoot and kill the deceased, and it was not apparently necessary, but that he did it in the heat of passion so to speak, then, Gentlemen of the Jury, the defendant would be guilty of manslaughter, and it would be your duty to render a verdict accordingly."

Here the court charged the jury "if . . . you are satisfied that the defendant acted with malice," etc., instead of charging them if you are satisfied *beyond a reasonable doubt,* etc. The complaint here is to the measure or *quantum* of proof required for conviction. Standing alone and detached from the remainder of the charge the exception would be well taken. But in each of the five paragraphs of the charge immediately preceding the one complained of, instruction as to the burden of proof was correctly given. And the instructions given related to murder in the second degree, manslaughter and the defendant's plea of self-defense. Moreover, this portion of the charge was primarily directed to a mitigating circumstance which if found to the satisfaction of the jury, would rebut or displace the presumption of malice and reduce the crime to manslaughter. *S. v. Baldwin,* 152 N.C. 822, 68 S.E. 148; *S. v. Kennedy,* 169 N.C. 288, 84 S.E. 515; *S. v. Terrell,* 212 N.C. 145, 193 S.E. 161. Consequently, when the charge is considered contextually, the lack of exactitude in the instruction complained of is insufficient to show reversible error.

Moreover, all the exceptions to the charge, except the last two discussed herein, are directed to the court's charge on murder in the second degree and not manslaughter; and since the defendant was convicted of manslaughter and not murder in the second degree, no error has been shown of sufficient merit to warrant a new trial.

We have carefully examined the remaining assignments of error and they are without merit.

It would seem the defendant's own testimony was sufficient to warrant the verdict rendered below. *S. v. Marshall,* 208 N.C. 127, 179 S.E. 427.

In the trial below, we find

No error.

STATE v. ROBERT L. SUTTON.

(Filed 13 April, 1949.)

1. Criminal Law § 77d—

The Supreme Court is bound by the record.

2. Rape § 19—

In this prosecution of defendant for carnal knowledge of a female child over twelve and under sixteen years of age, defendant offered evidence of the immortal character of prosecutrix and her sister and aunt. *Held:* A charge that such testimony was not competent upon the question of defendant's guilt or innocence, but that it was material as bearing upon the likelihood of defendant to indulge in such conduct, is prejudicial error.

3. Criminal Law § 78e (1)—

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of G.S. 1-180.

4. Same—

Where the only part of the charge applying the law to the evidence in the case is the statement of the respective contentions of the parties, exceptions for failure of the court to instruct the jury as to the law arising on the evidence, taken in each instance where the court arrayed the facts in the form of a contention, are sufficient to present defendant's contention that the charge failed to comply with G.S. 1-180.

5. Rape § 19—

Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of G.S. 1-180, and an exception thereto will be sustained. G.S. 14-26.

6. Criminal Law § 53d—

In a prosecution for a statutory crime it is not sufficient for the court merely to read the statute and the indictment, but the court, in discharging its duty to charge on all substantial features of the case, should explain the statute and outline the essential elements of the offense, and apply the law as thus defined to the evidence in the case. G.S. 1-180.

7. Same—

Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi, if believed by the jury.

STATE *v.* SUTTON.

APPEAL by defendant from *Sink, J.,* October Term, 1948, JACKSON. New trial.

Criminal prosecution under G.S. 14-26, on bill of indictment charging carnal knowledge of a female child over twelve and under sixteen years of age.

The evidence for the State tends to show that on 9 January 1947, on her thirteenth birthday anniversary, Sallie Ramsey was picked up near her home by defendant and carried on his car to a deserted spot off the main highway and near an old corn mill; that there he had sexual intercourse with her on the back seat of his automobile; that this was the first time the girl had had intercourse with any person; and that thereafter illicit relations were maintained by the defendant and the prosecutrix over a period of several months, the defendant taking her to various places for that purpose.

The evidence for the State likewise tends to show that defendant engaged in illicit relations with Sallie Ramsey's younger sister and probably with her aunt, Edna Davis, the aunt conniving to get the parties together at various times. There was also evidence of other incriminating facts and circumstances.

The evidence for the defendant tended to show that he was not acquainted with the prosecuting witness or her sister or aunt; that while she and her sister and aunt had been guilty of unseemly conduct, the man involved was named Ramsey; that defendant never associated with either one of the women. There was also evidence tending to show that it was impossible for defendant to have been at the places on the occasions and at the times testified to by the State's witnesses. Defendant likewise offered evidence of his good reputation.

The jury returned a verdict of guilty. The court pronounced judgment of imprisonment in the State's Prison for a term of not less than twenty or more than thirty years. Defendant excepted and appealed.

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

W. R. Francis, John M. Queen, Hugh E. Monteith, and David M. Hall for defendant appellant.

BARNHILL, J. The court below in its charge instructed the jury as follows:

"There has been testimony offered regarding the character and the conduct of Louise Ramsey and her aunt, Edna Davis, and Sallie Ramsey and her aunt, Edna Davis. The Court charges you that while this testimony is not competent as bearing upon the question of the guilt or innocence of the defendant, that it is material for you to consider only as

bearing on the inclination, disposition, likelihood or the lack of it, of the defendant to indulge in this manner of conduct."

Whether this instruction, as it appears in the record, conveys the thought the trial judge had in mind at the time or expresses with exactness just what he did say, we are unable to determine. In any event, we must take it as we find it.

How evidence tending to show that these three women were immoral, lascivious, dissolute characters could have any material bearing on "the inclination, disposition, likelihood or lack of it, of the defendant" to indulge in similar unbridled conduct or to show intent, design, or guilty knowledge of the defendant, or to identify the person charged, we are unable to perceive. To have his inclination and disposition to indulge in immoral acts judged by their conduct saddled upon him a burden the law does not contemplate.

While we do not recognize a broadside exception to the charge but require an assignment of error of this kind to point out wherein the judge failed to comply with G.S. 1-180, it is sometimes difficult to decide on which side a particular assignment falls. Here, however, we think the combination of exceptions and assignments brings the defendant under the wire and sufficiently presents his contention that the court below inadvertently failed to comply with the mandatory provisions of G.S. 1-180.

He excepts in part for that the court failed to instruct the jury in respect to the particular issues arising on the evidence and apply the law thereto in such manner as to enable the jury to understand the essential elements of the crime charged. Then, in each instance where the court arrayed the facts in the form of a contention, he excepts "for that the Court failed to instruct the jury as to the law arising on evidence of this character."

The court, in charging the jury, read the statute, G.S. 14-26, and the bill of indictment; charged on the presumption of innocence; defined reasonable doubt and properly placed the burden of proof. It then gave the contentions of the State on the one hand and the defendant on the other. It likewise gave the quoted instruction and charged the jury as to how they should consider "character testimony" and testimony of defendant.

In summary, this is the sum total of the charge. At no time was the jury instructed that in order to convict, the State must prove not only an act of illicit sexual intercourse between defendant and the girl, but also that she was under sixteen years of age and, at the time, had never had sexual intercourse with any other man. The elements of age and virginity are not mentioned, even in the statement of contentions, except that it is stated the defendant contends the prosecutrix "is a young girl

guilty of lascivious conduct" and "that she was not a virgin on the 9th day of January, 1947, as contended for by the State of North Carolina."

Therefore, under the charge considered contextually, the one issue submitted to the jury was as to whether there had been illicit relations between the defendant and the prosecutrix. The inadvertence of the court in failing to state and explain the other essential elements of the crime and relate them to the evidence in the case must be held for error.

"The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved. *Bird v. U. S.,* 180 U.S. 356, 45 L. Ed., 570." *S. v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751; *S. v. Jackson,* 228 N.C. 656, 46 S.E. 2d 858.

When a person is on trial, charged with having committed a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. *S. v. Flinchem,* 228 N.C. 149, 44 S.E. 2d 724; *S. v. Friddle, supra; Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630; *Bowen v. Schnibben,* 184 N.C. 248, 114 S.E. 170. This "calls for instructions as to the law upon all substantial features of the case." *Williams v. Coach Company,* 197 N.C. 12, 147 S.E. 435; *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615, and cases cited; *Lewis v. Watson,* 229 N.C. 20; *S. v. Fain,* 229 N.C. 644.

Thus it is, on a prosecution under G.S. 14-26, the failure of the court to give the jury a correct charge on the element of age is error. *S. v. Isley,* 221 N.C. 213, 19 S.E. 2d 875.

While here the age of the prosecutrix does not seem to be seriously questioned, the chastity of the girl at the time of the alleged offense as well as the identity of the offender is vigorously contested. Hence, the defendant was entitled to have the court instruct the jury fully as to the essential elements of the crime and to relate this law to the evidence in the case.

Evidence of an alibi is substantive and the defendant was entitled to an instruction as to the legal effect of his evidence of alibi, if believed and accepted by the jury. *S. v. Melton,* 187 N.C. 481, 122 S.E. 17.

For the reasons stated there must be a

New trial.

STATE v. WILLIAM EDWARD FENTRESS.

(Filed 13 April, 1949.)

1. Automobiles § 28e—

Evidence in this case of defendant's driving at an excessive speed while intoxicated, resulting in an accident causing the death of passengers in his car, held sufficient to sustain conviction of manslaughter.

2. Criminal Law § 78d (1)—

Where objection is not made to the question but only to the answer of a witness, its exclusion is discretionary with the court.

3. Criminal Law § 81c (3)—

Admission of testimony over objection is ordinarily harmless when identical matter is later introduced without objection.

4. Automobiles § 28d—

Where there is evidence that defendant was driving at excessive speed on the entire trip to and from a city in another state, the admission of testimony as to excessive speed at the beginning of the journey, even though somewhat remote, will not be held prejudicial.

5. Same—

Testimony of a witness that the car passed with the accelerator "wide open" and that in his opinion the car was traveling 85 miles per hour, *is held* competent as testimony of matters apprehended by the witness through his senses and relevant to the issue, and its admission does not constitute reversible error, certainly in view of its support from the physical facts at the scene of the wreck which occurred a few moments later, and the fact that the witness later testified to substantially the same import without objection.

6. Automobiles §§ 28d, 28f—

There was evidence that a fifth of whiskey was found in the wrecked car which defendant was driving and that shortly before the accident an officer of the law had told defendant he was too drunk to drive and required him to turn over the wheel to another. *Held:* The evidence of defendant's intoxication was sufficient to justify the court in reading the statute and charging the jury upon the law of drunken driving.

DEFENDANT'S appeal from *Phillip's J.*, November Term, 1948, CASWELL Superior Court.

The defendant was tried on an indictment, in the statutory form, charging him with manslaughter, was found guilty and sentenced to State's Prison for a term of not less than two nor more than four years. From this judgment he appeals to this Court, assigning errors.

The indictment grew out of a collision and destruction of an automobile driven by the defendant in which Miss Frances Williamson, a guest

in the car, and one Melvin Braxton, also a guest, were killed. The indictment is for the slaying of Miss Williamson.

In support of the charge the State depended on (a) evidence of drunken driving by defendant; and (b) driving at an unlawful rate of speed; it being contended that the death of Miss Williamson was the proximate result of defendant's culpable negligence in both respects.

In summary and partly in narrative form the State's evidence tended to show as follows:

The evidence is concerned with an automobile trip from Greensboro, North Carolina, to Danville, Virginia, and a partial return made by seven persons; the defendant Fentress driving in his own car; Jack Kincaid and Miss Williamson; Mack Allred and Miss Williams, Melvin Braxton, and an unnamed "boy from Missouri." They got together somewhat casually at Greensboro and after visiting a number of "night places" in Greensboro and on the High Point-Greensboro road—the Casa Blanca, Boar and Castle, and other places where some of the parties got beers, at the request of Jack Kincaid the party started to Danville where Kincaid and Miss Frances Williamson purposed to get married, and Allred and Miss Heddy Williams were like-minded. On arrival at Danville Melvin Braxton was left in the car and the others went into the house of a preacher in order to have the ceremony performed. They were told that the marriage could not take place that night because a blood test had to be first made and license obtained. They returned to the car.

Meantime the boy left in the car had begun to raise a disturbance and the police had arrived. The police "walked" them to test their condition as to intoxication, told the defendant Fentress he was "too high" to drive and required him to turn over the wheel to the Missouri boy whom he found sober enough to drive. On the return Fentress resumed driving and continued driving until the "accident." A witness testified that Fentress was "speeding" from the time they left Greensboro until the accident. Witnesses testified to warning Fentress that he was going too fast and asking him to slow down.

The first time evidence of such a warning was introduced the following occurred:

"Q. What was said by anybody in the car about his driving?

"A. A couple of them told him to slow down between Greensboro and Reidsville." Defendant objected; overruled, and exception.

There was further evidence that defendant was warned about the speed he was making after leaving Danville in the direction of Reidsville to which there was no objection.

J. T. Foster testified that he lived about three-quarters of a mile "above the accident" on the left side of 86 coming towards Yanceyville.

"Q. On this particular night did you see or hear this automobile?

"A. I heard it. Had just closed up shop and went in and this car came through and I thought it was going to hit the service station. I heard the car going through and the accelerator wide open and I got up and went to the porch and it had done hit."

The defendant objected; overruled; exception. Later this witness further testified: "As I heard the car approaching and heard it pass my house my opinion would be that it appeared to be wide open. I would say 85 miles." Later, after testimony concerning the map was entered, the witness testified without objection that as he heard the car approaching and heard it pass his house it appeared to be wide open and in his opinion was traveling at the rate of 85 miles per hour. A few moments after hearing the car pass he heard a crash and proceeded immediately to the scene of the accident. He further described conditions he found,—the car demolished and the bodies of the occupants scattered over the ground in different positions.

G. D. Dodson, a State Highway Patrolman, testified that he was sleeping about three blocks from where the accident occurred, was awakened by the crash, after which it was quiet; listened for more noise and heard a scream; dressed and went down to the place.

The accident occurred at a curve in the highway. There were skid marks tracing the path of the car but the brakes had not been applied. The marks indicated that the car was part time going sidewise, hitting the first tree, making a complete turn and hitting the second tree. The highway was dry. The car was practically demolished, jammed and buckled up, and the occupants scattered on the ground between the wheels. He found in the car a "5th" of whiskey in the glove compartment. Frances Williamson and Melvin Braxton died.

The State rested and the defendant demurred to the evidence and moved for judgment as of nonsuit, which was denied, and defendant excepted. Defendant offered no evidence but, (possibly by way of precaution), again moved for judgment as of nonsuit, which was denied, and he excepted.

(Objections to the instructions given the jury will be noted in the opinion.)

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

P. W. Glidewell, Sr., for defendant, appellant.

SEAWELL, J. The motion for judgment of nonsuit upon the evidence was properly overruled.

The objections to the admission of evidence is with respect to (a) warnings given the defendant by the occupants of the car that he was driving too fast and to slow down; (b) to the statement made by the "cop" at Danville, to Fentress that he was "to high" to drive, compelling him to relinquish the wheel to the "boy from Missouri" who seemed to be sufficiently sober; (c) admitting the evidence of J. T. Foster as to hearing the car pass with the accelerator wide open and going at terrific speed.

All these exceptions are subject to criticisms which affect their validity as presenting reversible error. First, objection is only to the answers and not made until the matter was in, under conditions which made exclusion discretionary with the court. *S. v. Hunt,* 223 N.C. 173, 176, 25 S.E. 2d 598; *S. v. Stancill,* 178 N.C. 683, 687, 100 S.E. 241. Second, testimony as to the identical matter was later introduced without objection. *S. v. Hunt, supra; S. v. Stancill, supra.*

We observe a distinction with respect to the warning given between Greensboro and Danville as being too remote in time elapsed and distance traveled to stand alone as independent evidence; but there is evidence that defendant was speeding from the time he left Greensboro until the accident. Taken with the whole evidence we do not find it sufficient to justify reversal on the theory of prejudicial error.

Furthermore, the evidence of Foster who testified that he heard the car passing with a great noise and at a rapid rate of speed does not lack circumstantial support, since its roaring progress stopped with a loud crash at the point where he found it a moment later, torn to pieces and its occupants lying on the ground about the wreck.

When relevant to the issue, a witness may testify to any thing he has apprehended by any of his five senses, or all of them together. The objection goes to the weight and significance rather than to the competency of the evidence. At any rate, the witness later testified to substantially the same thing without objection.

Appellant objects to the reading of the statute relating to drunken driving, on the ground that there was no evidence of defendant's intoxication. We do not agree with the ground of the objection and, therefore, not with its merit. The instruction to the jury brought forward by exception in defendant's brief was given in relation to this statute. The objection is based upon the same theory, that is that there is no evidence in the record of defendant's intoxication. As already stated, we cannot so hold, and cannot sustain the exception.

Other exceptions not discussed have been examined. On the whole record we do not find reversible error.

No error.

STATE v. T. R. STALLINGS.

(Filed 13 April, 1949.)

1. Appeal and Error § 40l—

A constitutional question will not be determined when the appeal may be made to turn upon a question of lesser moment.

2. Same: Criminal Law § 78b—

Where defendant attacks the ordinance under which he was convicted on the ground that it was beyond the police power of the municipality, but does not attack it on the ground that its provisions are too vague and indefinite to be enforceable, the court will limit its decision to the ground properly presented and fully argued.

3. Municipal Corporations § 39—

The Legislature has delegated to municipalities the power to license, regulate and control the operators and drivers of taxicabs. G.S. 160-200 (7), (36a), G.S. 20-37, G.S. 160-52.

4. Same—

Where the governing authority of a municipality has enacted an ordinance regulating operators and drivers of taxicabs within the municipality in the exercise of police power delegated to it, the wisdom and expediency of the regulation is solely for it, and the ordinance will be presumed valid and the courts cannot hold its terms unreasonable except for discrimination between persons in a like situation.

5. Same—

An ordinance of a municipality, enacted pursuant to its delegated police power, requiring the drivers of taxicabs to wear distinctive caps, *is held* for the reasonable protection of the public against unlicensed drivers or operators, and is not invalid as having no relation to the public safety or welfare.

6. Criminal Law § 79—

Exceptions not brought forward in the brief and argued will be deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Rousseau, J.*, at October Term, 1948, of CABARRUS.

This is a criminal action in which the defendant, T. R. Stallings, a duly licensed operator and driver of a taxicab in the City of Concord, was indicted in Cabarrus County upon a warrant duly issued, charging him with violating Section 1, Article IX, of the Taxicab Ordinance of the City of Concord, by failing to wear a cap, as required by the provisions of said ordinance.

Article IX, Section 1, referred to above, reads as follows: "CAP AND UNIFORM REQUIRED. Drivers of taxicabs shall be clean in dress and in

person, and shall wear a distinctive cap and necktie and be neat at all times while operating a taxicab."

It was admitted by the defendant that on the date alleged in the warrant, 2 May, 1948, he was operating a taxicab in the City of Concord, within the meaning of the ordinance, and that he was wearing a hat instead of a distinctive cap.

It was admitted that the defendant was a duly licensed taxicab operator and driver in the City of Concord.

The defendant admitted the Taxicab Ordinance was enacted by the Board of Aldermen of the City of Concord on 17 December, 1947.

The jury returned a verdict of guilty and from the judgment imposed, the defendant appeals and assigns error.

Attorney-General McMullan and Assistant Attorney-General Bruton, and Forrest H. Shuford, II, Member of Staff, for the State.

L. E. Barnhardt and Morton & Williams for defendant.

DENNY, J. The defendant challenges the validity of the section of the ordinance under consideration, on the ground that it is not a just and reasonable regulation, but is unlawful, arbitrary and unreasonable, and in violation of defendant's constitutional rights. Or, to put it another way, the defendant does not challenge the ordinance on the ground that it is too vague and indefinite to be enforceable. He challenges the power of the Mayor and Board of Aldermen of the City of Concord to pass an ordinance, requiring each operator and driver of a taxicab licensed by the City of Concord, to wear a cap while operating his taxicab.

The defendant simply takes the position and says in his brief, "the wearing of a hat instead of a cap as prescribed by said ordinance . . . is not detrimental in any sense to the public welfare."

Consequently, this appeal does not turn on what is meant by a "distinctive cap." If it did so, we might have some difficulty in sustaining this section of the ordinance, *S. v. Gooding,* 194 N.C. 271, 139 S.E. 435; *S. v. Morrison,* 210 N.C. 117, 185 S.E. 674; 50 Am. Jur. p. 204, *et seq.;* but since the ordinance is not challenged on the ground that it is too vague and indefinite to be enforceable, we will refrain from passing on its validity in that respect. Furthermore, "the rule is, that if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of lesser moment, the latter alone will be determined. *Reed v. Madison County,* 213 N.C. 145, 195 S.E. 620." *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22. Moreover, constitutional questions abandoned or not raised on an appeal will not be decided by the Court. And in passing on such questions, the Court will limit its decision to those questions which have been properly presented and fully argued.

11 Am. Jur. Const. Law, Sec. 93, p. 720 *et seq.* *Public Service Commission v. Grimshaw,* 49 Wyo. 158, 53 P. 2d 1, 109 A.L.R. 534.

The defendant contends that the power of a city to regulate taxicabs and taxicab operators is strictly limited to the express powers granted in G.S. 160-200, subsection 7 and subsection 36a, and that the power to prescribe the clothing a taxicab driver shall wear is not granted therein.

G.S. 160-200, subsection 7 of the above statute, grants to cities the following power: "To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions." And the pertinent part of subsection 36a, reads as follows: "The governing body may also require operators and drivers of taxicabs to prominently post and display in each taxicab, so as to be visible to the passengers therein, permit, rates and/or fares, fingerprints, photographs, and such other identification matter as deemed proper and advisable."

In addition to these statutes, we find that G.S. 20-37, also provides: "That cities and towns shall have the power to license, regulate and control drivers and operators of taxicabs within the city or town limits and to regulate and control operators of taxicabs operating between the city or town to points, not incorporated, within a radius of five miles of said city or town." Furthermore, G.S. 160-52 gives to the governing boards of municipalities the general power to enact ordinances. This statute contains the following provisions: "The board of commissioners shall have power to make ordinances, rules and regulations for the better government of the town, not inconsistent with this chapter and the law of the land, as they may deem necessary; and may enforce them by imposing penalties on such as violate them; and may compel the performance of the duties imposed upon others, by suitable penalties."

Therefore, the Legislature has deemed it to be the part of wisdom to delegate to the various municipalities of the State, the power to license, regulate and control the operators and drivers of taxicabs. In the exercise of this delegated power, it is the duty of the municipal authorities in their sound discretion, to determine what ordinances or regulations are reasonably necessary for the protection of the public or the better government of the town; and when in the exercise of such discretion an ordinance is adopted, it is presumed to be valid; and, the courts will not declare it invalid unless it is clearly shown to be so. *Motley v. State Board of Barber Examiners,* 228 N.C. 337, 45 S.E. 2d 550, 175 A.L.R. 253; *Brumley v. Baxter,* 225 N.C. 691, 36 S.E. 2d 281, 162 A.L.R. 930; *Chimney Rock Co. v. Town of Lake Lure,* 200 N.C. 171, 156 S.E. 542.

In the case of *Suddreth v. Charlotte,* 223 N.C. 630, 27 S.E. (2d) 650, *Barnhill, J.,* in speaking for the Court, said: "The business of carrying passengers for hire is a privilege, the licensing, regulation, and control of which is peculiarly and exclusively a legislative prerogative. So is the power to regulate the use of public roads and streets. The General Assembly in the exercise of this police power may provide for the licensing of taxicabs and regulate their use on public streets, or it may, in its discretion, delegate this authority to the several municipalities. 37 Am. Jur. 534, sec. 21; Anno. 114 A.L.R. 1120. . . . Where the power to regulate, license and control motor vehicles for hire is vested by the Legislature in the city council, there is a broad presumption in favor of the validity of an ordinance undertaking to exercise such power, and he who attacks it must show affirmatively that it is not expressly authorized by statute or that it is, as applied to him, unreasonable and oppressive. *Star Transp. Co. v. Mason,* 192 N.W. 873; *New Orleans v. Calamari, supra* (22 A.L.R.—Rehearing, p. 112). The municipality may name such terms and conditions as it sees fit to impose for the privilege of transacting such business, and the courts cannot hold such terms unreasonable, except for discrimination between persons in a like situation. The wisdom and expediency of the regulation rests alone with the law-making power. *Lawrence v. Nissen,* 173 N.C. 359, 91 S.E. 1036; *Turner v. New Bern,* 187 N.C. 541, 122 S.E. 469." *Yeiser v. Dysart,* 267 U.S. 540, 69 L. Ed. 775.

We do not think it is an unlawful, unreasonable or an arbitrary exercise of the police power which has been delegated to local municipal authorities by the Legislature, for a city to require, as a condition incident to the privilege of operating a taxicab on its streets, that the driver of such taxicab shall wear a distinctive cap or other insignia while operating a taxicab, to show that he is a duly licensed taxicab driver. Such a requirement would seem to be reasonable and a protection to the public against unlicensed drivers or operators.

Exceptions to the refusal of the court below to sustain the defendant's motion for judgment as of nonsuit have not been brought forward in his brief and argued, as required by Rule 28 of the Rules of Practice in the Supreme Court, and will therefore be considered as abandoned. 221 N.C. 562.

In the trial below, we find

No error.

BERTHA LITTLE TATE ET AL. v. WESTERN CAROLINA POWER CO.

(Filed 13 April, 1949.)

Eminent Domain § 21a—Action held one in tort for continuing trespass and was barred by the three-year statute of limitations.

Plaintiffs alleged that the construction by defendant of a dam caused the retardation of the current of streams draining plaintiffs' land, which resulted in progressive injury to plaintiffs' land from improper drainage, the first substantial damage having occurred seventeen years prior to the institution of the action. It was alleged that the dam required no maintenance but that its mere construction was the cause of the injury. *Held:* The action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being to recover for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action is barred by the three-year statute of limitations pleaded by defendant. G.S. 1-52 (3).

WINBORNE and ERVIN, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Patton, Special Judge,* October Term, 1948, of CALDWELL.

Civil action for damages to plaintiffs' farm lands, alleged to have been caused by the construction of the Rhodhiss Dam and Reservoir on the Catawba River.

There is allegation and evidence tending to show that the plaintiffs are the owners of two farms in Caldwell County, situate on Lower and Little Creeks, natural tributaries of Johns River, which latter stream flows into the Catawba River some miles above the Rhodhiss Dam.

This dam was built or constructed in 1924-1925, and is approximately eighteen miles down stream from plaintiffs' lands. It is 70 feet high. The dam and reservoir were erected by the defendant in the exercise of its *quasi*-public franchise to generate hydroelectric power for sale to the public. The reservoir was first filled with water in February, 1926. (These dates are different from those appearing in the case of *Power Co. v. Hayes,* 193 N.C. 104, 136 S.E. 353, where the same dam and reservoir were under consideration.) The headwaters of this reservoir come within 3½ miles of one of plaintiffs' farms and about 4½ miles of the other.

The water in the reservoir is from 23 to 26 feet lower in elevation than the waters in Lower and Little Creeks. "The pond is 21 feet lower than the lower line of the Little Place."

It is further in evidence that since 1928 plaintiffs' lands have gradually become wet, soggy and unfit for cultivation because of the retardation of the current in Lower Creek, which has caused sand and silt to be

deposited in the bed of the stream, and it is alleged that this condition will become "progressively worse"; that the first substantial injury or appreciable damage to plaintiffs' lands occurred in 1928, and that this action was instituted 12 June, 1945.

The gravamen of the complaint is that the "injury and damage" to plaintiffs' farms were "directly, proximately and solely caused by the defendant's construction of the Rhodhiss Dam and Reservoir . . .; that in constructing said dam under the power of eminent domain and in causing said dam to become and remain non-abatable, the defendant became liable for all damages thereafter occurring to said farms as direct and proximate result of the presence of said Rhodhiss Dam . . .; that said dam does not require any maintenance whatever, but that the mere construction of said dam and the way it was built for the purpose for which it was built guarantees and assures its perpetual existence and maintenance"; wherefore plaintiffs pray that "permanent damages be assessed and paid to them for the wrongful taking and appropriation of portions of said farms" . . . with . . . "interest at the legal rate of 6% upon the compensation due them from the time of such wrongful taking" . . . which . . . "occurred sometime ago."

It was also made to appear that in 1932 the defendant transferred and conveyed to Duke Power Company all remaining rights, easements and property acquired and held by it in connection with the dam and reservoir in question.

The defendant denied liability and pleaded the three-year and the ten-year statutes of limitation. Also that more than 20 years had intervened between the construction of the dam and the institution of the present action.

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

Guy T. Carswell, Frank H. Kennedy, Folger L. Townsend, and Carl Horn, Jr., for plaintiffs, appellants.

W. S. O'B. Robinson, Jr., W. B.. McGuire, Jr., and Proctor & Dameron for defendant, appellee.

STACY, C. J. This case, in its cast and setting, seems to be without any exact prototype. Consequential damages resulting from an original trespass are sought to be assimilated to compensation for an incidental easement. While form may be immaterial so long as it leads to recovery, nevertheless it becomes important on the issue of laches or the plea of the statute of limitations.

The plaintiffs have alleged and say they have offered evidence tending to show a continuing trespass since 1928 as a result of the erection of the

Rhodhiss Dam and Reservoir in 1924-1925, and the consequent retardation of the flow in the upper waters of Lower and Little Creeks. *Campbell v. R. R.*, 159 N.C. 586, 75 S.E. 110. Without discussing the sufficiency of the evidence to support these allegations, we pass to what both sides have elected to consider the battleground of debate.

There is neither allegation nor proof of an entry upon the lands of the plaintiffs for the purpose of appropriating them to a public use; nor of ponding water thereon. *Duval v. R. R.*, 161 N.C. 448, 77 S.E. 311. The headwaters of the defendant's reservoir do not reach within three miles of the plaintiffs' farms.

The complaint sets out a consequential injury or secondary result, and not a direct trespass or a taking as that term is used in the cases, though so designated once or twice in the pleading. The defendant never sought to condemn the lands of the plaintiffs, or to impose an easement thereon, does not want either except as a necessary consequence, and denies that it ever injured or damaged them in any way. Compensation is recoverable for a lawful appropriation, damages for a tort. It is contended, however, that the plaintiffs may waive the tort and sue in contract or *assumpsit*. Not so, after the bar of the original action, for then there is no actionable tort to waive. Nor would such waiver avail the plaintiffs unless the tort amount to a taking of their property or the imposition of an easement thereon. *Query v. Tel. Co.*, 178 N.C. 639, 101 S.E. 390.

The case is not like *Love v. Tel. Co.*, 221 N.C. 469, 20 S.E. 2d 337, or *Teeter v. Tel. Co.*, 172 N.C. 783, 90 S.E. 941, cited by plaintiffs, for in each of these cases there was an entry upon the land of the plaintiff and an appropriation of it to the defendant's use. Here, the plaintiffs have predicated their action solely on the original construction of the dam and reservoir—structures permanent in nature and erected in the exercise of a *quasi*-public franchise. *Sample v. Lumber Co.*, 150 N.C. 160, 63 S.E. 729; *Teeter v. Tel. Co., supra.* Note, the complaint is limited to "injury and damage" caused by the "construction" of the Rhodhiss Dam and Reservoir and to damages thereafter occurring to plaintiffs' farms as a direct and proximate result of "the presence of said Rhodhiss Dam," which dam, it is alleged, was so constructed as to require no "maintenance whatever." Consequently, no fresh act of injury thereafter occurring has been alleged or is sought to be shown. *Caveness v. R. R.*, 172 N.C. 305, 90 S.E. 244. This eliminates any consideration of a renewing, intermittent and recurring trespass. *Duval v. R. R., supra; Roberts v. Baldwin*, 155 N.C. 276, 71 S.E. 319; *Spilman v. Navigation Co.*, 74 N.C. 675. The plaintiffs have carefully refrained from asking for damages occurring within three years prior to suit brought, *Roberts v. Baldwin*, 151 N.C. 407, 66 S.E. 346, and are seeking to hold the defendant under its franchise for the original trespass as all its interest in

the dam and reservoir was transferred and conveyed to the Duke Power Company in 1932. *Logan v. R.R.*, 116 N.C. 940, 21 S.E. 959; *Campbell v. R. R., supra.*

Nor are the cases of *Clinard v. Kernersville,* 215 N.C. 745, 3 S.E. 2d 267, and *Dayton v. Asheville,* 185 N.C. 12, 115 S.E. 827, applicable to the facts of the instant record. In each of these cases, there was evidence of polluted air or stream, causing direct injury, which amounted to a "taking or appropriation" of the plaintiff's land for a public purpose. Accordant: *Rhodes v. Durham,* 165 N.C. 679, 81 S.E. 938; *Pumpelly v. Canal Co.,* 80 U.S. 166, 20 L. Ed. 557.

It is provided by G.S. 1-52 (ss. 3), that for a continuing trespass on real property, "the action shall be commenced within three years from the original trespass, and not thereafter." Clearly, the consequential trespass resulting from the retardation of the flow of the waters in Lower and Little Creeks, which the plaintiffs say began in 1928 and thereafter remained constant, is barred by this statute—the question of a direct "taking or appropriation" being out of the case or put to one side. *Davenport v. Drainage Dist.,* 220 N.C. 237, 17 S.E. 2d 1; *Cherry v. Canal Co.,* 140 N.C. 422, 53 S.E. 138; *Stack v. R. R.,* 139 N.C. 366, 51 S.E. 1024.

It follows, therefore, that the action was properly dismissed as in case of nonsuit.

Affirmed.

WINBORNE and ERVIN, JJ., took no part in the consideration or decision of this case.

IN RE WILL OF W. F. MCDOWELL.

(Filed 13 April, 1949.)

1. Appeal and Error § 6c (4)—

A party should object not only to the question but also to the answer of the witness, and, when the answer is not responsive, move to strike, in order to properly present his exception to the testimony.

2. Wills § 23b—

Witness was asked his opinion of the mental capacity of deceased to make a will on the date the paper-writing was executed. Witness replied he did not know the decedent at that date and then gave his opinion as to his mental capacity on a date some four years thereafter. There were no circumstances to show that the latter date was too remote in point of time. *Held:* The admission of the testimony will not be held for reversible error, since no prejudice is made manifest.

3. Evidence § 46b—

A granddaughter of deceased, who had lived in his house and had received numerous letters from him, is competent to testify as to his handwriting, and her testimony that the letters in question were in his handwriting is sufficient authentication, and objection that she did not testify that she knew his handwriting is too attenuate.

4. Wills § 23b—

Personal letters written by decedent to his granddaughter, one of the propounders, are competent upon the issue of mental capacity, the prohibition of G.S. 8-51 in caveat cases applying only to evidence of undue influence.

5. Wills § 25: Trial § 31e—

In a caveat proceeding, reference in the charge to the paper-writing as the "will" of deceased will not be held for reversible error when it appears that the jury understood the nature of the proceeding and could not have been misled thereby. G.S. 1-180.

APPEAL by caveators from *Burgwyn, Special Judge,* December Term, 1948, of RANDOLPH.

Issue of *devisavit vel non* raised by a caveat to the will of W. F. McDowell.

The alleged testator died 21 November, 1946, a resident of Randolph County. A paper-writing, executed 24 February, 1942, and purporting to be his last will and testament, was probated in common form on 29 November, 1946. Thereafter, on 16 April, 1948, a son of the deceased and three children of a deceased son filed a caveat to the probated instrument, alleging mental incapacity and undue influence at the time of its execution and publication. Another son of the deceased and his children are the propounders.

The matter was thereupon transferred to the civil issue docket, and upon the hearing the jury sustained the paper-writing as the last will and testament of the deceased.

From judgment on the verdict, the caveators appeal, assigning errors.

H. M. Robbins and Miller & Moser for propounders, appellees.

Smith & Walker and J. G. Prevette for caveators, appellants.

STACY, C. J. The appeal presents for review (1) the competency of evidence, and (2) the correctness of the charge.

1. The propounders offered Dr. J. T. Barnes as a witness and asked his opinion of the mental capacity of the deceased to make a will in February, 1942. He replied that he did not know the deceased in 1942; that he first met him in 1946, and at that time "he was perfectly normal—he talked that way anyway."

The caveators contend that the testimony of this witness was particularly hurtful since it came from a physician highly respected by the jury, and that it runs counter to the case of *In re Hargrove's Will,* 206 N.C. 307, 173 S.E. 577, where evidence of mental incapacity, more than two or three years after the execution of the alleged will, was held incompetent.

Initially, it should be observed that while the witness was asked to give his opinion as of February, 1942, he specifically limited his answer to 1946. Moreover, there was no objection to the answer and no motion to strike. *In re Will of Kestler,* 228 N.C. 215, 44 S.E. 2d 867.

It is the rule with us that on the issue of testamentary capacity, it is competent to show the mental condition of the maker a reasonable time before and after the execution of the paper-writing propounded as his will. *In re Will of Ross,* 182 N.C. 477, 109 S.E. 365. There are no circumstances here to render the evidence too remote in point of time. *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *In re Will of Kestler, supra.*

Out of a large number of witnesses, there were three or four others, who, like Dr. J. T. Barnes, were allowed to speak of the mental capacity of the deceased sometime after the making of his will. All these exceptions fall in the same category and none can be sustained as no prejudice has been made manifest.

2. The propounders offered Sarah Margaret Boling, a granddaughter of the deceased, who had received numerous letters from him and who had lived in his home. She testified that the letters were in "my grandfather's handwriting," and they were offered in evidence. The caveators contend that the letters were not properly identified as the witness did not state she knew the handwriting of her grandfather, and further that they constitute personal transactions with the deceased which are prohibited by the "dead man's statute." G.S. 8-51; *Arndt v. Ins. Co.,* 176 N.C. 652, 97 S.E. 631; *In re Will of Brown,* 203 N.C. 347, 166 S.E. 72.

The authentication and competency of the letters are supported by what was said in *Lee v. Beddingfield,* 225 N.C. 573, 35 S.E. 2d 697; *In re Will of Brown,* 194 N.C. 583, 140 S.E. 192; *In re Will of Lomax,* 226 N.C. 498, 39 S.E. 2d 388; and *Batten v. Aycock,* 224 N.C. 225, 29 S.E. 2d 739.

3. The caveators also complain that in several instances in the charge, the court referred to the paper-writing as the will of the deceased, and that such references amount to an expression of opinion in contravention of G.S. 1-180. The exception appears somewhat meticulous, and we think too attenuate on the present record for practical purposes. In this respect, it appears that the court was only following the example set by counsel for caveators in the examination of some of the witnesses. The

jury understood that what they were trying was a caveat filed to a paper-writing which had been probated in common form as the will of the deceased, and because of the caveat it was then being offered for probate in solemn form. *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488; *In re Will of Neal,* 227 N.C. 136, 41 S.E. 2d 90; *In re Will of Cooper,* 196 N.C. 418, 145 S.E. 782.

The remaining exceptions to the charge are likewise too refined to work a new trial, or to call for elaboration. They are not sustained. The charge as a whole comes well within the established practice.

A careful perusal of the record leaves us with the impression that the issue has been tried in substantial conformity to the decisions on the subject, and that the verdict and judgment should be upheld.

No error.

STATE EX REL. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA v. I. W. ROBERTS, CLAIMANT, 224 NORTH CLAY STREET, SALISBURY, NORTH CAROLINA, S. S. No. 240-16-2406, KLUMAC COTTON MILLS, INC., EMPLOYER, SALISBURY, N. C.

(Filed 13 April, 1949.)

1. Master and Servant § 62—

The findings of fact by the Employment Security Commission as to the eligibility of a claimant to benefits under the Act, are conclusive when supported by any competent evidence. G.S. 96-4 (m).

2. Master and Servant § 60—

Evidence that during a period of six months, claimant's efforts to obtain employment, in addition to reporting to employment service office, were limited to two occasions at one mill and one occasion at each of two other mills, is sufficient to sustain the Commission's finding that he had failed to show he had been actively seeking work within the purview of G.S. 96-13 (c).

3. Master and Servant § 61—

The Chairman of the Employment Security Commission is vested with all authority of the Commission, G.S. 96-4 (a), when the commission is not in session, and where it appears that the claim was heard on appeal by the Chairman, and that claimant appealed therefrom "to the full Commission or to the Superior Court," the hearing of the appeal by the Superior Court is accordant with statute, G.S. 96-15.

4. Appeal and Error § 40a—

A sole exception to the judgment and to the signing of same, presents only whether the record sustains the judgment.

EMPLOYMENT SECURITY COMM. *v.* ROBERTS.

APPEAL by claimant Roberts from *Patton, Special Judge,* October Term, 1948, of ROWAN. Affirmed.

The claim of I. W. Roberts for benefits from the unemployment compensation fund was examined by the Employment Security Commission and denied.

Evidence in support of this claim was heard by Claims Deputy Clark, and, on appeal from adverse ruling, by Appeals Deputy Proctor (two hearings), and by the Chairman of Employment Security Commission. In each instance claimant was held ineligible for benefits under the Act. G.S. 96-1, *et seq.* Among other things it appeared that claimant expressed his unwillingness to accept work on second or night shift. On the final hearing the Commission found that claimant Roberts was separated from employment by the Klumac Mills, Inc., 25 September, 1947; that claims for benefits under the Act were filed beginning 14 October, 1947, and up to time of final decision 25 May, 1948; that the claimant had during that period of six months in addition to reporting to employment service office made effort to obtain employment at Cannon Mills, Kannapolis, on two occasions, at Old Mill, China Grove, once, and at Klumac Mills once. The Commission concluded from the facts found that claimant had failed to show that he had been "actively seeking work" within the purview of the statute, G.S. 96-13 (c), and decided that he was ineligible for benefits during the period referred to and until he should show that the reasons for his ineligibility no longer existed. Claimant through counsel appealed "to the full commission or to the Superior Court" and stated he wished "to base this appeal upon your (Commission's) finding of fact." The case was thereupon sent to the Superior Court for hearing and was there heard. In the Superior Court it was held that the findings of fact of the Commission were supported by competent and substantial evidence, and the decision of the Commission was in all respects affirmed.

Claimant excepted "to the foregoing judgment and the signing of the same," and appealed to this Court.

W. D. Holoman, R. B. Overton, R. B. Billings, and D. G. Ball for appellee.

C. P. Barringer for claimant, appellant.

DEVIN, J. By statute the determination of the Employment Security Commission as to the eligibility of a claimant for benefits under the Act is made "conclusive and binding as to all questions of fact supported by any competent evidence." G.S. 96-4 (m); *Unemployment Compensation Com. v. Willis,* 219 N.C. 709, 15 S.E. 2d 4; *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 456. An examination of the evidence in the record

in this case leads to the conclusion that the court below ruled correctly that the findings and decision of the Commission were supported by competent evidence. The finding of fact that this claimant had not shown he had been actively seeking work during the period referred to was supported by the evidence and must be held conclusive as to the questions of fact involved. The court's affirmance of the conclusion based thereon will be upheld. By statute, G.S. 96-13 (c), an unemployed individual is eligible for benefits only if the Commission finds he is able to work and available for work, but he is not to be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work. The procedure here followed as to hearings and appeals seems to have been in accordance with the statute. G.S. 96-15.

Appellant complained here that he did not have a hearing on his appeal from the chairman to the full commission, but we note his appeal in this instance was in the alternative, to the full commission or to the Superior Court. By G.S. 96-4 (a) the Chairman of the Commission, except as otherwise provided by the Commission, is vested with all authority of the Commission, including authority to conduct hearings and make decisions when the Commission is not in session.

However, as the claimant's only exception was to the judgment and the signing of the same, the only question presented is the sufficiency of the record to sustain the judgment. *Query v. Ins. Co.,* 218 N.C. 386, 11 S.E. 2d 139; *Crissman v. Palmer,* 225 N.C. 472, 35 S.E. 2d 422; *Roach v. Pritchett,* 228 N.C. 747, 47 S.E. 2d 20; *Lea v. Bridgeman,* 228 N.C. 565, 46 S.E. 2d 555; *Rhodes v. Asheville,* 229 N.C. 355, 49 S.E. 2d 638.

The judgment of the Superior Court is accordingly

Affirmed.

THE BOARD OF TRUSTEES OF THE NEW BERN GRADED SCHOOLS v. FIRST-CITIZENS BANK AND TRUST COMPANY, INC., EXECUTOR AND TRUSTEE UNDER THE WILL OF A. H. BANGERT, DECEASED.

(Filed 13 April, 1949.)

Wills § 34e—

Testator left certain property in trust with direction that specified beneficiaries be paid a designated sum monthly from the income, with the balance of the net income to be paid to another trust. *Held:* The courts may not enlarge the stipulated monthly income so as to net the beneficiaries the amount stated after payment of income taxes levied under change of the law made after testator's death.

DEFENDANT'S appeal from *Hamilton, Special Judge,* October Term, 1948, CRAVEN Superior Court.

The proceeding under review is a controversy without action involving construction of the will of A. H. Bangert, and the administration of an estate left to defendant in trust for beneficiaries named in the will. The controversy is over the meaning of the 8th item of the will, which it is necessary in part to reproduce here.

> "Eighth—I devise and bequeath all the residue of my property of whatever nature and wherever situate to the First-Citizens Bank and Trust Company, Inc., of New Bern, N. C., to have and to hold the same in trust for the following uses:
>
> "(a) To keep all real estate belonging to my estate in good repair and the buildings insured against loss by fire and to keep all moneys invested in good securities;
>
> "(b) To collect rents from real estate and interest or dividends from my personal property and pay all taxes on my property, fire insurance premiums on and costs of repairs thereto, and expenses in connection therewith; and the expense of keeping my cemetery lot in good order;
>
> "(c) To first pay to my beloved niece, Mrs. Edna Watson Hall, during her life, the sum of One hundred and Twenty-five ($125.00) Dollars each month from and after my death; and then to pay to my beloved niece, Mrs. Jennie Watson Craig, of Gastonia, N. C., during her life, the sum of Fifty Dollars each month from and after my death; to pay to my nephew, Percy Oliver Bangert, during his life, the sum of Fifty Dollars each month from and after my death; to pay to my beloved niece, Mrs. Florence Bangert Najer, of Baltimore City, Md., during her life, the sum of Twenty-five Dollars each month from and after my death; and to pay to the Board of Trustees of the New Bern Graded Schools, and its successors in office, the rest of the net income from my estate to establish the trust fund hereinafter mentioned."

The will then provides that after the death of the named beneficiaries the sums bequeathed "to him or to her" shall be paid to the Board of Trustees of the New Bern Graded Schools to be held and administered by them under certain trusts set forth in the will.

The plaintiff contends that upon a proper construction of this item the defendant should pay over to the beneficiaries, Mrs. Edna Hall, Mrs. Jennie Craig, P. O. Bangert, and Mrs. Florence Najer, monthly as required during their respective lives the exact sums named in the bequests, and no more. The defendant contends that the will sufficiently provides, and the intention of the testator requires, that there shall be

added to these several stated amounts the sums necessary to relieve the bequest of the income tax which the recipient would otherwise have to pay, and which would otherwise result in materially reducing the bequest below the level of the sums the testator intended beneficiary to receive.

The court below agreed with plaintiff's contention and entered judgment accordingly. Defendant appealed.

R. E. Whitehurst and George B. Riddle, Jr., for plaintiff, appellee.

R. A. Nunn for defendant, appellant.

SEAWELL, J. The briefs do not contain much helpful citation of authority on this novel question; but the defendant does point out that the will must be construed with reference to conditions as they existed at the time of its making. It is argued that the amounts set aside for the monthly support of his beneficiaries, close relatives, were carefully considered as to their sufficiency at the time, when, at least in the Federal jurisdiction, it was not subject to the income tax as distributed to the legatees; but a subsequent change in the law makes it so, and the Commissioner of Revenue claims the monthly payments now taxable in the hands of the named legatees.

It is further pointed out that the will provides that the defendant shall "pay all taxes on my property, fire insurance premiums on and costs of repairs thereto, and expenses in connection therewith;" etc. This provision so manifestly refers to property in the hands of the trustee, and not that of which the beneficiary becomes the owner in the act of distribution, it may be eliminated from discussion.

We are unable to accede to the proposition that by the simple act of naming the amount each legatee is to receive at the hands of the trustee, the testator took into consideration both all the conditions that then were, and those which might come thereafter;—this particular change in the tax law which might, unfortunately for his beneficiaries, burden the legacy and reduce its value. With the knowledge, however, that nothing is more certain than taxes and death, and that the government might be forced to exploit all resources of revenue, it seems that some express provision would have been made for it if it had been so intended. To prevent such an incidence of the tax on the bequest would, we think, require a more positive expression of intent than we find in the will; and as there is no public policy to require it, we cannot substitute for actual intent any theory of what the testator, in his generosity, would have done if he had thought about it.

We are of the opinion that the correct conclusion was reached by the court below and its judgment is, therefore,

Affirmed.

STATE v. WILLIE WOLF.

(Filed 13 April, 1949.)

1. Criminal Law § 27: Intoxicating Liquor § 4a—

In a prosecution for possession of nontax-paid liquor the court will not take judicial notice that "white liquor" means nontax-paid liquor.

2. Intoxicating Liquor § 9d—

In a prosecution under G.S. 18-48 on a warrant charging possession of nontax-paid liquor, evidence by the State that six gallons of liquor and a jar of "white liquor" were found on defendant's premises, without evidence that the containers did not bear a revenue stamp of the Federal Government or a stamp of any of the County A.B.C. Boards, is insufficient to repel defendant's motion to nonsuit.

APPEAL by defendant from *Phillips, J.*, at November Term, 1948, of CASWELL.

The defendant was charged in the warrant with the unlawful possession of "illegal nontax-paid liquors"; and of having such liquors for the purpose of sale, but was tried only upon the count charging him with the unlawful possession of nontax-paid liquor.

The State offered evidence to show that on 19 June, 1948, the officers found "six gallons of liquor" in or near the defendant's tobacco field. Near-by they also found a "jar with white liquor in it." Numerous tracks, both car and foot, led down to the tobacco field where the road ended. The defendant lived on the premises and a path led from his house through the field to the tobacco road. One of the officers testified, that near the end of the road where the cars turned around, they found right many crates. "We could tell from the burned ashes that fruit jars were burned."

The defendant put on a witness who testified that he, and not the defendant, owned the liquor in question.

The jury returned a verdict of guilty and from the judgment imposed, the defendant appeals and assigns error.

Attorney-General McMullan and Assistant Attorney-General Moody and John R. Jordan, Member of Staff, for the State.

P. W. Glidewell, Sr., for defendant.

DENNY, J. The sole question presented on this appeal is whether or not the defendant's motion for judgment as of nonsuit, made at the close of the State's evidence and renewed at the close of all the evidence, should have been allowed.

The defendant was tried upon the count in the warrant charging him with the possession of nontax-paid liquor. The pertinent parts of G.S. 18-48, read as follows: "It shall be unlawful for any firm, person or corporation to have in his or its possession any alcoholic beverages defined herein upon which the taxes imposed by the laws of Congress of the United States or by the laws of this State, have not been paid and any person convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the Court . . . and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the State of North Carolina shall constitute *prima facie* evidence of the violation of this section."

His Honor charged the jury that the officers found on the premises of the defendant "six and a half gallons of nontax-paid whiskey in one place and near-by another jar of whiskey and that this was also nontax-paid whiskey, or commonly known as white liquor."

The State offered no evidence to show that the containers in which the seized liquor was held did not bear a revenue stamp of the federal government or a stamp of any of the county boards of North Carolina, which evidence would have been sufficient under the statute, to make out a *prima facie* case; but instead, it simply offered evidence to show that six gallons of liquor and a jar of white liquor were found on the premises of the defendant.

In the light of the evidence and the provisions of the statute, could the court take judicial notice that "white liquor" means "nontax-paid liquor"? We do not think so. *S. v. Holbrook,* 228 N.C. 582, 46 S.E. (2d) 842, cited by the appellee, is not in point on the question raised on this appeal.

The evidence might have warranted finding the defendant guilty of unlawful possession of liquor and of having it in his possession for the purpose of sale, if such counts had been submitted to the jury, but on the count submitted, in our opinion, the evidence offered is insufficient to support the verdict. Therefore, the defendant's motion for judgment as of nonsuit was proper, and should have been allowed.

Reversed.

MYRTLE ALLMAN GLADDEN, ADMINISTRATRIX OF THE ESTATE OF ROBERT E. GLADDEN, v. CHARLES E. SETZER.

(Filed 13 April, 1949.)

1. Trial §§ 22a, 22b—

On motion to nonsuit, evidence favorable to plaintiff is accepted as true and inconsistent testimony of defendant is ignored.

2. Automobiles § 18h (2)—

A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in the opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. *Held:* The testimony is sufficient to support an inference that the defendant violated G.S. 20-146 in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and nonsuit was error, defendant's evidence in contradiction not being considered.

APPEAL by plaintiff from *Coggin, Special Judge,* at the December Term, 1948, of CABARRUS.

The plaintiff, Myrtle Allman Gladden, as administratrix, sued the defendant, Charles E. Setzer, for damages for the death of her intestate, Robert E. Gladden, which occurred on 31 January, 1947, in a collision on the Rozzell Ferry Road in Charlotte, North Carolina, between an east-bound Ford truck owned and driven by the intestate and a west-bound Mack tractor with a tanker attached owned and operated by the defendant. To sustain her complaint that the death of her intestate was caused by a wrongful act, neglect, or default of the defendant under G.S. 28-173, the plaintiff called to the stand Ed Faggart, an occupant of the Ford truck at the time of the accident. He testified as follows: "We were riding along. There were some squirrels in the woods. I was looking at them when we got down across the bridge . . . I was looking off. Mr. Gladden hollered to me, 'Look out, that man will run into me.' When I knowed anything we were run into. I saw that it was one of them oil tanks that ran into us. I couldn't tell how fast it was going. We were driving just ordinary. We were on the right-hand side at the time of the collision, about 150 feet beyond the bridge. . . . I was hurt and knocked unconscious. I don't know anything about the position of the vehicles after the accident. . . . I was looking at some squirrels and didn't see the oil truck until Mr. Gladden hollered. It looked like he was going to pass us. The motor part had passed when I saw it the first time. . . . I don't remember passing an automobile coming into Charlotte. . . . I didn't see a car in front. I wasn't watching down the road

so much. . . . When I first saw defendant's truck-trailer the engine part had pulled by us. I looked at it. The tanker part hit us. The tanker part was sticking out when he pulled back to his right. He pulled the front part to his right and the tanker stuck out to the left. I don't know where exactly the tanker part was in regard to the center of the road. Mr. Gladden was driving on the right-hand side of the center of the road, proceeding in an ordinary manner."

The defendant introduced testimony indicating that the tragedy occurred in the manner set out in this paragraph. As the defendant's tractor-tanker combination was traveling west on its right half of the highway at a speed of 20 miles an hour, it met a passenger automobile operated by Mrs. Craig Dunn, which was proceeding in the opposite direction immediately in front of the east-bound Ford truck. Just as the tractor-tanker and the Dunn car were in the act of meeting and passing each other, the Ford truck "came out from behind the Dunn car" and crashed against the tractor-trailer, killing the intestate.

The court dismissed the action upon a compulsory nonsuit under the statute after all the evidence on both sides was in, and the plaintiff appealed, assigning this ruling as error.

John Hugh Williams for plaintiff, appellant.

Hartsell & Hartsell and Covington & Lobdell for defendant, appellee.

ERVIN, J. When the evidence favorable to plaintiff is accepted as true, and the conflicts therein are resolved in her favor, and the inconsistent testimony of the defendant is ignored, it is apparent that the plaintiff's evidence is sufficient to support an inference that the defendant violated G.S. 20-146 by failing to drive his tractor-trailer combination on his right half of the highway and thereby proximately caused the death of the plaintiff's intestate. *Hoke v. Greyhound Corp.*, 226 N.C. 692, 40 S.E. 2d 345; *Wyrick v. Ballard Co., Inc.*, 224 N.C. 301, 29 S.E. 2d 900; *Coach Co. v. Lee*, 218 N.C. 320, 11 S.E. 2d 341; *Williams v. Woodward*, 218 N.C. 305, 10 S.E. 2d 913; *Stovall v. Ragland*, 211 N.C. 536, 190 S.E. 899; *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631. Hence, the case ought to have been submitted to the jury. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. The judgment of nonsuit is

Reversed.

STATE v. CALEB I. WRAY.

(Filed 13 April, 1949.)

1. Criminal Law § 80b (5)—

Where only one of several indictments consolidated for trial appears in the record, and the record does not make it clear whether the indictment therein set out is the one referred to in the verdict, the appeal will be dismissed on motion of the Attorney-General for incompleteness and defectiveness of the record in material particulars.

2. Criminal Law § 81b—

The judgment of the Superior Court is presumed correct and the burden is on appellant to show error.

3. Criminal Law §§ 73a, 74—

It is the duty of appellant to see that the record is properly made up and transmitted.

APPEAL of defendant from *Phillips, J.,* November Term, 1948, of ROCKINGHAM.

Criminal prosecution on charge of (a) violation of prohibition laws, (b) assault with a deadly weapon, and (c) resisting an officer.

The Attorney-General moved to dismiss for the reasons set forth in the written motion filed.

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

P. W. Glidewell, Sr., for defendant, appellant.

PER CURIAM. The defendant appears to have been tried on four bills of indictment which were consolidated for trial. Only one of these appears in the record, which contains four counts respecting violation of the prohibition laws. The record discloses that defendant was convicted in "cases numbers 166, 167 and 168," "on all three counts," and the judgment is rendered in 167, which is identified therein as the count of resisting an officer, "that the defendant be confined in the common jail of Rockingham County," assigned to work on the roads for a term of 18 months"; and that in 168, the count of assault with a deadly weapon, the defendant was sentenced to the county jail of the county and assigned "to work on the public roads under the supervision of the Public Works Commission for a term of 18 months," the sentence to begin running at the expiration of the foregoing sentence; adding, "This sentence not to run concurrently, but to begin running at the expiration of the sentence imposed in 167—to run concurrently and not consecutively," (*sic*). And in number 166 the defendant was sentenced to be confined in the county

jail to work on the roads for two years, the sentence suspended for a period of five years on condition.

The record contains only one indictment, unnumbered, which may or may not have been the indictment under which defendant was found guilty.

At any rate, no indictments appear in the record relating to the resisting of an officer, or to an assault with a deadly weapon, under which the defendant was apparently convicted and sentenced; and it is impossible for the Court to determine with that certainty which the law requires whether the indictment set out in the record is the No. 166 referred to in the verdict.

This does not inure to the benefit of the appellant. *S. v. McDraughon,* 168 N.C. 131, 83 S.E. 181, thus states the rule applicable to the present case:

> "In cases of this character the jurisdiction of this Court is not original, but appellate. . . . The presumption is that the judgment of the Superior Court is correct, and the burden is on the appellant to show errors. As far back as *S. v. Butts,* 91 N.C. 524, all the requisites of the transcript were pointed out, and in *S. v. Frizzell,* 111 N.C. 722, the Court said: 'It is the appellant's duty to see that the record is properly and sufficiently made up and transmitted. Hereafter the Court will dismiss the appeal or affirm the judgment, as the case may be, when the record is defective in any material particular, in all cases in which the Attorney-General . . . sees proper to make such motion, unless sufficient excuse for the apparent laches is shown.' "

See also *S. v. Golden,* 203 N.C. 440, 441, 166 S.E. 311, and cases cited.

The motion of the Attorney-General must be allowed.

Appeal dismissed.

STATE v. ROSCOE SURLES.

(Filed 20 April, 1949.)

1. Criminal Law § 52a (1)—

Upon defendant's motion to nonsuit, the evidence must be considered in the light most favorable to the prosecution.

2. Burglary § 11—

The State's evidence tended to show that defendant's estranged wife went to her father's home for protection and that her father furnished her a house on his farm, that defendant went to this house at nighttime, went

to a bedroom window, aroused his wife and threatened to kill her if she did not let him in, cut the screen window from top to bottom and finally entered the house through the back door, and left when he found that his wife had fled. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary.

3. Burglary § 13b—

In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. G.S. 14-51, G.S. 15-170, G.S. 15-171.

4. Criminal Law § 2—

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond the mere preparation to commit it, but falling short of its actual commission.

5. Criminal Law § 60b—

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State's Prison for a term not in excess of ten years, G.S. 14-3, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute.

6. Criminal Law § 11—

Infamous offenses within the purview of G.S. 14-3, which prescribes that misdemeanors which are infamous or done in secrecy and malice shall be felonies, are those involving an act of depravity or of moral turpitude.

ERVIN, J., dissenting.

APPEAL by defendant from *Williams, J.*, December Term, 1948, of JOHNSTON.

Criminal prosecution on indictment charging the defendant with burglarizing the dwelling house of his estranged wife, Mrs. Estelle Surles, on the night of 25 August, 1948, with intent then and there to murder his wife, she being present at the time occupying the dwelling.

The record discloses that the prosecutrix and the defendant were married in 1935 and lived peaceably together until 1941 or 1942, when the defendant started working at Fort Bragg as a painter and began drinking whiskey. His drinking increased and his abusive conduct towards his wife became progressively worse. He assaulted her on numerous occasions, striking her with his fists, pulling her hair, cursing her and threatening to kill her and actually firing a gun in the house on two occasions.

Finally, in order to escape from these intolerable conditions, the prosecutrix fled to her sister's home, taking her children with her. The defendant followed; a warrant was obtained for his arrest and he was put under a suspended sentence for two years.

On promise of better treatment, the prosecutrix tried to live with the defendant again. This proved futile and of short duration. In fear for

her life, the prosecuting witness and her children went to her father's home for protection. He provided a home for her in a house on his farm across the road from his own home. Even here the defendant continued his molestation.

On the night of 25 August, 1948, around the hour of 10:00 p.m., the defendant came to the bedroom window of the dwelling house provided for his wife by her father and aroused the prosecutrix and her children from their sleep. He had been drinking, and the prosecuting witness told him to go away, but he threatened to cut her "G . . . d . . . head off" if she did not open the door. Tommy Johnson, who was traveling in the same taxi with the defendant and waiting for him, came to the window and tried to persuade the defendant from further molesting his wife, and said to him "put that knife in your pocket." The defendant told him to go back to the car or "he would cut his G . . . d . . . head off."

The defendant started cutting on the screen window. The prosecuting witness, fearing that he was coming into the house, then fled from her home, going through the back door, closing the screen door behind her, and sought refuge in her father's house. The defendant later said to Jack Tart, "I ripped the screen open with an old file or plow sweep lying on the window-sill."

The defendant entered the house through the back door, and when he found that his wife was not in the house he left and went back to the waiting taxi. The screen was cut from bottom to top, large enough for him to crawl through.

The defendant took the stand in his own behalf and admitted most of the State's evidence. He denied entering the house, however, after his wife had fled, but as to this he was contradicted by his little daughter. He attributed his conduct to strong drink and tippling.

Verdict: Guilty of an attempt to commit burglary in the second degree.

Judgment: Imprisonment in the State's Prison for a term of ten years. (This judgment rendered under G.S. 14-3.)

The defendant appeals, assigning errors, in that (1) the court overruled his motion for judgment as in case of nonsuit, and (2) imposed an excessive sentence.

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

C. C. Canaday and E. J. Wellons for defendant.

STACY, C. J. We are here called upon to say, first, whether the case survives the demurrers, and, second, whether the verdict supports the judgment.

1. Considering the evidence in its most favorable light for the prosecution, the accepted position on motion to nonsuit, we agree with the trial court that the inferences are such as to require the submission of the evidence to the jury.

Burglary is a common-law offense. *S. v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201. It consists of the felonious breaking and entering of the dwelling-house or sleeping apartment, of another, in the nighttime, with intent to commit a felony therein, whether such intent be executed or not. *S. v. Allen,* 186 N.C. 302, 119 S.E. 504. It was, and still is, among the few capital crimes, if not the only one, which may be committed without the execution of the felonious intent. The purpose of the law was and is to protect the habitation of men, where they repose and sleep, from meditated harm. The offense is now by statute, G.S. 14-51, divided into two degrees, first and second, depending upon the actual occupancy of the dwelling-house or sleeping apartment at the time of the commission of the crime.

It is further provided by G.S. 15-171 that upon a charge of burglary in the first degree, the jury, upon the finding of facts sufficient to constitute burglary in the first degree, may elect to render a verdict of guilty of burglary in the second degree, if they deem it proper so to do, and the judge is required so to instruct the jury in his charge. *S. v. McLean,* 224 N.C. 704, 32 S.E. 2d 227.

It is also provided by G.S. 15-170, that upon the trial of any indictment the defendant may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime. It was permissible, therefore, for the jury, under the indictment and the evidence, to convict the defendant of an attempt to commit burglary in the second degree.

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. *S. v. Parker,* 224 N.C. 524, 31 S.E. 2d 531; *S. v. Addor,* 183 N.C. 687, 110 S.E. 650, 22 A.L.R. 219; *S. v. Hewett,* 158 N.C. 627, 74 S.E. 356; *S. v. Hefner,* 129 N.C. 548, 40 S.E. 2; *S. v. Colvin,* 90 N.C. 718; 16 C.J. 113. "An indictable attempt, therefore, consists of two important elements: (1) an intent to commit the crime, and (2) a direct ineffectual act done towards its commission." 14 Am. Jur. 813; *S. v. Batson,* 220 N.C. 411, 17 S.E. 2d 511, 139 A.L.R. 614.

2. The defendant contends, however, that as he was convicted only of a misdemeanor, he cannot be punished by imprisonment in the State's Prison, according to the statutory provision in such cases. G.S. 14-1.

It is conceded that an attempt to commit burglary was a misdemeanor at common law. Is it an "infamous" offense, or is it one "done in secrecy and malice," or is it an offense committed "with deceit and intent to defraud"? If it fall within any one of these categories, it is pronounced a felony by G.S. 14-3, and punishable as prescribed therein. Otherwise, it is still punishable as at common law. The present judgment was entered pursuant to this statute, with specific reference thereto.

In *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1, it was held that an attempt to commit buggery was an infamous offense. And in *S. v. Ritter,* 199 N.C. 116, 164 S.E. 62, it is said that a conspiracy to commit murder is an offense done in secrecy and malice. Obliquely accordant: *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686. The soundness of these decisions is now questioned.

A felonious intent or malice is a necessary ingredient of burglary, and it is requisite that the crime be committed in the nighttime. *S. v. Allen,* 186 N.C. 302, 119 S.E. 504. To hold that an attempt at burglary is wanting in infamy would seem to adhere to form rather than to substance. Anno. 24 A.L.R. 1002. "Both at common law and by statute, burglary is an infamous crime." *People ex rel. Battista v. Christian,* 227 N.Y.S. 142, affirmed 249 N.Y. 314, 61 A.L.R. 793; 12 C.J.S. 665. If an attempt to commit burglary be not "infamous," what practical significance is to be ascribed to this word in the subject statute? Manifestly, the character of the allowable punishment cannot be the test of its meaning, for the statute applies only where no specific punishment is prescribed. *S. v. Rippy,* 127 N.C. 516, 37 S.E. 148; *United States v. Moreland,* 258 U.S. 433, 67 L. Ed. 700, 24 A.L.R. 992. The purpose of the section is to fix the punishment in such cases.

A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, *McKee v. Wilson,* 87 N.C. 300, and not to the measure of punishment then being set down. It would be a misnomer or misdescription to speak of an infamous misdemeanor, where no specific punishment is prescribed, if it were only intended thereby to designate an offense already subject to infamous punishment. Ordinarily, it is correct to say that an infamous offense is a crime which works infamy in the one who commits it, meaning thereby that it subjects the offender to an infamous punishment. *Gudger v. Penland,* 108 N.C. 593, 13 S.E. 168. But here we are to ascertain what is meant by the designation of an infamous misdemeanor, without specifically prescribed punishment, in a statute appointing the punishment for the offense so designated. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to

the circumstances and the time in which it is used"—*Mr. Justice Holmes* in *Towne v. Eisner,* 245 U.S. 418.

The General Assembly evidently had in mind some infamous misdemeanors with unprescribed specific punishments, or else the designation would have been eschewed. An attempt at burglary is certainly an act of depravity; it involves moral turpitude, reveals a heart devoid of social duties and a mind fatally bent on mischief. Anno. 40 A.L.R. 1048; 48 A.L.R. 266; 14 Am. Jur. 757. "What punishments (or offenses) shall be considered as infamous may be affected by the changes of public opinion from one age to another." *Ex Parte Wilson,* 114 U.S. 417, 29 L. Ed. 89. See, also, "Infamous Crime" in Bouvier's Law Dictionary and the use of this phrase in the Fifth Amendment to the Constitution of the United States. It is to be observed, however, that in determining whether a crime be infamous, the state courts exercise an independent judgment, and are not bound by the decisions of the Federal Courts as to the nature in this respect of crimes against the Government. 14 Am. Jur. 756.

It is provided by G.S. 14-55 that the preparation to commit burglary is a felony. In between mere preparation and actual commission lies the crime of attempt, which, if not a felony, undoubtedly arises from an artless omission in the statute. But such omission, if thought to exist, would seem to result only from a labored or strained construction. "The intention of the lawmakers is the law." *S. v. Emery,* 224 N.C. 581, 31 S.E. 2d 858; *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473.

Moreover, the cover of darkness is the full equivalent of secrecy so far as those intended to be harmed is concerned. To strike in the nighttime when the intended victim is disarmed by sleep, is a surreptitious act. Secrecy is implicit in an act which must be done in the nighttime. *S. v. Bridges,* 178 N.C. 733, 101 S.E. 29. The fact that the defendant here made his identity known, while attempting to accomplish his purpose, works no essential change in the nature of his crime, any more than if he had desisted through fear, resistance, or because of detection. *S. v. McDaniel,* 60 N.C. 245.

It follows, therefore, that an attempt to commit burglary comes within the definition of an "infamous" offense as used in the statute, or within the purview of an offense "done in secrecy and malice," either of which makes it a felony. Our previous decisions are in support of either or both denominations.

The verdict and judgment will be upheld.

No error.

ERVIN, J., dissenting: It may be argued with much reason that the Legislature ought to have made an attempt to commit burglary an aggra-

vated felony punishable by as much as ten years' imprisonment in the State's Prison. But since an investigation of this question has left me with an abiding conviction that it has not done so, I am compelled to note my dissent to both the conclusion and the reasoning of the majority of my brethren.

An attempt to commit burglary is undoubtedly an indictable offense at common law. *S. v. Colvin,* 90 N.C. 717. But there is no statute specifying in terms whether it is a felony or a misdemeanor or how it is to be punished. In consequence, the determination of the validity of the judgment of the trial court in this cause necessitates a journey into the history of the law of crimes and punishments. Thus, we are confronted once more by the ever recurring truth that an understanding of the things of the past is a prerequisite to a comprehension of those of the present.

The classification of public offenses into felonies and misdemeanors is of ancient origin. Some early writers put treason into a grade by itself on the ground hinted by *Lord Chief Justice Hale:* "All treason is felony, tho it be more." 1 Hale P. C., page 497.

At common law felonies were crimes which occasioned a forfeiture of the lands or goods of the offender. 14 Am. Jur., Criminal Law, section 13. Besides, capital or other punishment was added to the forfeiture according to the nature of the particular felony. 22 C.J.S., Criminal Law, section 6. All lesser crimes were misdemeanors. 22 C.J.S., Criminal Law, section 7.

Forfeiture for felony, which was the established rule at common law, has had no force in North Carolina since 1778. G.S. 4-1; *White v. Fort,* 10 N.C. 251, 264. From that time down to 1891, the dividing line between felonies and misdemeanors was an arbitrary one, having no reference to punishment. *S. v. Holder,* 153 N.C. 606, 69 S.E. 66. Whether a common law crime was a felony or a misdemeanor was determined by reference to its classification at common law, and whether a statutory offense was a felony or a misdemeanor was dependent upon the designation given it by the Legislature. *S. v. Hill,* 91 N.C. 561; *S. v. Mallett,* 125 N.C. 718, 34 S.E. 651. In line with the familiar principle that a penal statute must be construed strictly in favor of the accused, it was held with consistency during this period that statutory crimes were not felonies unless they were so declared by the Legislature. *S. v. Hill, supra.* After the adoption of the Constitution of 1868, the abolition of whipping and other corporal punishments, and the establishment of the state prison, crimes so denominated by the common law or by the Legislature constituted misdemeanors notwithstanding they may have been made punishable by legislative fiat with imprisonment in the state prison. *S. v. Dewer,* 65 N.C. 572; *S. v. Hill, supra.* Thus, certain grave crimes, such

as forgery and perjury, were misdemeanors. *S. v. Hyman,* 164 N.C. 411, 79 S.E. 284; *S. v. Mallett, supra.*

In 1891, however, the General Assembly enacted a statute accepting the principle that the grade of an offense is to be determined solely by the penalty which is prescribed for it. Laws of 1891, C. 205, sec. 1; *S. v. Mallett, supra.* This statute is now codified as G.S. 14-1 and is in these words: "A felony is a crime which is or may be punishable by either death or imprisonment in the State's prison. Any other crime is a misdemeanor." By virtue of this law, public offenses are now classified in North Carolina as follows: (1) All crimes punishable by death or imprisonment in the State prison are felonies; and (2) all crimes not so punishable are misdemeanors. *S. v. Harwood,* 206 N.C. 87, 173 S.E. 24; *S. v. Myrick,* 202 N.C. 688, 163 S.E. 803; *Jones v. Brinkley,* 174 N.C. 23, 93 S.E. 372; *S. v. Newell,* 172 N.C. 933, 90 S.E. 594; *S. v. Hyman, supra; S. v. Mallett, supra; S. v. Pierce,* 123 N.C. 745, 31 S.E. 847; *S. v. Addington,* 121 N.C. 538, 27 S.E. 988; *S. v. Bloodworth,* 94 N.C. 918.

G.S. 14-1, in and of itself, makes felonies of all offenses specifically punishable by imprisonment in the State prison notwithstanding they may be called misdemeanors by the statutes defining them. *S. v. Hyman, supra.*

It is apparent, however, that G.S. 14-1, standing alone, offers no solution for our present problem for the reason that there is no statute stating in terms how persons convicted of attempts to commit burglary are to be punished. For this reason, recourse must be had to G.S. 14-2 and G.S. 14-3, which provide for the punishment of crimes for which no specific sanctions are prescribed by other statutes.

A completed burglary is a felony by virtue of both the common law and the statute dividing it into two degrees. G.S. 14-51. At common law, however, an attempt to commit a felony is only a misdemeanor. *S. v. Stephens,* 170 N.C. 745, 87 S.E. 181; *S. v. Boyden,* 35 N.C. 505. In conformity to this rule, an attempt to commit burglary was expressly adjudged to be a misdemeanor in *S. v. Jordan,* 75 N.C. 27, which was handed down in 1876. This holding has not been overruled or questioned by any subsequent decision. Furthermore, no statute has been enacted since its rendition declaring an attempt to commit burglary to be a felony. For these reasons, G.S. 14-2 has no bearing on this case. It applies only where an act is made a felony without the nature of the punishment being specified. *S. v. Rippy,* 127 N.C. 516, 37 S.E. 148.

This brings us to a consideration of the question of whether the crime under scrutiny has been converted into a felony by G.S. 14-3. This statute had its genesis as section 120 of chapter 34 of the Revised Code of 1854, which was as follows: "Offenses made misdemeanors by statute,

where a specific punishment is not prescribed, shall be punished as misdemeanors at common law, but the punishment of the pillory shall be used only for crimes that are infamous or done in secrecy and malice, or done with deceit and intent to defraud." The statute may be found in its varying intervening mutations in these places. Battle's Revisal of 1872-3, c. 32, s. 108; Code of 1883, s. 1097; Revisal of 1905, s. 3293; Consolidated Statutes of 1919, s. 4173; and Public Laws of 1927, c. 1.

It is of utmost significance that historically the statute was designed to provide sanctions for misdemeanors for which specific punishments were not prescribed. The statute applied initially in terms solely to statutory misdemeanors, but in 1905 it was partially rewritten so as to cover "all misdemeanors," without regard to whether they arose at common law or were created by legislative fiat. By unvarying phraseology, the statute has consistently divided all crimes embraced within its provisions into two classes, to wit: (1) Ordinary misdemeanors; and (2) aggravated offenses defined as crimes that are infamous, or done in secrecy and malice, or done with deceit and intent to defraud.

Ordinary misdemeanors falling within the scope of the statute have been punished without variation "as misdemeanors at common law," that is, by fine or imprisonment in the county jail, or both. *S. v. Powell,* 94 N.C. 920; *S. v. McNeill,* 75 N.C. 15. Imprisonment in such case, however, cannot exceed two years. *S. v. Wilson,* 216 N.C. 130, 4 S.E. 2d 440.

The punishment authorized for the aggravated offenses named in the statute now codified as G.S. 14-3 has undergone change. Originally these crimes could be punished corporally. *S. v. Hyman, supra; S. v. Lytle,* 138 N.C. 738, 51 S.E. 66. After the ratification of the Constitution of 1868, however, corporal punishment was abolished by statutes reading as follows: "Every crime or offense whatever, heretofore punishable by the laws of North Carolina when the present Constitution went into effect with public whipping or other corporal punishment, shall hereafter, in lieu of such corporal punishment, be punished by imprisonment in the State's prison, or county jail for not less than four months nor more than ten years." Battle's Revisal, c. 32, s. 29 and s. 108.

Since that time persons committing the aggravated offenses in question have been subject to imprisonment for terms of not less than four months nor more than ten years. In 1883, it was decreed that such offenders should also be fined, but in 1905 the statute was reworded so as to specify that fine and imprisonment should be alternative punishments rather than cumulative sanctions. The Code, s. 1097; Revisal, s. 3293; C.S., s. 4173.

Although perpetrators of such crimes were subject to incarceration in the State prison after the abolition of corporal punishment, the aggravated offenses now under examination were called misdemeanors by the

Legislature and retained such grade in law down to 1891, when they were controverted into felonies despite their designation as misdemeanors by the statute declaring all crimes "punishable by either death or imprisonment in the State's prison" to be felonies. G.S. 14-1; *S. v. Howard,* 129 N.C. 584, 40 S.E. 71; *S. v. Mallett, supra.* In 1905, however, these offenses reverted to their oirginal classification of aggravated misdemeanors by virtue of a statutory alteration restricting imprisonment therefor to the county jail. Revisal, s. 3293; C.S., s. 4173; *S. v. Lewis,* 185 N.C. 640, 116 S.E. 259. But they were transformed to the grade of felony a second time in 1927 by an amendment restoring the former provision authorizing confinement of violators in the State prison as well as in the county jail. P.L. 1927, c. 1; *S. v. Harwood, supra.*

Nevertheless, the Legislature permitted these particular crimes to retain the express designation of misdemeanors until 1943 when the statute was restated as G.S. 14-3 in these words: "All misdemeanors, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offense be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except when the offense is a conspiracy to commit a misdemeanor, be guilty of a felony and punished by imprisonment in the county jail or State prison for not less than four months nor more than ten years, or shall be fined."

This brings us to a consideration of the question of whether an attempt to commit burglary constitutes an infamous offense, and by reason thereof has been converted from a common law misdemeanor to a felony by G.S. 14-1 and G.S. 14-3.

The majority opinion cites *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1, to sustain the proposition that such is the case. This decision holds that an attempt to commit the abominable and detestable crime against nature is an infamous offense under G.S. 14-3, but it advances no reason whatever from such conclusion and specifies no criterion by which to determine what other crimes are infamous. When *Spivey's case* is considered in the light of the history and purpose of the statute under review, a strong suspicion arises that it was one of those hard cases which form the quicksands of the law, and that the court succumbed to the temptation, which lies in constant wait for the judiciary, to forsake the function of the judge for that of the legislator. Be this as it may, *S. v. Spivey* is entitled to no force as an authority beyond the scope of its own precise adjudication. Certainly, it affords a rather insubstantial base for the present holding of the majority that an offense is infamous within the meaning of G.S. 14-3 if it appears to be of a "degrading nature" when subjected to some undefined and undisclosed test.

Although the term "infamous offense" has seen long service in our organic and statutory law, it is nowhere defined therein. But infamous offenses are not synonymous with felonies historically because "the line between felonies and misdemeanors has never been whether the offense is an infamous one or not." *Jones v. Brinkley, supra.* This observation finds accurate illustration in the statute under scrutiny.

The words "infamous offenses" are not employed in our organic and statutory law in a loose and fluctuating popular sense to signify any infraction of the criminal law which some judge or some segment of society may deem to be shameful or disgraceful. When the General Assembly of 1854 incorporated the words "crimes that are infamous" in the statute now embodied in G.S. 14-3, it chose a term which has a definite and well known meaning at common law. Consequently, it must be presumed that the term is used in the statute in the sense in which it was understood at common law. *Winston v. Beeson,* 135 N.C. 271, 47 S.E. 457, 65 L.R.A. 167.

The common law called certain offenses "infamous on account of the shameful status which resulted to the person convicted of one of this class of crimes." 14 Am. Jur., Criminal Law, section 4. Such a crime was said to work infamy in the person who perpetrated it. *Butler v. Wentworth,* 84 Me. 25, 24 A. 456, 17 L.R.A. 764; *Bell v. Commonwealth,* 167 Va. 526, 189 S.E. 441. For this reason, some writers and codifiers spoke of infamous persons rather than of infamous crimes. 3 Blackstone 363, 370; Revised Code, Index, p. 577.

An infamous offense within the meaning of the common law is one which renders the party convicted thereof incompetent to testify as a witness in a court of justice, or deprives him of his civil and political privileges. 22 C.J.S., Criminal Law, section 3; 14 Am. Jur., Criminal Law, section 4; Wharton's Criminal Law (12th Ed.), section 27; Underhill's Criminal Evidence (4th Ed.), section 378; Wigmore on Evidence (3rd Ed.), section 519, 520; Jones on Evidence in Civil Cases, section 716; *S. v. Valentine,* 29 N.C. 225; *S. v. Candler,* 10 N.C. 393; *Harrison v. State,* 55 Ala. 239; *Baum v. State,* 157 Ind. 282, 61 N.E. 672, 55 L.R.A. 250; *Sutherlin v. Sutherlin,* 27 Ind. App. 301, 61 N.E. 206; *Williams v. United States,* 4 Ind. Terr. 204, 69 S.W. 849; *State v. Clark,* 60 Kan. 450, 56 P. 767; *Garitee v. Bond,* 102 Md. 379, 62 A. 631, 111 Am. S. R. 385, 5 Ann. Cas. 915; *State v. Bixlar,* 62 Md. 354; *O'Connell v. Dow,* 182 Mass. 541, 66 N.E. 788; *State v. Henson,* 66 N.J.L. 601, 50 A. 468; *People v. Pharr,* 4 N. Y. Cr. 545; *Barker v. People,* 20 Johns. (N.Y.) 457; *McCafferty v. Guyer,* 59 Pa. 109; *Barbour v. Commonwealth,* 80 Va. 287.

Intrinsic indications in the Revised Code of 1854, which was enacted by the Legislature in its entirety, make it plain that the lawmakers used

the term "infamous offense" in its common law sense when they enacted the statute in question. For example, section 52 of chapter 34 bears the headnote "Perjured Persons made infamous" and provides that "all persons convicted of perjury or subornation of perjury shall be rendered thereby incapable of giving testimony before any court whatsoever"; and chapter 58 prescribes a procedure for restoration to citizenship of "any person who may have been convicted of an infamous crime whereby the rights of citizenship are forfeited." The last mentioned statute was a general law enacted by the Legislature on account of the provision of Article I, Section IV, Clause 4, of the Amendments to the State Constitution ratified in 1835 forbidding the General Assembly "to pass any private law to restore to the rights of citizenship any person convicted of an infamous crime." Incapacity to testify as a witness on account of crime, which was in force when the statute under scrutiny was adopted, was removed by an act of 1866, which is now embodied in G.S. 8-49. *Ex Parte Harris,* 73 N.C. 65; *S. v. Harston,* 63 N.C. 294. But existing constitutional provisions expressly disqualify for voting and for office-holding persons convicted of treason, or felony, or "any other crime" punishable by imprisonment in the State's prison. N. C. Const., Art. II, Section 11, and Art. VI, Sections 2 and 8.

Conviction of an attempt to commit burglary has never entailed a loss of civil and political privileges in this State. Hence, this crime cannot be an infamous offense under G.S. 14-3 unless its commission in times past excluded its perpetrator from being a witness in a court of justice. Infamous crimes in this sense embraced only treason, felony, and *crimen falsi.* Witmore on Evidence (3rd Ed.), section 520; Wharton's Criminal Evidence (11th Ed.), section 1166; Underhill's Criminal Evidence (4th Ed.), section 378; 58 Am. Jur., Witnesses, section 138; 70 C.J., Witnesses, section 134; *Smith v. State,* 129 Ala. 89, 87 Am. St. Rep. 47; *People v. Sponsler,* 1 Dak. 289, 46 N.W. 459; *People v. Whipple,* 9 Cow. (N.Y.) 707; *People v. Tonybee,* 20 Barb. (N.Y.) 168; *Wick v. Baldwin,* 51 Ohio St. 51, 36 N.E. 671; *Webb v. State,* 29 Ohio St. 351; *United States v. Sims,* 161 F. 1008.

The clearest exposition of this phase of the law is that of Dean Burdick, who says: "In our law, however, some confusion has been caused by applying to the term infamous crimes two meanings, one to describe the punishment inflicted, the other to characterize the crime. Thus, it has been held that an infamous crime is one punishable in the penitentiary with or without hard labor, and that the phrase infamous crime in the federal constitution means any crime punishable by an infamous punishment, such as imprisonment in a penitentiary. Under the statutory definition of felony in some states, this would make infamous crimes synonymous with felonies. At common law, however, an infamous crime

is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi*. This latter term means any offense involving corrupt deceit, or falsehood by which the public administration of justice may be impeded, such as perjury, subornation of perjury, forgery, bribery of witnesses, conspiracy in procuring non-attendance of witnesses, barratry, counterfeiting, cheating by false weights or measures, and conspiring to accuse an innocent person of crime. It will be observed that *crimen falsi* means, therefore, in our law practically the same as it meant in the Roman Law from which source it was, of course, derived. To the offenses which are infamous at common law other felonies have been added by statute, such as embezzlement and false pretenses, but the offenses included in *crimen falsi* are misdemeanors at common law which shows that the term infamous crime is broader than felonies." Burdick: Law of Crimes, section 87.

Thus, it clearly appears that an attempt to commit burglary was not one of the crimes whose commission rendered the convicted party incompetent as a witness.

Since an attempt to commit burglary is not an infamous offense in a legal sense, it has not been converted from a common law misdemeanor to a felony by G.S. 14-1 and G.S. 14-3 unless it can be said to be an offense "done in secrecy and malice, or with deceit and intent to defraud."

There is neither allegation nor evidence in the case at bar to sustain the theory that the precise offense of which the defendant has been convicted was "done in secrecy and malice, or with deceit and intent to defraud." The converse is true because the allegation is that his intent was to commit murder, and the evidence is that his act was done openly in the presence of witnesses and that he acquainted his intended victim with both his presence and his purpose. Hence, the conclusion of the majority that the crime in question was done "in secrecy" as well as in malice is in irreconcilable conflict with the record if the question whether an offense is "done in secrecy and malice" within the purview of the statute be one of fact for the jury rather than one of law for the judge.

But the problem is a legal one. When the Legislature used the words "done in secrecy and malice, or with deceit and intent to defraud," to describe the second and third classes of aggravated offenses included in the statute now codified as G.S. 14-3, its manifest purpose was to describe offenses in which either secrecy and malice, or the employment of deceit with intent to defraud are elements necessary to their criminality as defined by law.

Intrinsic indications of this legislative intent appear in various provisions of chapter 34 of the Revised Code of 1854 defining specific crimes, and this construction of the statute is supported explicitly in *S. v. Powell,*

94 N.C. 920, and implicitly in these decisions: *S. v. Perry,* 225 N.C. 174, 33 S.E. 2d 918; *S. v. Tyson,* 223 N.C. 492, 27 S.E. 2d 113; *S. v. Harwood, supra; S. v. Moore,* 204 N.C. 545, 168 S.E. 842; *S. v. Talley,* 200 N.C. 46, 156 S.E. 142; *S. v. Lewis, supra; S. v. Smith,* 174 N.C. 804, 93 S.E. 910; *S. v. Driver,* 78 N.C. 423; *S. v. McNeill,* 75 N.C. 15. It harmonizes with the interpretation placed upon the words of G.S. 15-1 exempting "malicious misdemeanors" from the bar of the two-year statute of limitations applicable to misdemeanors in general. *S. v. Claywell,* 98 N.C. 731, 3 S.E. 920; *S. v. Frisbee,* 142 N.C. 671, 55 S.E. 722. This Court declared in the case last cited that "when . . . the Legislature used the words 'other malicious misdemeanors,' which immediately follow the words 'malicious mischief,' it evidently intended to describe offenses of which malice is a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors, even in the absence of malice, and when malice, if present, would be only a circumstance of aggravation, which the Court might consider in imposing the punishment." Besides, this conclusion coincides with the fundamental rule of statutory construction that in a doubtful case penal statutes are to be construed strictly against the State and in favor of the citizen. *S. v. Jordon,* 227 N.C. 579, 42 S.E. 2d 674; *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169; *S. v. Campbell,* 223 N.C. 828, 28 S.E. 2d 499; *S. v. Ingle,* 214 N.C. 276, 199 S.E. 10; *S. v. Harris,* 213 N.C. 758, 197 S.E. 594; *S. v. Humphries,* 210 N.C. 406, 186 S.E. 473.

Under the statute thus construed, an attempt to commit burglary is a misdemeanor for its necessary elements as defined by law do not include either secrecy and malice or the employment of deceit with intent to defraud. Since I am convinced that this interpretation is consonant with the legislative intent, I am of the opinion that the defendant has been convicted of a misdemeanor, which is punishable as a misdemeanor at common law; that the judgment rendered on his conviction is invalid both in respect to the place of punishment designated and the extent of punishment assessed; and that the exception to the judgment ought to be sustained.

The decision of the majority puts a diametrically opposite construction upon this phase of the statute which, in my judgment, not only runs counter to the legislative purpose, but also produces unpropitious consequences. The opinion of the majority has the effect of extending the statute by interpretation to all crimes for which no specific punishments are prescribed irrespective of their essential legal elements or inherent moral qualities in cases where they are, in fact, "done in secrecy and malice, or with deceit and intent to defraud." Under this construction,

crimes which no man can number will in particular instances be transformed from insignificant misdemeanors to aggravated felonies entailing a loss of citizenship to offenders, whose hearts are free of moral turpitude, simply because of the relatively unimportant circumstance that they are "done in secrecy and malice." It must not be forgotten that the legal meaning of the word "malice" is milder than its popular sense, signifying as it does the mere "state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification or excuse." 22 C.J.S., Criminal Law, section 31.

I have not overlooked *S. v. Ritter,* 199 N.C. 116, 164 S.E. 62, holding that a conspiracy to commit murder is an aggravated offense because "done in secrecy and malice," and *S. v. Mallett, supra; S. v. Howard,* 129 N.C. 584, 40 S.E. 71; *S. v. Lewis, supra; S. v. Shipman,* 202 N.C. 518, 163 S.E. 657; *S. v. Lea,* 203 N.C. 13, 164 S.E. 737; *S. v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; and *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686, adjudging either expressly or impliedly that conspiracies to cheat and defraud are likewise aggravated offenses because "done with deceit and intent to defraud." These decisions apply only to conspiracies and are not controlling here. Moreover, it is worthy of observation that any possible question of whether the proper construction of the statute now codified as G.S. 14-3 in respect to conspiracies is to be found in these cases or in previous decisions, such as *S. v. Jackson,* 82 N.C. 565, and *S. v. Turner,* 119 N.C. 841, 25 S.E. 810, holding either explicitly or implicitly that a conspiracy is a misdemeanor even in those cases where its object is the commission of a felony, apparently became moot in 1943 when the General Assembly re-enacted the law with an amendment providing, in substance, that a conspiracy to commit a misdemeanor should not be converted into a felony by the statute. It seems that the Legislature thereby inferentially adopted as the law of the State the dictum of the late *Justice Schenck* in *S. v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25, that "a conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor."

PALOMINO MILLS, INC., v. DAVIDSON MILLS CORPORATION, C. W. BYRD, HENRY ROSE, AND HERBERT STEIN.

(Filed 20 April, 1949.)

1. Removal of Causes § 4b—

The allegations of a petition for the removal of the cause from the State to the Federal Court will be taken as true for the purpose of the motion.

2. Same—

In order to be entitled to removal from the State to the Federal Court on the ground of fraudulent joinder, the facts alleged in the petition must compel the conclusion as a matter of law, aside from the deductions of the pleader, that the joinder is fraudulent.

3. Same—

Where plaintiff has a joint and separable cause of action against a resident and a nonresident, the joinder of the resident will not be held fraudulent even though the joinder be made for the sole purpose of preventing removal to the Federal Court.

4. Corporations § 25b—

An officer of a corporation who commits a tort is liable therefor individually notwithstanding that he was acting for the corporation.

5. Corporations §§ 6a (2), 25b; Fraud § 4—

Ordinarily the president of a corporation is *ex vi termini* its head and general agent, and when he signs a bill of sale for goods on hand in a large amount five days after inventory, he will be held to actual or constructive knowledge of a material misrepresentation in the bill of sale.

6. Removal of Causes § 4b—Upon facts alleged in petition, cause existed against resident corporate president, and therefore his joinder was not fraudulent.

Plaintiff instituted action for damages for fraudulent misrepresentation in the sale of a large inventory of goods against a nonresident corporation and its resident president who signed the bill of sale. Defendant corporation moved for removal to the Federal Court on the ground of fraudulent joinder. *Held:* Conceding the truth of the allegations of the petition that its president made no misrepresentations and did not know of the sale until he executed the bill of sale upon direction of the board of directors, the president is charged with knowledge of the misrepresentation and participated in the perpetration of the fraud by signing the same, and therefore a cause of action exists in plaintiff's favor against the president individually, and his joinder cannot be held fraudulent.

APPEAL by Davidson Mills Corporation from *Rousseau, J.*, at November Civil Term, 1948, of ROWAN.

Civil action to recover $10,665, with interest, as damages resulting from alleged false and fraudulent representation by which plaintiff was induced to purchase certain personal property,—heard upon petition of corporate defendant for removal to District Court of the United States for the Middle District of North Carolina for trial, upon ground of alleged fraudulent joinder.

Plaintiff alleges in its complaint these pertinent facts: (1) That it is a corporation organized and existing under the laws of North Carolina, with its principal office in Rowan County,—its name having been changed in September, 1947, from Davidson Cotton Mills Company to "Palomino

Mills, Inc."; (2) that (a) the defendant Davidson Mills Corporation is a Delaware corporation, with one of its principal offices located in the city of Concord, North Carolina, with C. W. Byrd as an officer, to wit, its president, (b) that C. W. Byrd is a resident of Concord, North Carolina, and (c) that Henry Rose and Herbert Stein are stockholders, officers and directors of said Davidson Mills Corporation, and both are residents of the city of New York, State of New York, as plaintiff is informed and believes; (3) that on or about 5 March, 1947, plaintiff purchased, through Henry Rose, from Davidson Mills Corporation, C. W. Byrd, president, by bill of sale (Copy of which is attached to, and asked to be made a part of the complaint as fully as if written therein), certain personal property itemized and listed in Exhibit A attached to said bill of sale. (The bill of sale so attached to the complaint reads as follows:

"BILL OF SALE

"NORTH CAROLINA
MECKLENBURG COUNTY

"KNOW ALL MEN BY THESE PRESENTS THAT DAVIDSON MILLS CORPORATION, a Delaware corporation with an office and place of business in the Town of Davidson, Mecklenburg County, North Carolina, has this 5th day of March 1947, in consideration of ONE HUNDRED ($100.00) DOLLARS and other valuable considerations, to it paid by DAVIDSON COTTON MILLS COMPANY, a North Carolina corporation with its principal office and place of business in Salisbury, Rowan County, North Carolina, has bargained, sold and delivered to said DAVIDSON COTTON MILLS COMPANY the personal property listed on the attached exhibit marked EXHITIT A, consisting of merchandise inventories of DAVIDSON MILLS CORPORATION on hand as of the close of business on February 28, 1947;

"TO HAVE AND TO HOLD the same unto the said DAVIDSON COTTON MILLS COMPANY, its successors and assigns, and DAVIDSON MILLS CORPORATION hereby warrants the said property to be free from any and all encumbrances and does warrant the title thereby given to be good and indefeasible.

"IN TESTIMONY WHEREOF, DAVIDSON MILLS CORPORATION has caused this Bill of Sale to be executed by its duly authorized officers and its corporate seal to be hereto affixed, the day and year first above written.

DAVIDSON MILLS CORPORATION,
By: C. W. Byrd, President.

Attest:

C. A. POTTS, Secretary. (Corporate Seal.)")

(And, Exhibit A reads as follows:

"EXHIBIT A

54,120 #	White Cotton	@ .2902	$ 15,705.62
18,589 #	Cleaned Cotton	@ .2984	5,546.96
148,227 #	Dyed Cotton	@ .3563	52,813.28
800 #	Dyed Cotton	@ .35	280.00
1,093 #	Ground Waste	@ .03	32.79
69,336 #	Work in Process	@ .50	34,668.00
	Dyes & Chemicals		9,032.89
	Supplies		9,371.84
			$127,451.38)

(4) that line three of said Exhibit A called for 148,227 pounds of dyed cotton @ .3563 per pound, amounting to $52,813.28; (5) "that on the 5th day of March, 1947, the defendants, C. W. Byrd, Henry Rose and Herbert Stein, being officers and directors of the Davidson Mills Corporation, in order to induce the plaintiff to purchase the bill of goods set out in Exhibit A, falsely and fraudulently represented to the plaintiff that the said 148,227 pounds was dyed cotton; that the plaintiff relying upon said representation, bought from the defendants the said 148,227 pounds which they had fraudulently represented to it to be dyed cotton at the price of .3563 per pound, and paid the defendants for the same the sum of $52,813.28; and that 100 bales of said merchandise purchased from the defendants was not dyed cotton but was of a quality greatly inferior, which was known as dyed waste or 'frog hair,' as the defendants then well knew, to the plaintiff's damage in the sum of approximately $7800"; and "that said defendants further falsely and fraudulently represented to plaintiff and to W. F. McCanless, officer of plaintiff, that certain colored yarn in the inventory of merchandise (dyed cotton) bought by plaintiff from defendants was sold to Sure-Fit Products Company at 84c per pound, when in truth and in fact it was not sold and plaintiff sustained a loss of $2720.00." Thereupon plaintiff prayed judgment against the defendants, and each of them, in the sum of $10,665.00, together with interest and costs, etc.

The defendant Davidson Mills Corporation, appearing specially for the purpose, and in apt time, filed its verified petition, with bond for removal of the cause to the District Court of the United States for the Middle District of North Carolina for trial upon the ground of an alleged fraudulent joinder,—alleging, among other things, the following:

"7. That the plaintiff has wrongfully and fraudulently joined as a co-defendant with your petitioner, C. W. Byrd, who is immaterial, unneces-

sary and an improper party to this controversy . . . one wholly between . . . the plaintiff, a citizen and resident of the State of North Carolina . . . and the petitioner, a citizen and resident of the State of Delaware and a non-resident of the State of North Carolina;

"8. That C. W. Byrd . . . had nothing to do with the sale of the cotton mill and other assets connected therewith sold by this petitioner to the plaintiff and its predecessors in interest; that the said C. W. Byrd never owned, and does not now own, any stock of this petitioner; that he had nothing to do with the planning the sale by this petitioner of its cotton mill and other assets and did not know that any sale was contemplated until he was advised by Henry Rose, the chairman of the board of directors of this petitioner, that a sale had been made; that as a matter of fact, the sale by this petitioner was carried out pursuant to an agreement entered into on January 31, 1947, between this petitioner and W. F. McCanless, the president of the plaintiff in this action; that said sales agreement was entered into in the city of New York when C. W. Byrd was not present and knew nothing of negotiations pertaining to said sale; that the sales agreement was signed on behalf of this petitioner by Henry Rose, chairman of the board, and by W. F. McCanless; that the said agreement provides for the transaction to be closed and the deed to be delivered and any other instruments of conveyance that may be proper or necessary to be delivered upon payment of the purchase price in Charlotte, North Carolina, on March 5, 1947; that C. W. Byrd never, at any time, made any representation to W. F. McCanless, or any of his associates, pertaining to any of the assets being sold by this petitioner and was not present when any negotiations took place; that on March 5, 1947, pursuant to the terms of the sales agreement, dated January 31, 1947, a meeting took place in Charlotte, North Carolina, and at that time, W. F. McCanless, in writing, assigned a part of his interest in the purchase agreement to Davidson Cotton Mills Company, a North Carolina corporation; that the purchase price having been paid to this petitioner, the board of directors of this petitioner directed C. W. Byrd, in his capacity as president of this petitioner, to sign the deed of conveyance and the bill of sale; that the said C. W. Byrd had no authority to make any sale of any assets of this petitioner and merely acted in accordance with instructions and directions given him by Henry Rose, chairman of the board of directors of this petitioner;

"9. That . . . any damages which the plaintiff received or incurred, as a result of said purchase and sale was neither the direct or proximate cause or result of any representations or inducements made by C. W. Byrd; that the rights of the real parties in interest to his controversy can be finally adjudicated without the presence of the defendant C. W. Byrd; that the joinder in the said suit of C. W. Byrd, who is a resident of the

State of North Carolina, as a co-defendant in this action, is not in good faith and is fraudulently and manifestly for the purpose of attempting to deprive this petitioner of its right to remove this action to the United States District Court, and the plaintiff well knew at the time of the beginning of this suit that C. W. Byrd did not participate in, and had no connection with, the sale by this petitioner and that the said C. W. Byrd was not a stockholder but a director in this petitioner and in no way participated in the proceeds from said sale, and he was joined as a party defendant for the sole and only purpose of preventing the removal of this cause and not in good faith."

The petition for removal being disapproved by Clerk of Superior Court, the cause came on for hearing before the Judge of Superior Court, to whom appeal had been duly taken. The Judge affirmed the order entered by the Clerk, and denied the petition.

Defendant Davidson Mills Corporation appeals therefrom to Supreme Court and assigns error.

Hayden Clement and Walter H. Woodson for plaintiff, appellee.

Tillett & Campbell for Davidson Mills Corporation, defendant, appellant.

WINBORNE, J. The rule by which petitions to remove an action from the State court to the District Court of the United States for trial on the ground of an alleged fraudulent joinder of a resident defendant is aptly stated in the case of *Crisp v. Fibre Co.*, 193 N.C. 77, 136 S.E. 238. It is there held "that when the motion to remove is made on the ground of an alleged fraudulent joinder, the petitioner is entitled to have the State Court decide the question on the face of the record, taking, for this purpose, the allegations of the petition to be true. To warrant a removal in such case, however, the facts alleged in the petition must lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader, that the joinder is a fraudulent one in law and made without right," citing *Fore v. Tanning Co.*, 175 N.C. 583, 96 S.E. 48.

In this connection, in treating the subject in the *Crisp case,* it is also declared that "if the plaintiff has a right to sue one or more resident defendants jointly with the non-resident defendant, and, even though such resident defendant be joined solely for the purpose of defeating a removal, still such joinder cannot be said to be fraudulent, for the law will not give an absolute right and then declare its use or exercise a fraud. When the liability of the defendants is joint, as well as several, the plaintiff may, at his election, sue both, and no motive can make his choice a fraud," citing *R. R. v. Sheegog,* 215 U.S. 308. See also *Chesapeake & Ohio R. Co. v.*

Dixon, 179 U.S. 131, 45 L. Ed., 121, 21 S. Ct. 67, and Annotation 98 A.L.R. 1057.

In the light of these principles, does it appear on the face of the record in the case in hand, taking, for this purpose, the allegations of the petition to be true, that the facts so alleged "lead unerringly to the conclusion, or rightly engender and compel the conclusion, as a matter of law, aside from the deductions of the pleader," that the joinder of C. W. Byrd, a resident of this State, as a defendant, is a fraudulent one in law and made without right? The effect of the ruling of the court below is that such joinder was not fraudulent in law and was not made without right. With this ruling we are in agreement. It appears upon the face of the record that plaintiff's alleged cause of action arose out of a transaction between it and petitioner corporation by which petitioner sold to plaintiff certain personal property specifically described in an exhibit to a certain bill of sale, dated 5 March, 1947, executed in the name of petitioner corporation by C. W. Byrd, president, attested by its secretary and under its corporate seal; and that plaintiff alleges that on 5 March, 1947, defendants, C.W. Byrd and two others, in order to induce it to purchase the bill of goods set out in the said exhibit, made false and fraudulent representations in respect to certain items of the personal property, upon which representations it relied to its damage. This states a cause of action in tort against C. W. Byrd, as well as against the corporate defendant. See *Minnis v. Sharpe,* 198 N.C. 364, 151 S.E. 735.

In the *Minnis case,* quoting from Fletcher, Cyc. Corp., this Court declared that "it is thoroughly well settled that a man is personally liable for all torts committed by him, consisting in misfeasance, as fraud, conversion, acts done negligently, etc., notwithstanding he may have acted as the agent or under directions of another"; that "this is true to the full extent as to torts committed by officers or agents of a corporation in the management of its affairs"; that "the fact that the circumstances are such as to render the corporation liable is altogether immaterial"; that "the person injured may hold either liable, and generally he may hold both as joint tort-feasors"; that "corporate officers are liable for their torts, although committed when acting officially"; and that the officers "are liable for their torts regardless of whether the corporation is liable." But that in order to make an officer liable for the wrong of the corporation, he must be a participant in the wrongful act.

Moreover, taking the facts alleged in the petition to be true, that is, that all the negotiations leading up to the sales agreement of 31 January, 1947, were conducted by someone other than C. W. Bryd, and that he knew nothing of the proposed sale until the board of directors of the petitioner corporation directed him, in his capacity as its president, to sign the bill of sale, it apears from the petition that Byrd was both a director and

the president of petitioner corporation, and that at the closing of the transaction he, as such president, signed the bill of sale in which there appeared the specific item of personal property as to which plaintiff alleges there was a false and fraudulent representation. Thus it appears that he as president actually participated in the closing of the transaction. And, since it is the law in this State that ordinarily the president of a corporation is *ex vi termini* its head and general agent, *Phillips v. Land Co.*, 176 N.C. 514, 97 S.E. 417; *Banking & Trust Co. v. Transit Lines*, 198 N.C. 675, 153 S.E. 158; *Warren v. Bottling Co.*, 204 N.C. 288, 168 S.E. 226, it would seem to follow that at the time Byrd signed the bill of sale he must have had knowledge of what the merchandise inventories of the petitioner corporation consisted at the close of business five days prior thereto.

Indeed, for the establishment of actionable fraud it is not always required that a false representation should be knowingly made. It is recognized in this State that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as imparting verity. *Whitehurst v. Ins. Co.*, 149 N.C. 273, 62 S.E. 1067, and authorities there cited. See also *Unitype Co. v. Ashcraft*, 155 N.C. 63, 71 S.E. 61; *Robertson v. Halton*, 156 N.C. 215, 72 S.E. 316; *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5.

For reasons here stated, the record in the case in hand fails to disclose a right of removal. Hence the judgment below is

Affirmed.

STATE v. PAUL FLYNN, ERNEST ASHLEY, DELMAR LEE (DUNK) VESTAL, AND MRS. MAUDE LAYMON.

(Filed 20 April, 1949.)

1. Criminal Law § 52a (3): Larceny § 7—

Evidence that all of the defendants were riding in the car with their victim when he discovered his money was gone, and direct and circumstantial evidence tending to show that defendants robbed him pursuant to a plan and conspiracy and thereafter divided the loot between them and sought by devices and maneuvers to baffle pursuit, two of them fleeing across several states, *is held* sufficient as to each defendant to be submitted to the jury upon the charges of larceny and receiving.

2. Criminal Law §§ 34a, 48c—

Incriminating statements voluntarily made by one of defendants to an officer are competent as against him, and the fact that such statements contained references to conversations, declarations, acts and incidents said and performed by his codefendants will not render the testimony incompetent upon objection of each of the other defendants when in each instance objection was made the court instructed the jury that the testimony was competent solely against the defendant who made the statements and was not to be considered against the other defendants.

3. Criminal Law § 78e (2)—

Ordinarily misstatements of the contentions on the evidence must be brought to the trial court's attention in time to afford opportunity for correction in order for an exception thereto to be reviewed.

4. Larceny § 8—

A charge correctly defining larceny will not be held for error for failing to refer to larceny from the person even though the State's evidence tends to show this offense, since larceny from the person is but an aggravation of the offense.

5. Criminal Law § 53e—

Where the State relies upon direct and circumstantial evidence for conviction, a charge that the burden is on the State to prove defendants' guilt beyond a reasonable doubt is sufficient in the absence of a request for special instructions as to the nature of circumstantial evidence.

DEFENDANTS' Paul Flynn, Ernest Ashley and Mrs. Maude Laymon appeal from *Clement, J.*, September Term, 1948, YADKIN Superior Court.

The defendants were tried on a bill of indictment charging them in two counts with (a) larceny of $500 from the person of one Dale Winters, and (b) receiving the money knowing it to have been feloniously stolen.

On the trial the State's evidence was substantially as follows:

Dale Winters testified that he saw Paul Flynn and Ernest Ashley at the "Nite Spot," in Jonesville early Sunday morning, about the 16th of May. They came in an automobile; and at Winters' request the three of them went in the automobile to get some liquor. It was at Litt Vestal's house, and there he met "Dunk" Vestal. He gave him two dollars out of his pocketbook, which contained besides this five one-hundred-dollar bills, and put the pocketbook back in his hip pocket, and Vestal went and got the liquor. The woman, Maude Laymon, was there. She and Ashley went down the path toward the spring. Dunk Vestal and Flynn came back with the whiskey, and Dunk began to shoot toward the spring and the woman came back, and Dunk gave her a "sort of whipping." Pretty soon Ernest came up. They all then went to various places and got and consumed quantities of liquor. All of them riding in the same car, they went up above Elkin, where there was plenty of liquor—Dunk and Ernest

and Maude Laymon on the front seat, Paul Flynn and Winters on the rear seat. Witness stated he had loaned Ernest Ashley a dollar on the night before.

Going back from Elkin to Jonesville, somewhere above Elkin, Ernest Ashley and Dunk Vestal transferred the Laymon woman from the front seat to the back, so placed that Winters was between the two, Paul Flynn on one side and Maude Laymon on the other. After they had gone some distance beyond the bridge and into Jonesville, Winters missed his pocketbook. He looked about for it, thinking possibly it had slipped out of his pocket. It was lying on the seat beside him. All the money was gone except two dollars. Said the witness: "I told them I wanted my money—said it to the whole crew." The witness picked up a wrench and told them to stop. As soon as he got out of the car they drove off, Dunk Vestal driving. Winters then went to the Jonesville police, and reported his loss. When the sheriff came, they went in search of the defendants but did not then find them.

Sheriff Moxley substantially corroborated Winters' testimony in so far as the transaction had been recently communicated to him. He further testified that he made a search for the defendants that night but was unable to find them. Ashley and Flynn were arrested next day. Dunk Vestal and Maude Laymon, after a few weeks, were apprehended in Cedartown, Georgia, sometime in July.

Sheriff Moxley was then permitted, over numerous objections by each of the defendants, to testify as to statements made by the defendant Vestal after his apprehension and during his incarceration, which the witness said were voluntarily made, and after warning that they would be used against him. On each objection the jury was instructed the declarations were admitted against Vestal alone and were not to be considered against the other defendants. (The objections were of a class,—made on the ground that they were *res inter alia acta,* or second-hand testimony of the conversation of the declarant. Distinction will be made where important.)

Vestal's statement as testified to by Sheriff Moxley was substantially as follows:

Maude Laymon came with Vestal from Winston-Salem to Elkin, and they went over together to the Nite Spot where they met Ashley. After drinking together, Ashley carried Vestal and the Laymon woman to Litt Vestal's place, left them, and promised to come back for them the next morning. Ashley came the next morning, which was Sunday, with some other parties. At that time Ashley told Vestal that "Dale Winters had some money on him and he was going to get it." Litt Vestal returning to his place meantime, asked them to leave, which they did, Ashley, Vestal, Laymon and the others in the same car, and went to Jonesville,

to the Nite Spot, where they came up with Winters. Something was said about liquor. Dale got in the car with them and they all went back to Litt Vestal's place, where Winters gave Vestal money to buy liquor with—$5.00. They rode around a bit and Winters missed his money and accused them of getting it. Vestal told him "they would go back out there," but Winters wanted to get out, and the car was stopped and Winters was let out, and they went on.

They went to Winston. Ashley said they would be looking for his car, so they parked at a service station, got a taxi and went to Kernersville, to Maude Laymon's mother's.

When they got down there Ernest Ashley had $300—three one-hundred-dollar bills. Ashley sent the taxi driver back to Kernersville to get change for $100. When the taxi driver got back, Ashley gave him $100, gave Paul Flynn $50, and kept the rest. The one-hundred-dollar bill Ashley gave the cab driver to carry to Kernersville and get changed.

Vestal and Maude Laymon spent the night near Kernersville, and next day Vestal called a cab and he and Maude Laymon went to Martinsville, Virginia, then by train to West Virginia, and, after a short stay there, went to Cedartown, Georgia, where he sawed himself out of jail. In about 30 days he was arrested in Winston-Salem.

Ralph Stockton, a policeman of Kernersville, testified that on the night of May 15 a taxicab drove up with Bill Dean, the cab driver, Ernest Ashley and Paul Flynn in it, and he was asked if he could change a one-hundred-dollar bill. Witness told them he did not have that much change on him, but would go home and get it. When they got to the house, Ernest Ashley pulled a one-hundred-dollar bill out of his pocket-book, kept it hidden from witness, but took out the bill and slipped it to Dean, who gave it to the witness, who gave him three twenty-dollar bills and four ten-dollar bills in exchange.

Billy Dean testified that the night of the 16th of May the defendants, Dunk Vestal, Ernest Ashley, and Paul Flynn and Maude Laymon came to his taxicab stand in a Bluebird taxi, pulled up and told him to follow them out to Beesome's farm. When witness got there, Dunk Vestal told him to "wait around." Witness stayed about twenty minutes. Dunk Vestal asked him to go up town and get a one-hundred-dollar bill changed so that he could "pay off the boys." When the Bluebird cab got to Beesome's they paid the cabby off and he left. Witness stayed about twenty minutes. At Dunk Vestal's request he carried Paul Flynn back to Kernersville, and got his "boss," Mr. Morgan, to change a one-hundred-dollar bill. Witness then took Flynn and Vestal back to Beesome's. Maude Laymon, Ernest Ashley, Paul Flynn and Vestal were there,—went back in the house where they had liquor; and after awhile they

came out. After Vestal paid him off, he carried Ashley and Flynn back to Kernersville, where they saw Stockton.

Just before getting to Kernersville, Ashley said to the witness: "I want you to get a one-hundred-dollar bill changed so when we get to wherever we are going I will have money enough to pay you." Prior to this witness had got Mr. Morgan to change a one-hundred-dollar bill. Witness was now given a one-hundred-dollar bill by Ashley, and turned it over to Stockton, who went to the house and got change for it.

Witness carried the defendants Ashley and Flynn to Winston. From the point where they had left their car, witness directed them to the public highway, and left them. They paid him $10.25 for the trip.

On the following day, or day after, on a call, he picked up Vestal and Laymon and carried them to Martinsville, Virginia.

The State rested. The defendants offered no evidence. At the close of the evidence the defendants, each separately, demurred thereto, and moved for judgment as of nonsuit. This was overruled as to each defendant. Defendants excepted.

(Exceptions to the instructions to the jury will be noted in the opinion where necessary for discussion.)

The case was submitted to the jury, who returned a verdict of guilty, as to each defendant, on both counts. The defendants separately moved to set aside the verdict for errors committed on the trial, and the motions were declined. Defendants excepted. To the ensuing judgment on the verdict the defendants objected, excepted and appealed.

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

W. Scott Buck and Philip E. Lucas for defendant appellant Maude Laymon.

Allen Henderson for defendant appellants Paul Flynn and Ernest Ashley.

SEAWELL, J. The evidence was legally sufficient to support conviction as to all the defendants, and the demurrers to the evidence were properly overruled. If any doubt existed as to the sufficiency of the evidence against Maude Laymon, it must be dispelled when we look at the whole series of transactions she was sharing with her codefendants as raising an inference of a conspiracy to commit the crime alleged, and to cover it up by devices and maneuvers that would baffle pursuit. During the ride near Jonesville, and just before Winters missed his pocketbook and found the money gone, this woman was transferred from the front seat to the back so that Winters was between her and Flynn. She was closely associated with the defendants at almost every critical part of the story;

with them when the evidence points to a division of the spoils, and finally, after crossing several states, was found with the defendant Vestal in Cedartown, Georgia. The defense suggests that she was an abandoned woman, following the fortunes of Vestal through other motives; this does not remove the inferences of her participation in the crime.

The more serious challenge to the trial refers us to the admission in evidence of Sheriff Moxley's testimony in which he related the voluntary statements made to him by Dunk Vestal, while in jail. We examine the question of its competency, keeping in mind the limitations and cautions imposed by the judge—that it should be taken only against Vestal and not against any of his codefendants. The connected and revealing story of Vestal contained at points references to conversations, declarations, acts and incidents said and performed by his codefendants pending the transactions which the State contends led to the parting of Winters and his money, which if directly in evidence would be legally unobjectionable, however damaging against the actors or declarants to whom they refer. At the same time they all unquestionably are competent evidence against Vestal, bearing not only on his guilty knowledge, but his actual participation in the crime charged. The trial judge, as we have indicated, upon every objection, meticulously instructed the jury that the evidence must be taken against Vestal alone and not against any of the other defendants.

The involvement and unraveling of closely knitted transactions in which a number of persons have played a part often presents perplexing questions of competency in this respect. A major operation in dissection of the evidence by rule cannot be undertaken by the court without destroying the subject or leading to confusion. Ordinarily the only device is that used by the judge in the instant case; cautioning the jury as to its application, under an instruction formulated as we find it here. Its use has not been seriously questioned. As a matter of necessity arising out of what appears to have been the close co-operation of the participants and conspiratorial character of the evidence leading to the crime, the necessity of its application occurred rather more frequently than defendants desired.

Numerous exceptions have been taken to the charge of the court, largely in preservation of objections to the admission of evidence as we have outlined it. Space forbids discussing the exceptions by number; but we do not find that those related to this subject disclose reversible error.

We do not find the exceptions to the charge based on inaccuracies in the statement of contentions or the statements of evidence of such a character that would take the case out of the rule that such matters might be called to the attention of the court at the time, so that the error

or mistake made may be then corrected. *In re Will of West,* 227 N.C. 204, 41 S.E. 2d 838.

The defendants object that the court failed to define the crime charged because it did not refer to larceny from the person. Since the fact that larceny was from the person is but an aggravation of the offense, and it is not necessary to charge it in order to prove it, and since the court correctly defined the crime of larceny as is usually done, the objection seems to be without merit. *S. v. Bynum,* 117 N.C. 749, 23 S.E. 218.

The evidence in this case was mixed, the direct evidence of observers of the facts related, and circumstantial evidence arising out of the whole complex of facts presented. While the court may, with propriety, and frequently does, pay special attention to the nature of circumstantial evidence, it has never suggested that circumstantial evidence is any different from so-called direct evidence with regard to the degree of conviction necessary to establish guilt. Nor is it required, except upon request, to elaborate on the peculiar nature of that evidence.

In the case at bar the judge instructed the jury in formula approved by this Court that they should be convinced beyond a reasonable doubt as to the guilt of any defendant before finding him guilty. *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466; *S. v. Pierce,* 192 N.C. 766, 770, 136 S.E. 121; *S. v. Wiseman,* 178 N.C. 784, 794, 101 S.E. 629.

The appeal of Delmar Lee (Dunk) Vestal not having been perfected, is not before us and is not considered.

It has been impossible to treat all the exceptions of the defendants individually without writing a book,—they have been too numerous. In the classifications we have given them may be found the more serious contentions of the appellants. Many of the undiscussed exceptions present nothing novel or meirtorious and we have been constrained to reject them, although they have been considered. In those discussed, we find no reversible error.

No error.

STATE v. CLELLAN WARREN.

(Filed 20 April, 1949.)

Automobiles § 34b—

Power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right to review by the Superior Court, G.S. 20, Art. 2, and a provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal.

APPEAL by defendant, Clellan Warren, from *Harris, J.*, and a jury at the December Term, 1948, of the Superior Court of WAKE County.

The jury found upon an appropriate warrant and conflicting evidence that the defendant was guilty of the misdemeanor of driving a motor vehicle on a public highway at a speed in excess of that prescribed by subsection (b)2 of G.S. 20-141 as rewritten by section 17 of Chapter 1067 of the 1947 Session Laws. Judgment was thereupon pronounced against him as follows:

(1) That the defendant "be confined in the common jail of Wake County for a term of six months and assigned to work the public roads under the order and direction of the State Highway and Public Works Commission, said sentence suspended for two years upon condition that defendant pay the costs and remain law-abiding and of good behavior"; and (2) that the defendant surrender his driver's license to the Clerk of the Superior Court not later than 20 December, 1948, and not operate a motor vehicle on the public highways for a period of six months.

The defendant excepted to the judgment and appealed, assigning as error the provision of the judgment requiring him to surrender his license to drive motor vehicles and prohibiting him from operating such vehicles for the period specified.

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

William T. Hatch and Ray B. Brady for the defendant, appellant.

ERVIN, J. Under the Uniform Drivers' License Act, the power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right of review by the Superior Court. G.S. 20-Art. 2. Consequently, the provision of the judgment of the trial court requiring the defendant to surrender his license to drive motor vehicles and prohibiting him from operating such vehicles for a period of six months is void, and is hereby stricken out. *S. v. Cooper,* 224 N.C. 100, 29 S.E. 2d 18; *S. v. McDaniels,* 219 N.C. 763, 14 S.E. 2d 793.

Error.

STATE v. RALPH SILVERS.

(Filed 20 April, 1949.)

1. Criminal Law § 76c—

Certiorari will lie to the Supreme Court to determine the legality of defendant's imprisonment upon his contention that his sentence is in excess of that authorized by law for the offense of which he stands convicted.

2. Assault § 8d—

Assault with a deadly weapon with intent to kill is a misdemeanor.

3. Criminal Law § 60b—

A sentence directing that defendant be confined in the State's Prison for a term of ten years at hard labor is in excess of that permitted upon conviction of a misdemeanor, and in this case *certiorari* is granted and the cause remanded to the Superior Court for further proceedings in conformity with law.

THIS cause was heard before *Moore, J.*, at the August Term, 1948, of YANCEY.

Petition for a writ of *certiorari* filed in the Supreme Court and granted 1 March, 1949.

At the August Term, 1948, of the Superior Court of Yancey County, there were four criminal cases pending against the petitioner arising out of a single occurrence, and in each case the Bill of Indictment charged an assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death.

The defendant says in his petition for writ of *certiorari* that at the time he was called upon to plead to these indictments, he was in the custody of the Sheriff of Yancey County, having been arrested immediately prior thereto and held in jail; that he was not financially able to employ counsel and was not represented by counsel in the court below.

It is alleged in the petition that when the cases were called for trial they were consolidated, and the record shows the defendant entered the following plea: "Guilty of assault with intent to kill"; that the court thereupon consolidated the four cases for the purpose of judgment, and imposed a sentence directing that the "defendant be confined in Central Prison at Raleigh for a term of 10 years to do hard labor." It further appears the defendant was taken to Central Prison in Raleigh the day following the pronouncement of the judgment, and was thereafter transferred to Prison Camp No. 908 in McDowell County, where he is now imprisoned.

The defendant further alleges that he has been advised that the sentence imposed is in excess of that authorized by law, in that he did not plead guilty to a felony but only to a misdemeanor.

Wherefore he prays that the writ of *certiorari* be granted to the end that the legality of his imprisonment may be determined.

The Attorney-General concedes error.

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

W. E. Anglin for defendant.

DENNY, J. We held in *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140, that an assault with intent to kill is a misdemeanor. Therefore, upon the authority of that decision, and *S. v. Green,* 85 N.C. 600, and *S. v. Lawrence,* 81 N.C. 522, the judgment entered below is reversed and the cause is remanded to the Superior Court of Yancey County for proper judgment on the plea entered.

The prison authorities are directed to deliver the defendant into the custody of the Sheriff of Yancey County, to the end that the defendant may be given an opportunity to post bond pending the entry of a proper judgment on his plea.

Let this opinion be certified immediately to the Superior Court of Yancey County, in order that further proceedings may be had in accordance therewith and in conformity with the law in such cases.

Error and remanded.

STATE v. VANCE MEDLIN.

(Filed 20 April, 1949.)

Criminal Law § 52 (3): Intoxicating Liquor § 9d—

Circumstantial evidence disclosing that tools and materials appropriate for the construction of a still were found in defendant's barn, that a beaten path led from his house to the edge of the woods where a newly constructed still, with like material, was found, and that fermenting mash was found about 300 yards from his house, with vehicle tracks leading therefrom to the still, *is held* sufficient to be submitted to the jury upon a charge of unlawful possession of material and equipment for the manufacture of whiskey.

DEFENDANT'S appeal from *Harris, J.,* December Criminal Term, 1948, WAKE Superior Court.

The defendant was tried in the recorder's court of Wake County on a warrant charging him with unlawful possession of material and equipment for the manufacture of whiskey and, upon conviction, appealed to the Superior Court where the case was heard *de novo.* He was again found guilty and from the judgment on the verdict appeals to this Court.

Only one exception is presented on the appeal: Whether the evidence was legally sufficient to go to the jury over defendant's demurrer and motion for judgment as of nonsuit.

The evidence, which upon demurrer must be taken to be true, tends to show as follows:

The officers engaged in a search of defendant's premises found in his barn, or stable, the following: A pair of tin snips, a soldering iron, a

blow torch used to heat the soldering iron, wire solder and gasoline. There were bits of copper adhering to the blade and screw part of the snippers. The solder was about the size of a pencil and rolled on a spool. Searching the barn, the officers found a beaten path which led from it to a still about 125 or 150 yards from the house in the edge of the woods. A witness testified that no other path ran from the still to Medlin's crib. The still was brand new, as yet unused, made of copper, the seams soldered together with new solder. At the still were also found spools of solder wire bearing the same trademark and the same make as found in defendant's barn.

At another place about 250 or 300 yards from Medlin's house the officers found peach mash fermenting but not quite ready for distillation. The wagon path leading from the highway about 50 yards from Medlin's house reaches this spot. There were vehicle tracks leading up to the still. Medlin does not own a car but does own a woodsaw outfit on which stuff may be hauled.

The evidence disclosed that a number of other persons lived in the vicinity and owned and cultivated lands; and witnesses stated they did not know who owned the land on which the still was located.

This evidence was submitted to the jury over defendant's demurrer and exception and resulted, as stated, in a verdict of guilty.

The defendant made formal motion to set the verdict aside for error in the trial, which was declined, and as above stated, he objected to the ensuing judgment, excepted and appealed.

Attorney-General McMullan and Assistant Attorney-General Moody, and Forrest H. Shuford, II, Member of Staff, for the State.

W. H. Yarborough for defendant, appellant.

SEAWELL, J. Those who engage in the unlawful act of manufacturing intoxicating liquors do not set up signs with index fingers pointing to the location of the still, or mash, or products of distillation. Almost always, unless the party is found in the act, conviction depends in large measure on circumstantial evidence; and for that reason each case is *sui generis*. We need not expect to pull out of the card index cases exactly on all fours with that under review. However, examination of the following cases which deal with comparable circumstances will, we think, fully sustain the conclusion reached by the court below that the evidence in the instant case should go to the jury. *S. v. Crouse,* 182 N.C. 835, 108 S.E. 911; *S. v. Clark,* 183 N.C. 733, 110 S.E. 641; *S. v. Meyers,* 190 N.C. 239, 129 S.E. 600; *S. v. Weston,* 197 N.C. 25, 147 S.E. 618. The tools and materials found in the defendant's barn or crib, the snips with the adhering shreds of copper, the solder and rolls similar to

those found at the still, the freshly soldered seams of the newly made still found at the end of the path leading from the crib to the still, the nearby presence of the peach mash,—all these are circumstances, some of them novel, which in their combination generate inferences of the defendant's guilt,—strong or weak it is not our province to say,—which were properly left to the jury. *S. v. Massengill,* 228 N.C. 612; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Gentry,* 228 N.C. 643, 648.

We find no error in the trial.

No error.

CLARA C. STALLINGS v. OCCIDENTAL LIFE INSURANCE COMPANY.

(Filed 20 April, 1949.)

Appeal and Error § 51a—

On former appeal by defendant from a directed verdict in plaintiff's favor in her action on a policy of life insurance, it was held that the conflicting evidence as to conditional delivery of the policy or an absolute delivery upon acceptance of applicant's promise to pay the balance of the first premium, should have been submitted to the jury, and that the directed verdict in plaintiff's favor was error. *Held:* The decision on the former appeal is the law of the case, and upon the subsequent trial upon substantially identical evidence it was error for the trial court to grant defendant's motion to nonsuit.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Stevens, J.,* January Term, 1949, of FRANKLIN. Reversed.

This was an action to recover on a life insurance policy issued by the defendant on the life of Horace Rubbin Stallings.

The issuance of the policy and its delivery 27 June, 1947, and the death of the insured 23 September, 1947, were admitted, but defendant denied liability on the ground that the policy had been conditionally delivered, and that payment in full of the first premium had not been made at the time of the death of the insured. Plaintiff's evidence tended to show unconditional delivery of the policy and of the countersigned official receipt for first premium, upon payment of $5 and the acceptance by defendant's agent of the insured's promise to pay the balance as soon as his government check (which had been approved) was received. This check was not received until shortly after the death of insured. There was evidence of the contract and method of accounting between defendant and its agent, and of a letter to the agent from the defendant, written

after the death of insured, in which inquiry was made "whether you made any arrangement with him (insured) to complete the payment at some later date."

At the conclusion of all the evidence, defendant's renewed motion for judgment of nonsuit was allowed and plaintiff appealed.

E. C. Bulluck for plaintiff, appellant.
Smith, Leach & Anderson for defendant appellee.

DEVIN, J. This case was here at Fall Term, 1948, and is reported in 229 N.C. 529, 50 S.E. 2d 292, where the facts material to the decision are stated. The appeal in that case was by the defendant from a judgment in favor of the plaintiff, the defendant assigning as error that the trial court overruled its motion for nonsuit and directed a verdict for the plaintiff. We found error and awarded a new trial. In writing the opinion *Chief Justice Stacy* stated the Court's decision on the facts then appearing as follows: "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."

On the second trial below, had pursuant to this opinion, the presiding judge allowed defendant's motion for judgment of nonsuit and dismissed the action.

From an examination of the record we observe that substantially the same evidence was again offered on the determinative issue as that which had been presented on the first trial. Hence we are of opinion that the evidence should have been submitted to the jury under appropriate instructions as decided on the former appeal which constituted the law of the case on those facts. *Pinnix v. Griffin,* 221 N.C. 348, 20 S.E. 2d 366; *Cheshire v. First Presbyterian Church,* 222 N.C. 280, 22 S.E. 2d 566. True, the former appeal involved exception to a directed verdict in favor of plaintiff, while the present appeal is from judgment of nonsuit, but, on substantially the same evidence as that now presented, we held the conflicting testimony necessitated trial by jury.

The judgment of nonsuit is

Reversed.

BARNHILL and WINBORNE, JJ., took no part in the consideration or decision of this case.

W. F. STOKES AND J. B. CONGLETON, JR., TRADING AS STOKES & CONGLETON, v. D. ARCHIE EDWARDS, DON CASEY AND THOMAS E. CASEY, TRADING AS EDWARDS, CASEY & SONS; J. H. JAMES AND J. H. JAMES, JR.; AND W. ROBERT JOHNSON AND J. F. SHERMAN, TRADING AS JOHNSON-SHERMAN COMPANY.

(Filed 20 April, 1949.)

1. Sales § 15—

Where a buyer purchases goods for a particular purpose, known to the seller, in reliance upon the skill, judgment, or experience of the seller in regard to the suitability of the goods, the seller, regardless of whether he is the manufacturer of the goods or not, impliedly warrants that the goods are reasonably fit for the contemplated purpose, and this rule applies even though the purchaser purchases for resale to others for the contemplated use.

2. Trial § 22a—

Upon motion to nonsuit, the evidence favorable to plaintiffs is taken as true. G.S. 1-183.

3. Sales § 27—

Evidence of appellants' breach of implied warranty that the goods were reasonably fit for the purpose for which sold, and breach of the contract under which appellants accepted return of the merchandise and promised to replace the goods or give the purchasers their money back, *is held* sufficient to overrule appellants' motion to nonsuit.

4. Sales § 29—

Where, after making complaint that the goods were not fit for the purpose for which sold, the buyer returns the goods and refrains from instituting legal proceedings in consideration of the seller's oral promise to replace the goods or give the buyer his money back, the oral agreement to make reparation is a new contract supported by sufficient consideration and the buyer may recover for its breach.

5. Trial § 36—

Where the issues submitted present to the jury proper inquiries as to all the determinative facts in dispute, objection thereto is untenable, especially where appellants do not ask for or tender any specific issues.

6. Same—

The failure to submit an issue is not error when there is no evidence tending to justify an affirmative answer to such issue.

7. Sales §§ 27, 29: Trial § 39—Answers to issues held not inconsistent when construed in light of pleadings and testimony.

Plaintiffs' allegations and evidence were to the effect that two partnerships were engaged in the manufacture or sale of oil burning tobacco curers, that plaintiffs purchased a quantity of the burners for resale, that the burners were not reasonably suitable for the purpose for which they were sold, and that upon plaintiffs' objection, one of the partners of the

second partnership, acting for that partnership, promised to replace the burners or refund plaintiffs' money in consideration of plaintiffs' surrender of the defective burners and forbearance to bring legal proceedings for breach of the implied warranty. *Held:* The verdict of the jury on one issue that plaintiffs were not entitled to recover from the first partnership, and on the subsequent issue that plaintiffs were entitled to recover from the second partnership, are not conflicting when construed in the light of the pleadings and testimony, since it is obvious that the jury awarded recovery for breach of the second partnership's contract to replace the burners or refund the purchase price, which contract necessarily extinguished the right of action to recover for the breach of implied warranty.

APPEAL by defendants, W. Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company, from *Parker, J.*, and a jury, at the January Term, 1949, of the Superior Court of PITT County.

The case made out by the plaintiffs' evidence arose in 1946 and was as follows:

The defendants, J. H. James and J. H. James, Jr., partners, hereinafter called James and James, and the defendants, W. Robert Johnson and J. F. Sherman, partners trading as Johnson-Sherman Company, hereinafter called Johnson and Sherman, manufactured and wholesaled oil burners for curing tobacco under an overall partnership agreement. Acting through the agency of their sales representatives, the defendants, D. Archie Edwards, Don Casey, and Thomas E. Casey, who did business under the style of Edwards, Casey and Sons, the defendants, James and James, and the defendants, Johnson and Sherman, sold fourteen of the oil burners to the plaintiffs, W. F. Stokes and J. B. Congleton, Jr., partners, trading as Stokes and Congleton, retail dealers, with knowledge that the plaintiffs relied upon their skill or judgment in the premises and intended to resell such burners to farmers for use in tobacco barns for curing tobacco. The plaintiffs paid the defendants, James and James, and the defendants, Johnson and Sherman, $1,650.00 for the fourteen oil burners, and made an additional outlay of $140.00 in installing them in the barns of the farmers to whom they were resold. When put in operation, the fourteen oil burners proved to be wholly unfit for use in curing tobacco in that "all the heat stayed in the burners," or the burners became "red hot," setting the barns on fire. Pursuant to the insistent demands of their customers, the plaintiffs repossessed the fourteen oil burners, refunded their retail sale prices to their customers, and called upon the defendants, Johnson and Sherman, for restitution. Soon thereafter, to wit, on 18 October, 1946, the defendants, Johnson and Sherman, acting through the agency of J. F. Sherman, entered into an oral agreement with the plaintiffs whereby the plaintiffs surrendered the fourteen defective oil burners to Johnson and Sherman and refrained from bringing legal proceedings for the recovery of the loss they had suffered and

whereby Johnson and Sherman agreed that they "would either replace the burners or give plaintiffs their money back." Johnson and Sherman accepted the return of the burners by the plaintiffs and retained them, but subsequently refused to make reparation to plaintiffs in either of the alternative ways specified in the agreement of 18 October, 1946.

The plaintiffs sued all of the defendants upon a complaint setting forth in substance the above matters and the additional averments that J. F. Sherman acted for James and James as well as for Johnson and Sherman in making the agreement of 18 October, 1946. But no testimony was given on the trial tending to show that James and James either authorized or ratified the agreement in question.

The action was dismissed as to the defendants, D. Archie Edwards, Don Casey, and Thomas E. Casey, upon a *demurrer ore tenus,* and proceeded to trial as between the plaintiffs and the other four defendants, who filed a joint answer denying all of the material allegations of the complaint.

The defendants, James and James, offered no evidence at the trial, but Johnson and Sherman introduced testimony which tended to show that they were neither the manufacturers nor the sellers of the fourten oil burners in controversy; that, on the contrary, they acted in the premises simply in the capacity of known and authorized agents for disclosed principals, to wit, James and James, the real manufacturers and sellers; that similar oil burners made and sold by James and James had proved in practice to be well adapted to use for curing tobacco; and that they had never entered into any agreement to make any reparations to the plaintiffs.

Issues were submitted to and answered by the jury as follows:

1. Were the fourteen oil burners described in the complaint manufactured by J. H. James, J. H. James, Jr., and W. Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company, as partners? Answer: Yes.

2. If not, were the said fourteen oil burners described in the complaint manufactured solely by J. H. James and J. H. James, Jr.? Answer: No.

3. Did the plaintiffs purchase the fourteen oil burners described in the complaint from Edwards-Casey & Sons and were Edwards-Casey & Sons, Agent of Johnson-Sherman Company? Answer: Yes.

4. If J. H. James and J. H. James, Jr., were the sole manufacturers of the fourteen oil burners described in the complaint, did Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company, agents of J. H. James and J. H. James, Jr., sell said oil burners described in the complaint to the plaintiff through Edwards-Casey & Sons as sub-agents? Answer: No.

5. Were the fourteen oil burners purchased by the plaintiffs from Edwards-Casey & Son, as described in the complaint, defective in material or workmanship at the time of their delivery to the plaintiff so that they were not reasonably fit for the use for which they were intended? Answer: Yes.

6. Did the defendants W. Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company, agree with the plaintiffs to make good any and all damages sustained by the plaintiffs in the sale of said fourteen oil burners described in the complaint, and, if so, have they failed to do so? Answer: Yes.

7. What damage, if any, are the plaintiffs entitled to recover from James H. James and James H. James, Jr.? Answer: None.

8. What damage, if any, are the plaintiffs entitled to recover from W. Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company? Answer: $1,790.00.

The defendants, Johnson and Sherman, excepted to the submission of the first, third, fourth, fifth, sixth, and eighth issues, but did not suggest or tender any other issues.

Judgment was entered on the verdict in favor of plaintiffs and against the defendants, "W. Robert Johnson and J. F. Sherman, T/A Johnson-Sherman Company," for $1,790.00 and costs of the action, and Johnson and Sherman appealed, assigning the refusal of the trial judge to dismiss the action upon a compulsory nonsuit and other rulings as error.

J. B. James and W. W. Speight for plaintiffs, appellees.

J. Faison Thomson and J. W. H. Roberts for defendants, W. Robert Johnson and J. F. Sherman, trading as Johnson-Sherman Company, appellants.

ERVIN, J. An understanding of the precise nature of the cause of action upon which the judgment has been rendered is indispensable to a determination of the validity of the assignments of error.

When it is construed with a proper degree of liberality, the complaint states two causes of action alternative in nature, to wit: (1) A primary cause of action for damages for breach of an implied warranty that the fourteen oil burners were reasonably fit for the particular use of curing tobacco; and (2) a secondary cause of action for breach of an express contract, *i.e.*, the agreement of October 18, 1946, by which the appellants and their associates agreed to make specific reparation to the plaintiffs in the premises in consideration of the plaintiffs' returning the fourteen oil burners and forbearing to institute legal proceedings for breach of the implied warranty. Manifestly, the plaintiffs could not recover upon both

of the causes of action alleged for the reason that the establishment of the second necessarily required proof of the extinguishment of the first.

When a buyer purchases goods for a particular purpose known to the seller and relies on the skill, judgment, or experience of the seller for the suitability of the goods for that purpose, the seller impliedly warrants that the goods are reasonably fit for the contemplated purpose, and is liable to the buyer for any damages proximately resulting to him from the breach of this warranty. *Aldridge Motors, Inc., v. Alexander,* 217 N. C. 750, 9 S.E. 2d 469; *Thomason v. Ballard & Ballard Co.,* 208 N.C. 1, 179 S.E. 30; *Swift v. Aydlett,* 192 N.C. 330, 135 S.E. 141; *Poovey v. Sugar Co.,* 191 N.C. 722, 133 S.E. 12; *Gravel Co. v. Casualty Co.,* 191 N.C. 313, 131 S.E. 754; *Farquhar v. Hardware Co.,* 174 N.C. 369, 93 S.E. 922; *Thomas v. Simpson,* 80 N.C. 4. This is true even though the seller is not the manufacturer or producer of the goods, and even though the buyer is a dealer who purchases the goods for resale to others for the contemplated use. *Aldridge Motors, Inc., v. Alexander, supra;* 46 Am. Jur., Sales, sections 346, 355, 356; 55 C. J., Sales, section 719.

In passing upon the exceptions of appellants to the denials of their motions for a compulsory nonsuit under G.S. 1-183, we must take it for granted that the evidence favorable to the plaintiffs is true. *Hughes v. Thayer,* 229 N.C. 773, 51 S.E. 2d 488; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. When this is done, it clearly appears that prior to 18 October, 1946, the plaintiffs acquired a meritorious case of action against the appellants and their associates, James and James, for the breach of an implied warranty that the fourteen oil burners were reasonably fit for use in curing tobacco, and that on 18 October, 1946, the plaintiffs and the appellants made an oral agreement whereby the plaintiffs refrained from bringing suit against the appellants and their associates for breach of this warranty and surrendered the oil burners to the appellants, who have since retained them, and whereby the appellants agreed that they would "replace the burners or give plaintiffs their money back." Since a contract is "an agreement, upon sufficient consideration, to do or not to do a particular thing," the oral agreement between plaintiffs and appellants was in law a contract, obligating the appellants to make reparation to plaintiffs in one or the other of the ways specified. *Belk's Department Store v. Insurance Company,* 208 N.C. 267, 180 S.E. 63; *Overall Co. v. Holmes,* 186 N.C. 428, 119 S.E. 817. The forbearance of plaintiffs to institute legal proceedings against the appellants and their associates for breach of the warranty, and their surrender of the defective oil burners constituted a sufficient consideration for the promise of the appellants to recompense the plaintiffs. *Myers v. Allsbrook,* 229 N.C. 786, 51 S.E. 2d 629; *Chemical Co. v. McNair,* 139 N.C. 326, 51 S.E. 949; *Lowe v. Weatherley,* 20 N.C. 353; 17 C.J.S., Contracts, section 104.

Furthermore, the plaintiffs' evidence discloses that the appellants have breached the contract of 18 October, 1946, and thereby damaged the plaintiffs to the extent of their monetary outlay. Thus, it is evident that the court properly refused to nonsuit the plaintiffs.

The exceptions to the submission of the first, third, fourth, fifth, sixth and eighth issues are untenable. The trial court prepared the issues with meticulosity to present to the jury proper inquiries as to all essential matters or determinative facts in dispute. *Sams v. Cochran,* 188 N.C. 731, 125 S.E. 626; *Mann v. Archbell,* 186 N.C. 72, 118 S.E. 911. It is true that no issue was submitted to the jury as to whether the defendants, James and James, were bound by the contract of 18 October, 1946. This was proper for there was no evidence tending to justify an affirmative answer to any such issue. *Bank v. Furniture Co.,* 200 N.C. 371, 157 S.E. 13. Moreover, the appellants did not ask for or tender any such issue at the trial. *McNeeley v. Shoe Co.,* 170 N.C. 278, 87 S.E. 64; *Curtis v. Cash,* 84 N.C. 41.

Appellants except to the verdict on the theory that the answers of the jury to the seventh and eighth issues are in irreconcilable conflict. In addition, they except to the judgment as legally inconsistent in that it adjudges them liable to plaintiffs and exonerates their associates, James and James. These exceptions are based upon a misapprehension of the findings of the jury. When the verdict and judgment are construed in the light of the pleadings and the testimony, it is obvious that the jury has found that the plaintiffs are entitled to recover of appellants for a breach of the contract of 18 October 1946, rather than for a breach of the original warranty, and that the judgment has been rendered on the basis of that finding. This being true, the answers of the jury to the seventh and eighth issues are consistent, and the judgment is correct because the defendants, James and James, were not parties to the contract of 18 October, 1946. Besides, it may be noted that appellants seek to blow both hot and cold on this phase of the case. Their answer declares that James and James are not liable to the plaintiffs upon either of the causes of action alleged.

We have carefully considered the other assignments of error, and have reached the conclusion that none of them will justify the award of a new trial. The trial and judgment in the Superior Court will be upheld.

No error.

STATE v. LOUIS BASS BRAXTON.

(Filed 20 April, 1949.)

1. Criminal Law § 52a (1)—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State.

2. Larceny § 7: Robbery § 3—

Evidence of defendant's guilt of larceny and receiving and guilt of highway robbery *held* sufficient to overrule his motions to nonsuit as to each charge.

3. Larceny § 8—

A charge to the effect that the taking must be with criminal purpose and intent at the time to deprive the prosecuting witness of his property and to appropriate it to the accused's own permanent use, defines the felonious intent constituting an element of the offense of larceny, and objection thereto on the ground that it did not require the jury to find that the taking was with a felonious intent is untenable, certainly where the court had theretofore defined larceny as a felonious or criminal taking, etc.

4. Criminal Law §§ 53b, 81c (2)—

A charge that reasonable doubt is a doubt based upon reason and common sense "growing out of the evidence in the case" is erroneous, since reasonable doubt may arise from lack of evidence as well as upon the evidence adduced, and such instruction must be held for prejudicial error since it involves the intensity of proof as well as the burden.

5. Criminal Law § 81c (5)—

The jury returned a verdict of guilty in each of two separate prosecutions of defendant. After verdict the court consolidated the cases for the purpose of judgment, and rendered a single judgment upon the verdicts. *Held:* A new trial being awarded for error in the trial of one of the indictments, the judgment must be set aside and the cause remanded for proper judgment upon the verdict rendered in the other indictment.

APPEAL by defendant from *Hamilton, Special Judge,* at August Term, 1948, of PITT.

The defendant was tried upon an indictment, No. 3393, charging him with larceny and receiving. The jury returned a verdict of guilty as charged. Judgment was not pronounced, but the defendant was immediately put on trial upon an indictment, No. 3459, charging him with highway robbery. The jury likewise returned a verdict of guilty as charged.

Thereupon the court ordered the two cases consolidated for the purpose of judgment, and pronounced judgment as follows: "That the defendant be confined in the State's prison for a term of not less than eight years nor more than ten years."

The defendant appeals, assigning error.

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

LeRoy Scott and Albion Dunn for defendant.

DENNY, J. In the respective trials upon the above indictments, the defendant moved for judgment as of nonsuit at the close of the State's evidence and renewed his motion at the close of all the evidence. The motions were denied and the defendant duly excepted in each case and assigns error based thereon.

It is well settled in this jurisdiction that in passing upon a motion for judgment as of nonsuit in criminal prosecutions, the evidence must be considered in the light most favorable to the State, and when so considered, on the record before us, we think the evidence is sufficient in each case to sustain the rulings of the court below. *S. v. Gordon,* 225 N.C. 757, 36 S.E. 2d 143; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *S. v. Brown,* 218 N.C. 415, 11 S.E. 2d 321.

BILL OF INDICTMENT NO. 3393.

In this case the defendant excepts and assigns as error the following portion of his Honor's charge: "If the State in this case has satisfied you from the evidence beyond a reasonable doubt that the defendant Louis Braxton, on the 15th day of August, with the criminal purpose and intent at the time to deprive the prosecuting witness, Howard Hazleton, of his pocketbook and the contents thereof, having had no right to it at the time, and for the purpose of appropriating it to his own permanent use and enjoyment, took the said money of the said prosecuting witness, then you would return a verdict of guilty."

The defendant contends this instruction did not require the jury to find that the taking, if any, was with a felonious intent. We do not so construe it. But on the contrary, we think the instruction gave the essential elements of larceny which constitute a felonious intent. *S. v. Massengill,* 228 N.C. 612, 46 S.E. 2d 713; *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Epps,* 223 N.C. 741, 28 S.E. 2d 219; *S. v. Holder,* 188 N.C. 561, 125 S.E. 113; 52 C.J.S. p. 817 *et seq.* Moreover, the court had defined larceny to be "the felonious or criminal taking and carrying away of the personal property of another by force and against the will of the owner and taking and carrying it away with the then present intent on the part of the one who takes it to appropriate it to his own use for all time and to deprive the rightful owner of its use, and when that taking is from the person of one then it becomes larceny from the person." No prejudicial error has been shown, and the exception will not be upheld.

We have examined the remaining assignments of error relating to the trial of this case, and they are without merit.

BILL OF INDICTMENT No. 3459.

The defendant excepts and assigns as error the following excerpt from his Honor's charge: "And if the State has satisfied you from the evidence and beyond a reasonable doubt—and a reasonable doubt, gentlemen, is a doubt based upon reason and common sense and growing out of the evidence in the case—then you will return a verdict of guilt in this case."

The vice complained of here is the instruction that a reasonable doubt *"is a doubt based upon reason and common sense and growing out of the evidence in the case."* As said in *S. v. Tyndall, ante,* 174, a reasonable doubt "may arise from lack of evidence or from its deficiency. In a criminal prosecution the burden is on the State to establish the guilt of the accused beyond a reasonable doubt, and not on the defendant to raise a doubt as to his guilt. *S. v. Steele,* 190 N.C. 506, 130 S.E. 308; *S. v. Sigmon,* 190 N.C. 684, 130 S.E. 854; *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466." *Stacy, C. J.,* said in the last cited case: "A reasonable doubt is not a vain, imaginary, or fanciful doubt, but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be 'fully satisfied' (*S. v. Sears,* 61 N.C. 146), or 'entirely convinced' (*S. v. Parker,* 61 N.C. 473), or 'satisfied to a moral certainty' (*S. v. Wilcox,* 132 N.C. 1137), of the truth of the charge, *S. v. Charles,* 161 N.C. 287. If after considering, comparing, and weighing all the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith, to a moral certainty, in the defendant's guilt, then they have a reasonable doubt; otherwise not, *Commonwealth v. Webster,* 5 Cushing (Mass.) 295; 52 A. Dec. p. 730; 12 Cyc. 625; 16 C.J. 988; 4 Words and Phrases 155."

While some authorities hold that a reasonable doubt sufficient to justify the acquittal of a defendant *must arise from the evidence* and that an instruction to that effect includes *want of evidence,* 23 C.J.S., Criminal Law, Section 910, at p. 164, we think such instruction is too limited and tends to prejudice the rights of the defendant.

A defendant is entitled to an acquittal if there is a reasonable doubt in the minds of the jurors as to his guilt, and it makes no difference whether that doubt arises out of the evidence in the case or from the lack of evidence of sufficient probative value to satisfy the jury beyond a reasonable doubt of his guilt.

Nor can the defect in the instruction given in the trial below be regarded as inconsequential or harmless. It involves the intensity of proof as well as the burden. Substantially similar instructions have been con-

sidered by other courts and held for error. *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Sigmon, supra; Carter v. State,* 71 Ga. App. 626, 31 S.E. 2d 666; *Alexander v. State,* 32 Ga. App. 488, 123 S.E. 923; *Stanford v. State,* 153 Ga. 219, 112 S.E. 130; *State v. King,* 232 Iowa 16, 4 N.W. 2d 244; *State v. Parkin,* 230 Iowa 991, 299 N.W. 917; *Smith v. State,* 135 Fla. 835, 186 So. 203; *Hulst v. State,* 123 Fla. 315, 166 So. 828; *Walker v. State,* 82 Fla. 465, 90 So. 376; *People v. Andrea,* 295 Ill. 445, 129 N.E. 178; *State v. Herwitz,* 109 Wash. 153, 186 P. 290; *Cooper v. State,* 120 Neb. 598, 234 N.W. 406; *McIntosh v. State,* 105 Neb. 328, 180 N.W. 573, 12 A.L.R. 798; *State v. Price* (Del.), 7 Boyce 544, 108 A. 385.

The necessity for a new trial upon indictment No. 3459 requires a consideration of the action of the court in consolidating these cases for trial for the purpose of judgment.

Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial, as authorized by G.S. 15-152, the counts contained in the respective bills will be treated as though they were separate counts in one bill, and where there are several counts and each count is for a distinct offense, a general verdict of guilty will authorize the imposition of a judgment on each count. *S. v. Harvell,* 199 N.C. 599, 155 S.E. 257. Likewise, where there are several counts in a bill, and a general verdict of guilty is returned, the court may impose judgment and "if the verdict on any count be free from valid objection and has evidence tending to support it, the conviction and sentence for that offense will be upheld." *S. v. Murphy,* 225 N.C. 115, 33 S.E. 2d 588; *S. v. Graham,* 224 N.C. 347, 30 S.E. 2d 151; *S. v. Norton,* 222 N.C. 418, 23 S.E. 2d 301. But where cases are consolidated for judgment only, these decisions are not controlling. When cases are consolidated after verdict, for the purpose of judgment and a single judgment is rendered on the verdicts, and a new trial is granted in one of the consolidated cases, the ends of justice would seem to require that the judgment so entered be set aside and the cause remanded for proper judgment in the case or cases in which no error is made to appear. Therefore, the judgment entered below will be set aside and the cause remanded for proper judgment on the verdict upon indictment No. 3393; and for a new trial upon indictment No. 3459.

In No. 3393—Error and remanded.

In No. 3459—New trial.

THE STRAUS COMPANY, INC., A CORPORATION, v. JAMES N. ECONOMYS, TRADING AS CALIFORNIA RESTAURANT.

(Filed 20 April, 1949.)

Sales § 10—Evidence held not to show misrepresentation by seller as to time of shipment or that delay was due to causes under his control.

In this action by the seller, defendant set up a counterclaim for damages resulting from defendant's wrongful misrepresentation of time of shipment and delivery of the restaurant equipment and machinery purchased. Defendant's evidence was to the effect that in response to a telephone call, plaintiff stated that the shipment was being loaded and would arrive at destination the following Sunday night or Monday, but that the goods did not arrive until the following Thursday. Defendant offered no evidence that the goods were not loaded and ready for shipment at the time plaintiff made the statement. Plaintiff had expressly contracted against liability for delay caused by the independent carrier over which plaintiff had no control. *Held:* The statement as to the time the goods would arrive was no more than an expression of opinion, and there being no evidence that the goods were not loaded at the time stated by plaintiff or that the delay was due to causes under plaintiff's control, nonsuit of the cross-action was proper.

APPEAL by defendant from *Grady, Emergency Judge,* November Term, 1948, WAKE. Affirmed.

Civil action on account for restaurant machinery and equipment sold and delivered in which defendant sets up a counterclaim for damages.

Plaintiff sold to defendant certain machinery and restaurant equipment to be installed in its place of business in Raleigh, f.o.b. point of shipment, for $3,996.10. The points of shipment were Philadelphia and Richmond, and the shipments were to be made by indepndent contract haulers. Plaintiff was to notify defendant of the time of shipment.

On Saturday, 2 February 1946, plaintiff, in response to a telephone call, informed defendant the shipment was being loaded and would arrive in Raleigh Sunday or Monday "without fail." Thereupon, defendant got in touch with his contractor, had him report and begin the work of removing his old equipment, preparatory to installing the new on Monday, his regular closing day. The shipment did not arrive until about noon Wednesday. Two sinks were missing, due to the fact that the truck failed to stop in Richmond and "pick them up" as it was instructed to do. Plaintiff, on notice thereof, sent them by special truck and they arrived Thursday morning.

The contract of purchase and sale is in writing, was accepted by defendant 1 September 1945, and provides in part that (1) "Vendor not liable for delays beyond control," and (2) "The Straus Company, Inc., cannot guarantee delivery on any particular date by reason of frequent delays

caused by transportation companies or other causes over which it has no control."

Defendant paid all the purchase price except $671.72. This action was instituted to recover said balance. The defendant, answering the complaint filed, admitted the balance due plaintiff and pleaded a counterclaim in tort for damages proximately caused, as he alleges, by the wrongful conduct of plaintiff in falsely advising him as to the time of delivery. He alleges that the information furnished him was false, that the shipment was not actually rolling toward Raleigh 2 February as represented by plaintiff, that in fact the first truck load was actually shipped Wednesday, 6 February, and the second on Thursday, 7 February.

He alleges further that, relying on the information from plaintiff that the shipment was being loaded and would arrive in Raleigh Sunday night or Monday, he had all his equipment torn out and removed, that due to the delay in the arrival of the new equipment, he was compelled to close his restaurant two and one-half days, and that by reason thereof, he suffered damages in the sum of $779.63, made up of net profits lost, rent, wages of waitresses and other employees, and items of expense including the cost of the truck sent from Richmond.

When the cause came on for trial, the defendant agreed that the issue based on plaintiff's cause of action should be answered in favor of plaintiff and proceeded to offer evidence in support of his counterclaim. When he closed, plaintiff moved to dismiss the counterclaim as in case of nonsuit. The motion being overruled, it offered in evidence the admissions contained in the answer and also the contract of purchase and sale. It then renewed its motion to dismiss. The motion was allowed.

Thereupon the court signed judgment for plaintiff and dismissed the counterclaim at the cost of defendant. Defendant excepted and appealed.

Bickett & Banks for plaintiff appellee.

Thomas W. Ruffin for defendant appellant.

BARNHILL, J. We may concede, without deciding, that defendant has alleged a good cause of action. That is not the weakness of his position here. He must fail for the want of proof that the shipment was not "being loaded" on Saturday, and the truck was not "on its way from Philadelphia" on Sunday when defendant called a second time. He, it is true, says that the representations to this effect were false, but he offered no evidence in support thereof. Instead, his witness testified: "I told him what the trouble was and that the truck was on its way from Philadelphia." "The only reason that it wasn't delivered was simply that the transportation facilities . . . didn't get down here until sometime later than I expected." The truck "did not stop by my place of business but

came straight through Richmond to here to make delivery as quick as possible. If that hadn't been so I would have put those sinks on that truck."

Plaintiff had no control over the shipment after it was loaded, or over the truck. Of this defendant was fully aware. He knew also that plaintiff had expressly contracted against liability for delay in delivery caused by the transportation company. Hence, under the circumstances here disclosed, the statement of plaintiff's general manager that the shipment would arrive in Raleigh Sunday night or Monday was nothing more than the expression of the opinion that the truck in due course would reach Raleigh at that time. The defendant relied thereon at his own risk.

Defendant's cross action must rest on proof that the plaintiff knowingly or negligently misrepresented the facts as to the time of the shipment or that the delay in delivery was due to causes under its control. Since the record is devoid of any evidence to that effect, the judgment below must be

Affirmed.

BEATRICE SACHS STADIEM v. ISAAC STADIEM; COMMERCIAL NATIONAL BANK OF KINSTON, KINSTON, N. C.; BRANCH BANKING & TRUST COMPANY, KINSTON, N. C.; AND FIRST CITIZENS BANK & TRUST COMPANY, KINSTON, N. C.

(Filed 20 April, 1949.)

1. Divorce § 12—

In an action under G.S. 50-16 for alimony without divorce, the amount of attorneys' fees allowable to plaintiff's counsel is for the determination of the trial court in its discretion, with reference to the condition and circumstances of the defendant, among other things, and the amount allowed is subject to review only for abuse of discretion.

2. Same—

The fact that after the institution of the action the client abandons the suit instituted in this State and institutes another suit for divorce in another state, and counsel employed here are permitted to withdraw since no further services could be performed, does not affect such counsel's right to an order allowing them counsel fees out of the property of defendant for the services performed here in good faith.

3. Same—

The fact that an order allowing counsel fees has been entered in an action under G.S. 50-16 does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services.

4. Same—

On this appeal from an order allowing additional counsel fees under G.S. 50-16, the amount *is held* not so unreasonable as to constitute an abuse

of discretion when viewed in the light of the circumstances under which made.

APPEAL of defendant, Isaac Stadiem, from *Hamilton, Special Judge,* at New Bern, N. C., October 16, 1948, as of May Term, 1948, LENOIR Superior Court.

Thomas J. White, H. Frank Owens, Jr., and J. A. Jones for petitioner appellees.

H. P. Whitehurst and R. E. Whitehurst for defendant appellant.

SEAWELL, J. The appeal is from an order of Hamilton, S. J., allowing to Thomas J. White, H. Frank Owens, Jr., and J. A. Jones of the Kinston Bar, attorneys' fees *pendente lite* as counsel representing the plaintiff in the above captioned proceeding for alimony without divorce against her husband, Isaac Stadiem. The appeal is by the defendant in that proceeding.

The brief of appellant admits that the sole question involved is whether the judge abused his discretion in making the award; arguing in the brief that the allowance was not properly related to the services rendered plaintiff in the proceeding; or the condition and circumstances of the defendant; his estate, financial status, and ability to pay.

The plaintiff, contemplating bringing the alimony proceeding, employed the named attorneys to represent her. These held numerous conferences, claimed to be necessary to the investigation of the case, lasting from August 18, 1947, until September 6, inclusive. On September 6 they filed plaintiff's petition for alimony without divorce in Lenoir Superior Court. The hearing was scheduled for the 13th but was postponed to a later date. On the 13th of September, however, on the hearing of the plaintiff's motion before Judge Henry L. Stevens, a consent order was signed making provision for the support of the plaintiff *pendente lite;* and on September 30 an order was made allowing $500 attorneys' fees *pendente lite* to her attorneys, J. A. Jones and Thomas J. White, above named. That order finds as a fact "that J. A. Jones and Thomas J. White have rendered valuable services to the plaintiff."

In the motion now under review on defendant's appeal therefrom, considered as an affidavit, it is stated that the hearing of the cause did not come off on the 13th as expected but was continued; and that in order to meet the date of trial the movents,—plaintiff's lawyers,—had spent much of their time and were largely occupied after the continuance in labors connected with the case; that during the pendency of the proceeding plaintiff's attorneys, including Owens,—not named in the above order,—on account of the conduct of defendant who constantly made dis-

turbing demands on plaintiff, were compelled for a long period of time to have daily conferences with their client until March 1, 1948, when, without the knowledge or consent of her lawyers, she left Kinston for New York City, carrying the child with her, and is there now supported by Stadiem under what conditions is not stated. They further allege that in addition to the services performed in North Carolina, they were compelled to extend investigation to New York where they spent several days in investigation of the defendant's conduct, particularly his relations with other women. They say the proceeding instituted in behalf of the plaintiff was continued from time to time and during its pendency movents were necessarily engaged in "more than 79 conferences in length from one to 17 hours" in the necessary performance of their duties as counsel.

The client finally brought action in New York against her husband for divorce on the ground of adultery; and her counsel in this State were finally permitted to withdraw from the proceeding. The proceeding, on the record, is still pending.

The movents exhibited statements of the financial condition of the defendant from which the court found substantially that he had an income from his mercantile business of at least $100 per week; that he owned properties, real and personal, worth at least $37,759.92, and that amongst his assets there was at least $10,000 in checking and savings accounts in named banks "and that $1,000 was a reasonable sum for and in behalf of the named petitioners."

When allowable, the amount of attorneys' fees in a case of this sort is within the sound discretion of the court below and is unappealable except for abuse of that discretion. The statute itself, however, contains some guides to the exercise of that discretion and practice has developed others. Within the rule of reasonableness the court must consider along with other things the condition and circumstances of the defendant. Generally speaking, in this respect G.S. 50-16 runs parallel with section 50-15 regarding allowances for attorneys' fees.

The original attorneys for the defendant do not appear in this cause; he is now represented by other counsel who contend and argue that plaintiff's case was overloaded with counsel and that one only might have handled the case. The movents in a counter thrust point out that during the pendency of this action many lawyers of distinction were from time to time employed by the defendant: Messrs. Whitaker & Jeffress, Kinston; Mr. K. A. Pittman, Snow Hill; Mr. John D. Larkins, Jr., Trenton; Mr. Ottway Burton, Asheboro; Messrs. Sutton & Greene, Kinston; Mr. H. P. Whitehurst, New Bern; and Mr. R. E. Whitehurst, New Bern; and they have been compelled to do battle with this array.

It is further argued by appellant that movents have much extended the nature and importance of various conferences had since the initial allowance of $500 in order to show services meriting the later allowance; and moreover, that the allowance of $1,000 was entirely out of line with the estate and financial condition of the defendant and so unreasonable as to constitute an abuse of discretion.

At the time Judge Hamilton's order was made it had become largely a question of the services already rendered, and no award could have been made with a view to prospective services, as movents' client had seen fit to seek remedy by another route and with new counsel. Whoever was responsible for this new move does not appear; it does appear, however, that the movents themselves were not at fault; and the services, whatever they were, appear to have been rendered in good faith; and the findings of fact by the court with regard to them cannot be assumed to be perfunctory.

The fact that the efforts of the attorneys on behalf of their client, made in good faith, were, without fault on their part but by the voluntary act of the client, in which they did not participate, rendered unfruitful, and they were permtted to withdraw since no further services could be performed, could not affect the validity of the order. *McFetters v. McFetters,* 219 N.C. 731, 14 S.E. 2d 833.

The statute itself provides for amendment to the orders allowing subsistence of attorneys' fees from time to time *during the pendency of the action;* and it necessarily follows that allowances may be made for past services as well as those prospective and that the initial order allowing attorneys' fees does not, *per se,* write "paid in full" against allowances subsequently made during the pendency of the action. See *McFetters v. McFetters, supra.*

In much of the foregoing the court has merely given expression in different phraseology to the text of the statute and applied the clear-cut rules laid down in the case of *McFetters v. McFetters, supra,* q. v.

There are so many elements to be considered in an allowance of this kind;—the nature and worth of the services; the magnitude of the task imposed; reasonable consideration for the defendant's condition and financial circumstances,—these and many other considerations are involved. On this appeal the question before us is not whether the award may not have been larger than that anticipated or even usual in cases of that kind; but whether in consideration of the circumstances under which it was made it was so unreasonable as to constitute an abuse of discretion.

We cannot find that the order was such as to transcend the discretion of the court. Having reached this conclusion as to its validity, we cannot question its propriety. The order is

Affirmed.

BLAND B. PRUITT, TRADING AS PRUITT LUMBER COMPANY, v. J. A. RAY AND WIFE, MARY MAGGIE RAY.

(Filed 20 April, 1949.)

Trial § 48½—

Where a party's motion to set aside the verdict involves no question of law or legal inference, such motion is addressed to the sound discretion of the trial court and its ruling thereon is not subject to review in the absence of abuse of discretion. G.S. 1-207.

APPEAL by plaintiff from *Harris, J.*, at December Term, 1948, of FRANKLIN.

Civil action to recover for an alleged balance due on goods sold and delivered.

The plaintiff alleges, and his evidence tends to show, that during the months of November and December, 1947, he sold and delivered to the defendants certain building materials; that several payments were made or credits allowed on the account during said period, and that on 5 December, 1947, the defendant J. A. Ray went to the office of the plaintiff and requested C. B. Ray, Jr., an agent and employee of the plaintiff, to give him a statement of his account. The employee examined the ledger and prepared a statement showing a balance due the plaintiff of $459.72. The defendant J. A. Ray thereupon issued a check to the plaintiff for $459.72, and noted thereon "account in full"; and the employee of plaintiff gave him a receipt therefor, marked "account paid in full." It was discovered thereafter that invoices totaling $277.18 had not been posted or charged to the account of the defendants, and were therefore not included in the statement rendered. The plaintiff made demand for the payment of this additional sum. Payment was refused.

The jury returned a verdict in favor of the defendants. The plaintiff moved to set aside the verdict. Motion denied. Plaintiff appeals and assigns error.

Hamilton Hobgood for plaintiff.

Edward F. Griffin for defendants.

PER CURIAM. The only question involved on this appeal is whether or not the court below committed error in denying plaintiff's motion to set aside the verdict and for a new trial.

The plaintiff's contentions were submitted to the jury on a proper issue and in a charge which he concedes to be free from error.

There was no question of law or legal inference involved in the motion lodged below. Consequently it was addressed to the sound discretion of

the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. No abuse of discretion is shown. G.S. 1-207; *Ziglar v. Ziglar,* 226 N.C. 102, 36 S.E. 2d 657; *Anderson v. Holland,* 209 N.C. 746, 184 S.E. 480.

The judgment below is

Affirmed.

CARTER R. POPE v. J. E. BURGESS.

(Filed 4 May, 1949.)

1. Deeds § 1c—

While the courts will go far to sustain informal and non-technical instruments purporting to convey interests in real estate, and while technical words of conveyance are not necessary, it is required that words of conveyance, in common parlance at least, be employed.

2. Same: Tenants in Common § 3—

While G.S. 41-2 may not preclude tenants in common from providing for survivorship by adequate contract *inter sese,* an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. The execution by the administrator of the deceased tenant in common of a deed to the surviving tenant, made under the supposed authority of the contract, is without effect.

DEFENDANT'S appeal from *Bone, J.,* November Term, 1948, NASH Superior Court.

The plaintiff and the defendant entered into a contract for the purchase and sale of certain lands described in the complaint. The plaintiff allegedly owner in fee thereof, tendered deed and the defendant purchaser declined to accept it and pay for the land as agreed, for that plaintiff could not convey a good title. The plaintiff sued.

The plaintiff claims title under the muniments set out below, and under the following circumstances:

On and prior to December 28, 1934, the plaintiff, Carter R. Pope, and his brother, William R. Pope, cotenants and owners in fee of the lands described, each of them unmarried and having no children or descendants of deceased children, entered into an agreement on that date, which was duly acknowledged and recorded in Nash County Registry, in words and figures following:

"NORTH CAROLINA
NASH COUNTY

"This Contract, made this December 28, 1934, by and between

William R. Pope and Carter R. Pope, Witnesseth:

"That whereas, the parties hereto are the owners as tenants in common of two hundred forty (240) acres of land, more or less, including the store house and building, the tenant houses and all outhouses, and improvements of every kind and sort, located in Nash County, North Carolina, described or referred to in the last Will and Testament of Thomas S. Pope, deceased, and also in the deed executed by Thomas S. Pope and Allean Pope to T. T. Thorne, Trustee, recorded in Book 347, at page 259, in the office of the Register of Deeds of Nash County, and in addition thereto, are the owners as tenants in common of two (2) acres of land situate in or near the Town of Battleboro, and being the same land conveyed by J. R. Whitehead and wife, Mayme Whitehead, to William R. Pope and Carter R. Pope; and whereas, the parties hereto have agreed to and with each other that it is the desire and purpose that on the death of either one of said parties, that is William R. Pope and Carter R. Pope, that the survivor, or one living, shall become the absolute owner in fee simple of all and every part of the interest of the party hereto deceased in the foregoing described lands, and it is further agreed that the executor, or administrator of the party hereto so deceased, as aforesaid, shall make, execute and deliver unto the survivor a deed in fee simple for such estate, right, title and interest as the person so deceased may have or own at the time of his death in and to the foregoing described or referred to lands, so that the survivor shall become the absolute owner in fee simple of the estate and interest of the deceased party in as full and ample a manner as if the conveyance should have been made of said lands to the said survivor. It is the purpose and intent of this conveyance that the parties hereto, who are tenants in common of said lands, desire and intend that on the death of one of the parties hereto that all the estate, right, title, and interest that he has in and to the aforesaid lands shall become vested in the survivor as the owner in fee simple thereof, just as if said survivor, whether it be William R. Pope or Carter R. Pope, had been the owner of said lands in fee simple absolute in the first place.

"The consideration for this contract is Ten Dollars ($10.00) paid by each of the contracting parties hereto to the other contracting party, and for other good and valuable considerations passing from and to the parties to this contract.

"This instrument is executed in duplicate originals on this 28th day of December 1934, original copies hereof delivered to William R. Pope and to Carter R. Pope.

"Witness our hands and seals, the day and year first above written.

(s) WILLIAM R. POPE (Seal)

(s) CARTER R. POPE (Seal)"

William died intestate March 15, 1946, without wife or child or descendants of deceased children, leaving his brother, the plaintiff, surviving. Subsequently Thomas A. Burgess, administrator of the deceased William R. Pope, executed to Carter Pope a fee simple deed purporting to convey the premises; and this was duly acknowledged and recorded.

The answering defendant admitted all the allegations of the complaint and expressed a willingness to accept the plaintiff's conveyance and pay for the land, provided his title was approved by the Court.

No facts as to possession of the property under color of the administrator's deed appear in the record, and in fact no evidence was presented outside the pertinent documents.

The trial judge was of the opinion that plaintiff's title was good and entered judgment accordingly, requiring compliance with the contract of purchase and sale.

Defendant excepted and appealed.

L. L. Davenport and T. A. Burgess for plaintiff, appellee.

J. W. Grissom for defendant, appellant.

SEAWELL, J. Conceding that survivorship may be annexed to a tenancy in common by adequate contract *inter sese* of the co-owners, and that the Act of 1784, now G.S. 41-2, abolishing survivorship incident upon joint tenancy by operation of law, does not bar or affect such action, we are then brought to the question whether the exhibited contract between the parties is adequate to accomplish that result.

We may eliminate from consideration the deed of the administrator, made under the supposed authority of the contract, as neither aiding nor vitiating its effect, and treat it as mere separable surplusage. But, to become effective, there must be something left in the deed sufficient to presently convey or release the respective interests of the brothers as co-owners upon which the survivorship is predicated.

Our courts have gone very far to sustain informal and non-technical instruments purporting to convey interests in real estate, either present, future, or contingent. But our research does not disclose any instrument where a simple expression of the intention to do so will supply the absence of words implying conveyance. It is true that technical operating words of conveyance are not necessary, but ordinary words, or words in common parlance or language of a similar import must be used. *Waller v. Brown,* 197 N.C. 508, 149 S.E. 687; *Armfield v. Walker,* 27 N.C. 580; *Cobb v.*

Hines, 44 N.C. 343; *Scott v. Brown,* 206 P. 572, 71 Colo. 275; *King v. Coffey,* 131 So. 796, 22 Ala. 245. The language used in the instrument under review, while sufficiently pointed as to the description of the property, and while the instrument itself is referred to as a conveyance, does no more than to state the intention of the parties respectively that the survivor should have the property described without using any words or language which might, under the most liberal construction by the Court, be regarded as transferring a present interest. In fact the expression of intent is general, rather than specific, as to an ultimate result rather than the present means. Such operative words as are found are used in connection with the execution of the administrator's deed, implying, we think, that the brothers had no conception of the necessity of executing the intent *in praesenti,* but that it might be carried out by the administrator or executor, or either, after the death of the contracting party.

For these reasons the judgment of the court below finding a clear and unencumbered title in the plaintiff must be

Reversed.

SAINT MARY'S SCHOOL AND JUNIOR COLLEGE, INC., v. ROBERT W. WINSTON, JR.

(Filed 4 May, 1949.)

1. Wills § 12—

A will expressly declaring void all other wills left by testatrix revokes a prior codicil as well as any will such codicil was intended to modify, explain or supplement.

2. Wills § 33d—

Where the instrument fails to name a beneficiary, the asserted trust would be void for uncertainty.

3. Wills §§ 32, 33a—

The will in suit bequeathed and devised all the residue of the estate, including the land in controversy, to B. for life, and then appointed B. and another executor to execute the will "as I know they will carry out my wishes," the executors "to take entire charge of my estate." *Held:* The executors were to take solely for the purpose of carrying out the wishes of testatrix, and no beneficial interest in remainder was devised to them personally, and B. takes a life estate only, with the remainder undisposed of.

4. Wills § 33a: Executors and Administrators § 20—

Where a will charges the executors with carrying out the wishes of testatrix, but the wishes of testatrix are not expressed within the "four corners" of the instrument, a deed executed by the executors to an

eleemosynary corporation purporting to effectuate the known wishes of testatrix, is ineffectual.

APPEAL by plaintiff from *Stevens, J.,* at February Term, 1949, of WAKE.

This is an action for specific performance.

The defendant entered into a written agreement with the plaintiff, on 17 November, 1948, under the terms of which the defendant agreed to purchase from the plaintiff the land described in the complaint upon the delivery of a warranty deed conveying to him a good, indefeasible fee simple title to the property. The plaintiff tendered to the defendant a warranty deed, on 2 December, 1948, purporting to convey to him such a title. He refused to accept the tendered deed, contending the plaintiff does not own anything more than an estate *pur autre vie* in the property.

On 9 July, 1931, Eliza A. Pool, owner of the land involved herein, executed a last will and testament, in which she made a number of bequests and a devise in Item Twelve thereof, which reads as follows: "I give and bequeath all the residue of my property to Bessie T. Brown to use during her life time and I hereby appoint Bessie T. Brown and Willis G. Briggs my lawful executors to all intents and purposes to execute this my last Will and Testament as I know they will carry out my wishes. They are to give no bond but take entire charge of all my estate. I leave a list of small articles to be given to a few of my friends. All other Wills left by me I declare null and void."

After the death of the testatrix, on 25 November, 1935, the will and the following codicils, or purported codicils, were duly probated in common form:

"June 1st, 1932. My property has depreciated so much that I cannot leave any money to any one except Bessie T. Brown and Sarah Grandy Briggs. E. A. Pool."

"June 5, 1928. I have talked with Bessie Brown and she knows how I wish my money to be used and the charitable institutions that will get it. The relatives and friends will understand this and be glad I've arranged it to save them trouble. If my little property were divided equally among dear friends and relatives no one would get enough to do any good but left together it will help some boys and girls and also the sick and helpless. If Bessie should need it she can use it in case of sickness or loss. She and Willis I know will carry out my wishes. The money I've left to St. Agnes Hospital is to go to the endowment fund. Eliza A. Pool."

Believing that it was the desire and intent of Eliza A. Pool that upon the death of Bessie T. Brown, the plaintiff should receive and own the property, or so much thereof as remained undisposed of at the death of

Bessie T. Brown, and that said property or the proceeds from the sale thereof should become a part of the endowment fund of Saint Mary's School and Junior College, Inc., Bessie T. Brown (unmarried), individually, and Bessie T. Brown and Willis G. Briggs, as executors under the will of Eliza A. Pool, deceased, executed a deed to the plaintiff for the property involved herein, on 7 February, 1946, which deed was duly filed for registration in the office of the Register of Deeds for Wake County, N. C., 11 February, 1946. It is stated in this deed that it is made pursuant to and "in execution of the powers and authority vested under the said will and the part thereof probated and recorded in the office of the Clerk of the Superior Court of Wake County, in Book of Wills 'M,' page 242, and in accordance with the known wishes and intentions of said Eliza A. Pool and so expressed by her."

The court below heard this cause by consent, without the intervention of a jury, and held that the plaintiff cannot convey to the defendant a good, indefeasible, and marketable fee simple title to said real estate, and entered judgment accordingly.

Plaintiff appeals and assigns error.

Joseph B. Cheshire and Joseph B. Cheshire, Jr., for plaintiff.

Howard E. Manning for defendant.

DENNY, J. It is disclosed by the record herein, that the purported codicil to the will of Eliza A. Pool, dated 5 June, 1928, was not probated until sometime after the original will, dated 9 July, 1931, and the codicil, dated 1 June, 1932, had been probated. It will also be noted that the will of Eliza A. Pool, executed 9 July, 1931, contains the following provision: "All other Wills left by me I declare null and void." Therefore, this purported codicil, executed 5 June, 1928, as well as any will it was intended to modify, explain or supplement, was declared to be null and void by the testatrix.

Consequently, the kind of estate which the plaintiff owns in the property involved herein must be determined by the provisions contained in Item Twelve of the last will and testament of Eliza A. Pool. Are these provisions sufficient to vest in Bessie T. Brown, individually, or in Bessie T. Brown and Willis G. Briggs, as executors of said will, title to the property in fee simple? We do not think so.

It must be conceded the provisions under consideration are not sufficient to create a trust, but, if they were sufficient, since no beneficiary is named, the trust would be void for uncertainty. *Thomas v. Clay,* 187 N. C. 778, 122 S.E. 852; *Dry Forces, Inc., v. Wilkins,* 211 N. C. 560, 191 S.E. 8; *Woodcock v. Trust Co.,* 214 N.C. 224, 199 S.E. 20.

The appellant contends, however, that since it is a general rule to construe a residuary clause so as to prevent intestacy as to any part of the testator's estate, unless there is an apparent intention to the contrary expressed therein, *Faison v. Middleton,* 171 N.C. 170, 88 S.E. 141; *Crouse v. Barham,* 174 N.C. 460, 93 S.E. 979; *McCullen v. Daughtry,* 190 N.C. 215, 129 S.E. 611; *Tate v. Amos,* 197 N.C. 159, 147 S.E. 809; *Case v. Biberstein,* 207 N.C. 514, 177 S.E. 802; *Rigsbee v. Rigsbee,* 215 N.C. 757, 3 S.E. 2d 331; *Ferguson v. Ferguson,* 225 N.C. 375, 35 S. E. 2d 231; *Jones v. Jones,* 227 N.C. 424, 42 S.E. 2d 620, the provisions in the residuary clause of the last will and testament of Eliza A. Pool are sufficient, under the decision in the case of *Ralston v. Telfair,* 17 N.C. 255, to vest in the executors of her will a fee simple title to all her real estate, subject to the life estate of Bessie T. Brown. It is not contended in appellant's brief that the title vested in them in trust for some unnamed beneficiary, or beneficiaries, or the next of kin, but that the executors took beneficially for themselves.

We do not think the provisions under consideration on this appeal are sufficiently similar to those construed in the *Ralston case* to make that decision controlling in the instant case. Here Eliza A. Pool made her devise and appointed her executors in the following language: "I give all the residue of my property to Bessie T. Brown to use during her lifetime and I hereby appoint Bessie T. Brown and Willis G. Briggs my lawful executors to all intents and purposes to execute this my last Will and Testament as I know they will carry out my wishes. They are to give no bond but take entire charge of all my estate." Certainly there is nothing in the foregoing language to indicate that in carrying out her wishes, the executors were to do anything more than carry out her wishes, which were expressed in her will. The further provision to the effect that no bond was to be given, but that the executors would take entire charge of all her estate, is not sufficient to constitute a devise in fee simple, to the executors.

In the *Ralston case,* the pertinent parts of the testator's will read as follows: "It is my will and desire, that my notes and bond amounting to between eight and ten thousand dollars, should remain in the custody of Churchwell Perkins, who has them now in possession, and that he should collect them as speedily as possible, and to pay the debts, and the remainder to be paid to the executors, to dispose of as they may think fit. It is my will, that the remainder of my property should be disposed of as my executors think proper." In an action against the executors by one who alleged himself to be Ralston's next of kin, the court held the executors took the fee "beneficially for themselves," and that they did not hold the property as trustees for the next of kin.

It is stated in the deed from the executors and Bessie T. Brown, individually, to the plaintiff, that the deed is made "in accordance with the known wishes and instructions of said Eliza A. Pool, and so expressed by her." Conceding this to be true, we can find no such "wishes and intentions" expressed by her within the "four corners" of her will. *Weaver v. Kirby,* 186 N.C. 387, 119 S.E. 564; *Thomas v. Clay, supra; Trust Co. v. Cowan,* 208 N.C. 236, 190 S.E. 87.

Since Eliza A. Pool devised to Bessie T. Brown a life estate only in the residue of her property, and failed to dispose of the remainder, we hold the conveyance from Bessie T. Brown, individually, and Bessie T. Brown and Willis G. Briggs, as executors of the last will and testament of Eliza A. Pool, conveyed nothing more than the life estate of Bessie T. Brown. Therefore, the plaintiff only holds an estate *pur autre vie* in the property.

The judgment of the court below is

Affirmed.

STATE v. Z. T. BOWSER.

(Filed 4 May, 1949.)

1. Clerks of Court § 7: Criminal Law § 12c—

Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the Superior Court and not the Juvenile Court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. G.S. 110-21.

2. Bastards § 1—

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of the father to support his illegitimate child, the mere begetting of the child not being denominated a crime, and the question of paternity being incidental to the prosecution for nonsupport.

3. Bastards § 6—

Evidence in this prosecution of defendant for his willful neglect or refusal to support his illegitimate child *held* sufficient to overrule motions to nonsuit.

4. Indictment and Warrant § 15—

The trial court has authority to permit the solicitor to amend a warrant charging defendant with willful failure to support his illegitimate child by inserting the word "maintain" so as to charge his willful failure to support and maintain his illegitimate child.

5. Criminal Law § 81c (2)—

Where the charge of the court contains no prejudicial error when construed contextually, objection thereto will not be sustained.

APPEAL by defendant from *Carr, J.*, at January Term, 1949, of WASHINGTON.

Criminal prosecution begun in Recorder's Court of Washington County, North Carolina, upon a warrant dated 4 September, 1948, on affidavit of Rulie Lee Brown, sworn to on same date, charging: "That Z. T. Bowser, at and in said county, on the ..... day of September, 1948, with force and arms, unlawfully and wilfully did neglect, fail and refuse to support his illegitimate child, born on or about August 4, 1948, and begotten by him upon the body of the said Rulie Lee Brown, the said Z. T. Bowser being the father of said child, contrary to the statute, etc.," heard and tried in Superior Court of Washington County on appeal thereto from judgment on conviction in said Recorder's Court.

After the jury was impaneled in Superior Court, and before the State offered any evidence, defendant moved that the case be remanded to the Juvenile Court for trial upon the ground that the Superior Court, at term time, was without jurisdiction of the case for that at the time of the conception of the child in question, defendant was under sixteen years of age. In this connection it was agreed by counsel for defendant and the Solicitor for the State that defendant was born on 18 May, 1932; that the child in question was born 4 August, 1948; and that the warrant alleges the willful failure to maintain and support said child in the month of September, 1948.

The court denied the motion, and defendant excepts.

The evidence offered by the State on the trial below, in the light most favorable to the State, is reflected in extracts of the testimony of the witnesses, as follows:

The prosecutrix, Rulie Lee Brown, testified on direct examination: "I am the mother of a child . . . a girl. Z. T. Bowser is the father of my child. He had relations with me twice, once in September 1947, and again in November 1947 . . . My baby was born August 4, 1948. I have never had relations with anyone else but Bowser . . . I found out that I was going to have a baby in December when I went to the doctor. My mother and father found out that I was pregnant. It was in December . . . after I went to the doctor. I told Z. T. Bowser about my being pregnant. I did not tell him right away . . . My father talked to him. I did not talk to him before the baby was born. He would not say anything to me . . ."

Then on cross-examination, she continued: ". . . The first time I told Bowser about it was in February . . . He would not listen to me. I did not tell him anything in February."

The State also introduced the child in evidence for the purpose of letting the witness exhibit it to the jury. Exception.

John Brown, the father of prosecutrix, testified on direct examination: ". . . Rulie Lee is my daughter . . . When I found out that she was pregnant I talked with her. She told me that Z. T. Bowser was the father of the child . . . I went to him before the child was born. I went out to the baseball diamond and talked to him. He denied it. I told him she did not hang around anywhere but to his home . . . He said, 'Yes, it is me and what are you going to do about it?' I told him . . . he would see. I did not ask him what he was going to do about it. He said that to me . . . Nothing was said about support of the child further. My daughter and I went to his home. He was sitting on the porch and seemed that he did not want to talk. I went to him before and after the child was born. My girl and I went to Bowser's home together. She told him she wanted him to give her some support to his baby. He looked at her and asked, 'Have I got a baby? Well, I do not know about that.'"

Then, continuing on the cross-examination, this witness testified: "I went to see Bowser three times. The first time was on the baseball ground to tell him what he had done. The second time was to his home with my daughter . . . I saw Bowser at . . . moving picture place—next to where he works. I told him that I wanted some support. He said, 'I will see about it.'"

And the mother of prosecutrix testified: "I am mother of Rulie Lee Brown . . . I found out that she was pregnant. She told me that Z. T. Bowser was the father of her child . . . The child has been supported by John and me since its birth."

On the other hand, defendant, reserving exception to denial of his motions made (1) a second time to remand the case to the Juvenile Court, and (2) for judgment as in case of nonsuit, and testifying in behalf of himself, admitted (1) that John Brown, the father of prosecutrix, came to him at Margolis Store and asked that he "give support to the baby"; (2) that he has contributed nothing to the support of the baby, and does not intend to do so; and (3) that he has refused to contribute anything to the support of the child; but he denies in material aspect all other testimony offered by the State.

Motion of defendant for judgment as of nonsuit, at close of all the evidence, was denied and he excepted.

The court, at the close of the evidence and on motion of Solicitor for the State, permitted the warrant to be amended by inserting the word "maintain" in the charge as set out in the warrant, "to the end that the warrant may track the language of the statute." Defendant excepted.

The case was then submitted to the jury on these issues, which were answered by the jury as indicated:

"1. Is the defendant Z. T. Bowser the father of the child Peggy Anne Brown, begotten upon the body of Rulie Lee Brown? Answer: Yes.

"2. Has the defendant Z. T. Bowser willfully neglected and refused to support and maintain his said illegitimate child, Peggy Anne Brown, begotten upon the body of Rulie Lee Brown? Answer: Yes."

Thereupon the court entered judgment that defendant be confined in jail, etc., suspended on condition that he pay certain sum of money per week for the support of the child, etc. Defendant appeals therefrom to Supreme Court, and assigns error.

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

P. H. Bell for defendant, appellant.

WINBORNE, J. While the assignments of error presented by appellant on this appeal fail to reveal error in the trial below, we treat some of them *seriatim:*

1. There is no error in refusing to remand the case to the Juvenile Court of Washington County.

The statute, pertaining to the establishment of Juvenile Courts, Article 2 of Chapter 110 of General Statutes, provides that "the Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in or being at the time within their respective districts: (1) "Who," among other things, "violates any . . . State law . . ." And it is understood, in law, that the term "court" when so used in this statute, refers to the Juvenile Court which is therein created, G.S. 110-22, formerly C.S. 5040, as a separate but not independent part of the Superior Court. See *In re Prevatt,* 223 N.C. 833, 28 S.E. 2d 564, and cases cited.

In the light of this statute, G.S. 110-21, formerly C.S. 5039, as applied to the facts of the present case, it is seen that at the time the offense with which defendant is charged was committed, as well as on the date warrant was issued against him, he was more than sixteen years of age. Defendant is indicted under G.S. 49-2, which provides that "any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties" as are provided in the statute referred to as "An Act Concerning the Support of Children of Parents Not Married to Each Other." The only prosecution contemplated under this statute is that grounded on the willful neglect or refusal of any parent to support and maintain his or her illegitimate child,—the mere begetting of the child not being

denominated a crime. *S. v. Stiles,* 228 N.C. 137, 44 S.E. 2d 728, and cases cited. The question of paternity is incidental to the prosecution for the crime of nonsupport. *S. v. Summerlin,* 224 N.C. 178, 29 S.E. 2d 462; *S. v. Stiles, supra.* Defendant, having been born on 18 May, 1932, as stipulated, became sixteen years of age on 18 May, 1948, and the warrant was issued 4 September, 1948.

2. As to the assignments of error based upon exceptions to denial of motions, aptly made, for judgment as of nonsuit, the evidence offered against defendant is sufficient to take the case to the jury (1) on questions of paternity of the child, and of admission of paternity by defendant, which are incidental to the prosecution for the crime of nonsupport, *S. v. Summerlin, supra; S. v. Stiles, supra;* and (2) on question of willful neglect and refusal by defendant to support and maintain his illegitimate child. G.S. 49-2.

3. The ruling of the court in permitting the amendment to the warrant, to which exception is also taken, is in keeping with rules of practice in the courts of the State. See *S. v. Brown,* 225 N.C. 22, 33 S.E. 2d 121, where the authorities are cited.

4. As to the charge: While portions of the charge as shown in the record to which exceptions are taken, may be in some respects inaccurate, it appears reasonably clear that when read contextually the jury could not have been confused or misled, and, hence, prejudicial error is not made to appear.

5. Other exceptions have been considered and found without merit.

In the judgment below, there is

No error.

LOUIS A. BYE, EMPLOYEE, v. INTERSTATE GRANITE COMPANY, EMPLOYER, BITUMINOUS CASUALTY CORPORATION AND/OR PACIFIC EMPLOYERS INSURANCE COMPANY, NON-INSURERS, CARRIERS.

(Filed 4 May, 1949.)

1. Master and Servant § 53e—

The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease. G.S. 97-57. This result is not affected by the fact that prior to the time such insurance company became the carrier, medical examinations had disclosed that the employee was suffering with the disease, that the Industrial Commission had advised him as to the compensation and rehabilitation provisions of the Act, but had, in the exercise of its discretion, failed to order him to quit the occupation. G.S. 97-61.

2. Master and Servant § 55d—

Where the findings of the Industrial Commission essential to the validity of its award are supported by competent evidence, such findings are binding on the courts on appeal.

DEFENDANT Pacific Employers Insurance Company's appeal from *Shuford, Special Judge,* October 4, 1948, Extra Term of MECKLENBURG Superior Court.

Smathers, Smathers & Carpenter and James L. DeLaney for Pacific Employers Insurance Co., defendant, appellant.

Pierce & Blakeney for Bituminous Casualty Corporation, defendant, appellee.

David J. Craig, Jr., for plaintiff, appellee.

SEAWELL, J. The appeal under consideration is by the Pacific Employers Insurance Company, Carrier of Insurance for the Interstate Granite Company. The controversy is between the Bituminous Casualty Company, appellant, sometime carrier for the Granite Company during the employment of the plaintiff's intestate, now appellee, and the Pacific Company, appellant, carrier when the employee quit work. The employer, the Granite Company, did not appeal; and since the sole question involved is which of the carriers is liable under the risk, and subject to payment of the award, which is not assailed, the plaintiff administratrix is not concerned with the result.

The subject award was made under a claim filed by Bye before the Industrial Commission March 3, 1947, for compensation for total and permanent disability caused by silicosis contracted in the course of employment as a granite stone cutter through the inhalation of silica dust. A hearing was had before Commissioner Buren Jurney, upon which hearing findings of fact were made and award adverse to the Pacific Company, and appeal was made by it to the full commission. There the award was again adverse, exonerating the Bituminous Company and fixing liability on the appellant. From this award the Pacific Company appealed to the Superior Court of Mecklenburg County, where the award of the Commission was affirmed; and the Pacific Company appealed to this Court.

Pertinent to this appeal, the Workmen's Compensation Act, G.S. 97-57, provides:

> "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance

carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable."

Silicosis is a progressive and often fatal condition similar to asbestosis which latter was formerly recognized as compensable under the more general provisions of the statute as an accident arising out of, and in the course of employment. *McNeely v. Asbestos Co.,* 206 N.C. 568, 174 S.E. 451. By amendment to the law, silicosis, along with other occupational diseases named, was made compensable in the same manner as an injury by accident arising out of and in the course of employment.

Obvious difficulties in fixing liability for compensation during successive periods, or stages, of employment, no doubt led to the present law which predicates the liability on the last exposure, providing it is as much as 30 days, and makes no provision for sharing liability with former employers, or carriers on previous risks, or pro rating the award. The sole liability is upon the carrier which was "on the risk"—that is, insurer —for the period of last exposure, as defined and limited in the act. *Haynes v. Feldspar Producing Co.,* 222 N. C., 163, 22 S.E. 2d 275; G.S. 97-57, *supra.*

This much we do not understand appellant to dispute. It does, however, ask serious consideration of the contention that prior to the filing of the present claim, and before it became carrier, and while Bituminous was still "on the risk," all the facts and conditions entitling the employee to compensation for total disability had supervened; and that certain letters, or communications made by Bye, the employee, to the Industrial Commission, and the answers thereto amounted, in law, to a filing of Bye's claim as employee, and assumption of jurisdiction by the Industrial Commission; and that the more formal claim made thereafter was nugatory, and fixed no liability on Pacific Company, which became carrier thereafter; citing *Hardison v. Hampton,* 203 N. C. 187, 165 S.E. 355; *Hanks v. Utilities Co.,* 210 N.C. 312, 186 S.E. 252; and several cases from other jurisdictions, to which our attention has been given. It is further contended that under G.S. 97-61, it was the duty of the Industrial Commission, under the reports made by the examining physician, to remove Bye from the employment and whatever claim he might have dates from that time and pertains to the Bituminous Company, then on the risk.

In this connection the appellant presents the examinations made of Bye from time to time, showing the beginning and progress of his silicosis disease, his notification thereof, and the advice given him in regard to quitting the occupation, or going into something else. These examinations are compulsory, and are made from time to time, and reports thereof filed, by authority of G.S. 97-61.

We find that he was advised by the Industrial Commission to seek new employment because of reports made to the Commission by the examining physician, but that because of his age he was advised by the Commission (May 29, 1946), "because of your age and long exposure the Industrial Commission is leaving it to your own judgment; but to inform you of your rights, the Commission is sending you a copy of the Workmen's Compensation Law, and call to your attention Sections 97-54 through 97-71, and particularly Section 97-61." The cited section applies not only to compensation but to rehabilitation. The inquiry of Bye seemed rather to debate the question whether he should abandon the only employment he knew anything about, or seek rehabilitation under the statute; and we do not find it significant as affecting the validity of the claim and award. No order was made by the Commission and we cannot find that the situation made it compulsory in law, or deprived the Commission of sound discretion.

Bye had been working, intermittently, for the Granite Company since 1941. His last resumption of work began in January, 1947, and lasted 39 days. The claim was filed in apt time thereafter.

The only findings of facts essential to the validity of the award were supported by competent evidence, and are binding on us; *Morgan v. Cloth Mills,* 207 N.C. 317, 177 S.E. 165; *Graham v. Wall,* 220 N.C. 84, 16 S.E. 2d 691; *Archie v. Lumber Co.,* 222 N.C. 477, 23 S.E. 2d 834; and we find no reason to challenge the conclusion reached.

The judgment of the Superior Court is

Affirmed.

M. A. DOMINEY v. INTERSTATE GRANITE COMPANY, EMPLOYER, BITUMINOUS CASUALTY CORPORATION AND/OR PACIFIC EMPLOYERS INSURANCE COMPANY, NON-INSURERS, CARRIERS.

(Filed 4 May, 1949.)

DEFENDANT, Pacific Employers Insurance Company's appeal from *Shuford, Special Judge,* October 4, 1948, Extra Term of MECKLENBURG Superior Court.

Smathers, Smathers & Carpenter and James L. DeLaney for Pacific Employers Insurance Co., defendant, appellant.

Pierce & Blakeney for Bituminous Casualty Corporation, defendant, appellee.

David J. Craig, Jr., for plaintiff, appellee.

PER CURIAM. This case is controlled by what is said in *Bye v. Granite Company, ante,* 334, and the judgment of the Superior Court is affirmed on that authority.

Affirmed.

T. LACY WILLIAMS, ADMINISTRATOR C. T. A., D. B. N. ON THE ESTATE OF K. B. JOHNSON, DECEASED, v. MRS. M. ALICE JOHNSON, WIDOW OF K. B. JOHNSON, DECEASED, F. T. DUPREE, JR., TRUSTEE, MRS. ETHEL G. BONNER, EXECUTRIX OF A. M. BONNER, C. P. DICKSON, L. C. YEARGAN, W. L. TOTTEN, INDIVIDUALLY AND AS TRUSTEE, W. P. CAMPBELL, FRED HUNTER, J. L. GARWOOD, S. P. VENTERS, J. L. GEORGE, A. A. CORBETT AND GEORGE W. BREWER.

(Filed 4 May, 1949.)

1. Homestead § 4—

Right and title to homestead is created by the Constitution, Art. X, sec. 2, and a resident may have his homestead allotted even though he is solvent, G.S. 1-386, and while the sheriff must lay off homestead before levy and sale under execution upon real property against a resident debtor, G.S. 1-371, the allotment of the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead and does not create the right or vest title in the debtor.

2. Homestead § 8—

When the homestead is once allotted, the only way the property embraced therein may lose its homestead character is by death, abandonment, or alienation.

3. Same: Judgments § 23—

Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not renew the running of the statute against judgments then of record or thereafter docketed.

4. Homestead § 9—

The registration of a certified copy of the report of the appraisers is indispensable only when the allotment is made on petition of the homesteader and when the homestead is laid off by the sheriff, failure to register report of the appraisers is an irregularity insufficient to invalidate the allotment. For statutory change on this aspect see Chap. 912, Session Laws of 1945.

5. Homestead § 4: Appeal and Error § 51b—

Decisions of long standing adjudicating homestead rights, which have not been overruled, create rules of property governing such rights so long as they are not superseded by act of the Legislature.

6. Judgments § 22a—

A docketed judgment is a lien upon the realty of the judgment debtor and is also evidence of a personal debt of the judgment debtor, but creates no lien against the personalty.

7. Judgments § 23: Homestead § 4—

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. G.S. 1-369.

8. Executors and Administrators § 17: Limitation of Actions § 10—

If the judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, G.S. 28-105, et seq., and to protect himself against the running of the statute of limitations as against the debt, G.S. 1-22, he must file his claim with the personal representative of the deceased.

9. Executors and Administrators § 13f—

Where land is sold to make assets to pay the debts of the deceased, the proceeds of sale retain the quality of real property to the extent necessary to discharge all liens thereon, and only the surplus, if any, becomes personal property and is payable to the personal representative as personal assets of the estate.

10. Same: Executors and Administrators § 29—

Where the proceeds of sale of land to make assets to pay debts of the decedent are insufficient to pay all liens in full, the proceeds must be used exclusively for the payment of the liens, G.S. 28-105 (5), and no part of the proceeds may be taxed with costs of administration.

11. Same: Reference § 17—

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, G.S. 6-21 (6), and order of the court pro rating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed.

APPEALS by W. L. Totten, individually and as trustee, Ethel C. Bonner, executrix, and C. P. Dickson, respondents, from *Stevens, J.*, March Term, 1949, WAKE.

Petition for advice and instruction respecting the proper distribution of estate funds in the hands of petitioner.

K. B. Johnson, a resident of Wake County, died testate, possessed of certain personal property, and also certain real estate which had theretofore been allotted to him as a homestead. Numerous judgments against him appear of record at the time of his death and for years prior thereto. His widow, the executrix, filed a final account and paid into the clerk's office $368.44, without undertaking to resort to the land to make assets to pay the judgment creditors.

Thereafter, plaintiff was appointed administrator *c. t. a., d. b. n.* He collected from personal assets the additional sum of $318.14, making total personal assets in the sum of $686.58. He also instituted a proceeding

to sell the homestead land to make assets. The land was sold and he received and now has in hand $6,500, subject to certain claimed administrative expenses.

C. P. Dickson, A. M. Bonner, testator of Ethel C. Bonner, and W. L. Totten, judgment creditors and respondents herein, filed notice of their respective judgments with the executrix. The claims of Totten and Dickson were rejected. The claim of Mrs. Bonner was first disapproved and then accepted and approved. Dickson instituted suit and recovered judgment, but Totten elected not to sue, so that now the claims of Dickson and Bonner have been filed with the executrix within the law and they claim the prior right to participate in the distribution of the personal assets.

In 1935 there were a number of judgments against K. B. Johnson of record, including judgment in favor of P. D. Snipes against K. B. Johnson *et al.*, docketed in Judgment Docket 35 at p. 170. Execution was issued on the Snipes judgment. The sheriff, acting thereunder, had Johnson's homestead allotted in one town lot and a thirty-five acre tract of land. Notations of the allotment dated 11 June 1935 and the report of the sheriff appear on the face of the judgment. The return of the appraisers appears in the judgment roll. It is contended that a certified copy of the homestead allotment was not certified to and registered in the office of the register of deeds of Wake County, but the referee did not so find and there is no exception to his failure to so find.

The Snipes judgment under which the homestead was allotted bears this entry: "Received of Harold W. Johnson $8,717.70 in full of judgment, interest and costs. This December 3, 1935." signed by the assistant clerk.

It is conceded that if the payment of the judgment under which the homestead was allotted or the irregularity in the returns thereof does not revive the running of the statute of limitations, then the first three judgments docketed and now owned by respondent Dupree, Jr., trustee, and the Ogburn judgment now owned by respondent Totten, trustee, will consume all the funds derived from the sale of the homestead property, and the appellants, other than Totten, will be relegated to such rights as they may have to participate in the distribution of the personal estate.

The referee filed his report in which he found facts in detail. Upon the facts found he concluded that: (1) there was a valid allotment of homestead which operated to suspend the running of the statute of limitations upon all docketed judgments against K. B. Johnson during the continuance of the homestead; (2) the cancellation of the judgment under which the homestead was allotted did not operate to cancel the homestead allotment or revive the running of the statute of limitations against docketed judgments; (3) upon the death of the judgment debtor, the

statute of limitations began to run anew but was again suspended by the institution of the proceeding to sell the land to make assets; (4) a judgment creditor who has an existing lien upon land embraced within a homestead allotment is not required to file or prove the claim with the personal representative of the judgment debtor; (5) the proceeds from the sale of the homestead land retain their character as realty for the purpose of discharging all liens against the same in the order of their priority at the time of the death of the judgment debtor; (6) the homestead allotment tolled the statute of limitations as to docketed judgments solely for the protection of their lien and that therefore the personal debts evidenced by the judgments numbered one to six inclusive are now barred by the ten-year statute and judgments numbered seven to fourteen inclusive are also barred in so far as they vest in the judgment creditors any right to share in the distribution of the personal estate; (7) a judgment creates no lien or personal property and the statute, after the death of the judgment debtor, continues to run against it unless the claim is filed with the personal representative; (8) the amounts due on the Bonner and the Dickson judgments constitute valid claims against the estate and must share in the distribution of the personal assets; (9) the fund derived from the real property, less the costs of sale, should be applied to the payment of the first three judgments owned by Dupree, Jr., trustee and the Ogburn judgment owned by Totten, trustee, in the order of their record priority; and (10) the fund derived from personal assets should be applied first toward the payment of the costs of administration, attorneys' fees, and referee's fees, and the balance thereof should be paid on the Bonner and Dickson judgments, notices of which were filed with the testatrix.

Respondents Dickson and Bonner filed exceptions to the report as appears of record.

The cause came on to be heard on the referee's report at the January Term, 1949, Wake Superior Court. It was then agreed that the court should take the cause under advisement and render judgment in or out of court at his convenience.

At the March Term, on 16 March, the judge rendered judgment overruling all exceptions and affirming the report of the referee. At the same term, on 24 March, the court signed an amendatory judgment in which it is directed that the costs of court, the costs of administration, attorneys' fees and referee's fees be prorated between the fund derived from the sale of real estate and the fund derived from the sale of personal property "in proportion to the total amount of money derived from each source." Respondent Totten, trustee, excepted to the amendatory judgment and appealed. Respondents Bonner and Dickson also appealed.

Briggs & West for Mrs. Ethel C. Bonner, Exr.
A. J. Fletcher and F. T. Dupree, Jr., for F. T. Dupree, Jr., trustee.
W. L. Totten, individually and as trustee, in propria persona.
Harris & Poe and Logan D. Howell for C. P. Dickson.

BARNHILL, J. The appeals here present two questions for decision: (1) Does the payment of the judgment under which a debtor's homestead is allotted extinguish the homestead and revive the running of the statute of limitations against judgments then of record or thereafter docketed, and (2) did the court err in taxing a ratable portion of the costs incurred in this proceeding against the fund derived from the sale of the homestead real estate?

The right to a homestead is guaranteed by the Constitution. N. C. Const., Art. X, sec. 2. Insolvency or the need for protection against sale is not a prerequisite to its allotment. While the homestead may have real beneficial value only when the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition. G.S. 1-386.

When a sheriff is seeking to collect a judgment under execution issued to him, he must, before levying upon the real property of the debtor, proceed to have the debtor's homestead allotted. G.S. 1-371. But this does not create the homestead right. Title thereto is vested in the owner by the Constitution and no allotment by the sheriff is necessary to create the right or vest the title.

No sale can be had until the homestead is first ascertained and set apart to the judgment debtor. The allotment by the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead which is subject to sale under execution. *Lambert v. Kinnery,* 74 N.C. 348; *Gheen v. Summey,* 80 N.C. 188; *Littlejohn v. Egerton,* 77 N.C. 379. The issuance of the execution and the levy thereunder merely set in motion the machinery through which the homestead is valued and set apart to the owner.

Thus it appears that the homestead, whether allotted on the voluntary petition of the owner or by the sheriff under execution, is not the offspring of and does not draw its life blood from a judgment debt. It stems from the Constitution and "it is not the condition of the homesteader that creates the homestead condition, but the force of the Constitution, attaching to and acting upon the land." *Thomas v. Fulford,* 117 N.C. 667.

When the homestead is once allotted, the only way the property embraced therein may lose its homestead character is by death, abandon-

ment, or alienation. 40 C.J.S. 442; *Posey v. Commercial Nat. Bank,* 55 S.W. 2d 515; *Hillsborough Inv. Co. v. Wilcox,* 13 So. 2d 448; *Nelson v. Hainlin,* 104 So. 589; *Fidelity & Casualty Co. of N. Y. v. Magwood,* 145 So. 67.

Once acquired it is presumed to continue. So strong is this presumption that the majority of courts hold that where the homestead character has attached to property, it can be lost only by waiver or abandonment by the owner. *In re McClain's Estate,* 262 N.W. 666; *City Nat. Bank v. Johnson,* 96 S.W. 2d 482; *De Haven & Son Hardware Co. v. Schultz,* 269 P. 778.

"If . . . the homestead has once been laid off at the instance of creditors, though the debts may be discharged, the restriction remains . . ." *Hughes v. Hodges,* 102 N.C. 236; *Tucker v. Tucker,* 103 N.C. 170.

"While the homestead as allowed lasts, it remains 'exempt from sale under execution or other final process obtained on any debt;' and it lasts during the life of the owner thereof; and, after his death, during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right." *Jones v. Britton,* 102 N.C. 166.

The purpose of the homestead provision of the Constitution is to surround the family home with certain protection against the demands of urgent creditors. *De Haven & Son Hardware Co. v. Schultz, supra; Gee v. Moore,* 14 Cal. 472; 2 Tiffany, Real Property, sec. 577. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid.

To say that it is defeated and its protection destroyed merely by the payment of the judgment under which it was allotted is to overlook the very nature and purpose of the right. *Gardner v. McConnaughey,* 157 N.C. 481, 73 S.E. 125.

It is suggested that if the payment of the judgment did not vacate the homestead allotted then the homesteader loses the protection it is intended to afford; that if vacated, the running of the statute of limitations would no longer be tolled, but if continued in force the judgments are kept alive to the detriment of the homesteader. The answer here is the homestead allotment protected the debtor's home against execution sale under any one of the numerous judgments then of record—the end it was designed to accomplish.

If a certified copy of the report of the appraisers was not registered in the office of the register of deeds of the county, as now contended, this was

an irregularity insufficient in force and effect to invalidate the allotment. *Bevan v. Ellis,* 121 N.C. 224; *Crouch v. Crouch,* 160 N.C. 447, 76 S.E. 482; *Carstarphen v. Carstarphen,* 193 N.C. 541, 137 S.E. 658.

The object of the notice by registration in the office of the register of deeds "is not to inform the creditors of the homesteader that the homestead, after it is allotted, cannot be sold under execution for his debts, because the creditors are presumed to know that that was so even before the homestead is allotted." It is to give notice to third parties having transactions with the debtor respecting the homestead property and is indispensable only when the allotment is made on the petition of the homesteader. *Bevan v. Ellis, supra; Crouch v. Crouch, supra.*

The soundness of these decisions may not be attacked at this late date. They created a rule of property which governed the application of the homestead statute as to all transactions affecting the homestead so long as they were not overruled or superseded by Act of the Legislature. (In this connection note Chap. 912, Session Laws, 1945, which now makes the registration of the return of the appraisers a prerequisite to its validity, at least against all third parties.)

A money judgment is a bipronged, dual-natured instrument: (1) It is the evidence of a personal debt of the judgment debtor payable out of any assets he may possess, and (2) it is a lien against the real estate of the debtor as security for the payment of the debt.

When a homestead is allotted it serves to suspend the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead. *Cleve v. Adams,* 222 N.C. 211, 22 S.E. 2d 567. It does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. G.S. 1-369, 370. *McDonald v. Dickson,* 85 N.C. 248; *Kirkwood v. Peden,* 173 N.C. 460, 92 S.E. 264; *Hicks v. Wooten,* 175 N.C. 597, 96 S.E. 107.

If the judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, G.S. 28-105, *et seq.,* and to protect himself against the running of the statute of limitations as against the debt, G.S. 1-22, he must file his claim with the personal representative of the deceased. *Daniel v. Laughlin,* 87 N.C. 433; *Barnes v. Fort,* 169 N.C. 431, 86 S.E. 340; *Rodman v. Stillman,* 220 N.C. 361, 17 S.E. 2d 336. While the amount due is adjudicated, it is nonetheless a provable debt. *Moore v. Jones,* 226 N.C. 149, 36 S.E. 2d 920.

Ordinarily the judgment creditor must enforce his rights against the estate of his deceased debtor through the personal representative. *Moore v. Jones, supra.* Hence it is proper, if not mandatory, to give notice in all instances. However, as the estate here is insolvent and those judgment creditors who have not filed notice with the plaintiff or his predecessor can only assert their claims against the homestead property, that question

is not presented for decision. See, however, *Stonestreet v. Frost,* 123 N.C. 640, and *Rodman v. Stillman, supra.*

The referee correctly concluded that the fund in the hands of the plaintiff derived from personal assets of deceased should first be applied toward the payment of the costs of administration, including attorneys' fees. The court below erred in sustaining the exception thereto and directing that such costs should be paid in part out of the fund derived from the sale of real property.

This proceeding is a necessary incident to the proper administration of the estate of the deceased and the costs of administration are payable out of the personal assets. When resort is had to land to make assets, the proceeds of the sale retain the quality of real property to the extent necessary to discharge all liens thereon. Only the surplus, if any, becomes personal property and is payable to the personal representative as personal assets of the estate. *Moore v. Jones, supra.* To say that this fund must pay a part of the costs of administration is but to hold that it is, *pro tanto,* personal property. This is *contra* the controlling rule and would necessarily deprive the judgment creditors of a part of their security which must, under the law, be applied exclusively to the payment of their liens to the extent of the value of the security. G.S. 28-105 (5). *Matthews v. Peterson,* 150 N.C. 134, 63 S.E. 721. The fund is set apart to their use. It may not be consumed, in whole or in part, in the payment of the costs of administration.

Lightner v. Boone, 222 N.C. 421, 23 S.E. 2d 313, is factually distinguishable. There a trust fund—a personal asset—was the subject of controversy.

What is here said does not apply to the referee's fee which is taxable in the discretion of the court. It is so expressly provided by statute. G.S. 6-21 (6).

The amendatory judgment entered 24 March 1948, in so far as it relates to the taxation of costs other than the referee's fee must be vacated. Both judgments as here modified are affirmed.

Modified and affirmed.

STATE v. RALEIGH SPELLER.

(Filed 4 May, 1949.)

1. Rape § 4—

Evidence in this case of defendant's guilt of the capital offense of rape *held* sufficient to overrule defendant's motion to nonsuit. G.S. 15-173.

2. Criminal Law § 32c: Rape § 3—

Articles of clothing identified as those worn by the accused and the prosecutrix at the time of the crime, bearing tears and stains corroborative of the State's theory of the case, are properly admitted in evidence.

3. Criminal Law § 33—

Where there is evidence that incriminating statements made by defendant to officers were voluntary, it is not error for the court to admit testimony thereof in evidence.

4. Constitutional Law § 34d—

The constitutional right of every defendant in a criminal prosecution to be represented by counsel contemplates not only that accused shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. Constitution of N. C., Art. I, sec. 11. XIV Amendment to the Federal Constitution.

5. Jury §§ 3, 9—

Counsel for defendant must be prepared to support with evidence their challenge to the array when the jury is selected from citizens of the county in the ordinary course of law, but when the judge, subsequent to the convening of the term, enters an order on his own motion without notice, calling for a special venire from another county under the provision of G.S. 1-86 counsel for defendant should be given time to investigate and procure evidence in support of their challenge to the array.

6. Constitutional Law § 33—

Exclusion of Negroes from grand and petit juries solely because of their race or color denies Negro defendants in criminal prosecutions the equal protection of the laws required by the Fourteenth Amendment to the Federal Constitution.

7. Same: Jury § 3—New trial awarded for failure to grant counsel opportunity to procure evidence to support challenge to the array.

After the convening of the term the trial court entered an order for a special venire from another county under authority of G.S. 1-86. Counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race. The court refused the request of counsel for time to investigate and secure evidence in support of their challenge to the array, but counsel for defendant obtained evidence from members of the special venire and bystanders of the courtroom, tending to sustain their challenge. *Held:* It appearing that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial must be awarded for the denial of defendant's constitutional right to be properly represented by counsel.

8. Constitutional Law § 33: Criminal Law § 81a: Jury § 3—

Ordinarily, findings of the trial court that special veniremen were drawn and summoned in accordance with law and that there had been no discrimination against persons of defendant's race in preparing the jury list, are conclusive when supported by evidence, but when it appears that the

trial court refused to give defendant time to investigate and procure evidence in support of his challenge to the array and that such refusal amounted to a denial of defendant's constitutional right to proper representation by counsel, the findings upon incomplete evidence are not conclusive.

APPEAL by prisoner, Raleigh Speller, from *Parker, J.*, and a jury, at the November Term, 1948, of BERTIE.

This is the second time that this case has come to this Court on the appeal of the prisoner, a Negro man, from a sentence of death pronounced on a verdict of a petit jury finding him guilty of the capital felony of rape upon a white woman. On the former appeal, this Court reversed the conviction and judgment and remanded the action to the Superior Court of Bertie County for a new trial because it concluded that the prisoner had been denied his constitutional rights through the purposeful exclusion of members of his race from the grand jury by which he was indicted. *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537. The prisoner was indicted anew on the same charge at the August Term, 1948, of the Superior Court of Bertie County by a different grand jury composed of members of both the white and Negro races. The validity of the second indictment is not challenged. When arraigned thereon, the prisoner pleaded "not guilty" and procured a continuance of the trial to the November Term, 1948, of the Superior Court of Bertie County.

On the opening day of that term, to wit, 15 November, 1948, the presiding judge entered an order on his own motion under G.S. 1-86 directing that a special venire of 75 persons should be summoned from Warren County, a county in the same judicial district as Bertie, to appear in the Superior Court of Bertie County at 3:00 o'clock p.m. on the following day as the jury panel for the trial of this case, and providing that the names of such persons should be drawn from the jury box of Warren County by a child under ten years of age in the presence of the Clerk to the Board of Commissioners of Warren County, the Solicitor of the district, the prisoner, and counsel for the prisoner.

Neither the solicitor nor counsel for the defense had any notice that the jury panel would be called from Warren County until the trial judge read and signed the order therefor in open court on the first day of the term. Warrenton, the county seat of Warren County, is about 82 miles from Windsor, the county seat of Bertie County, where the prisoner made his home, and more than 50 miles from Durham and Raleigh, where counsel for the defense resided and ordinarily practiced law. The record does not indicate that the prisoner or his attorneys possessed any personal knowledge of Warren County or its affairs when trial was had in this case.

Pursuant to the order for the special venire, scrolls bearing 75 names were drawn from the jury box of Warren County in the courthouse at Warrenton about 5:00 p.m. on Monday, 15 November, 1948, by a child under ten years of age in the presence of the clerk to the Board of Commissioners of Warren County, the solicitor, the prisoner, and counsel for the defense. As a result of absence or illness, 18 of those whose names were drawn did not receive a summons to serve on the panel; but the remainder, consisting of 56 white men and 1 Negro, appeared at the courthouse of Bertie County in Windsor at the appointed hour on Tuesday, 16 November, 1948.

Before the trial jury was chosen, sworn, or impaneled, counsel for the prisoner lodged "a challenge to the entire array of petit jurors upon the ground of disproportionate representation of Negroes on petit juries in Warren County and long, continuous and systematic exclusion of Negroes from petit juries in Warren County, all contrary to the laws of the State of North Carolina and of the United States." When they interposed their challenge to the array, the attorneys for the defense moved "the Court to grant time to get evidence from Warren County on the issue of disproportionate representation of Negroes on petit juries and long and continuous exclusion of Negroes from petit juries in Warren County." The trial judge denied this motion, but announced that he would "hear any evidence that the defendant has," and that there were "at least 59 people from Warren County, one of whom is a Negro, in the court room."

Counsel for prisoner thereupon undertook to support the challenge to the array by calling six witnesses at random from the special veniremen and other bystanders in the courtroom. One of these witnesses, to wit, T. W. Sykes, the only Negro on the panel, testified that he had been a juror in Warren County "a time or two" in the 44 years he had resided there, but that he did not recall any other Negroes who had served on the grand jury or the petit jury in Warren County during that period. Three of the witnesses stated that "Negroes had served on petit juries in Warren County almost every term of court in the last 8 or 10 years." The other two disclaimed any knowledge of the matter in controversy. It was agreed, however, that many Negroes owned property in Warren County.

After these six witnesses had testified, the court temporarily desisted from hearing evidence on the challenge to the array and proceeded with the selection of a trial jury from the special venire of 57 persons so that members of the venire not chosen as trial jurors might not be detained in Bertie County overnight. In taking this course, the presiding judge announced that the trial jury would not be impaneled until he had ruled on the prisoner's challenge to the array. An all-white trial jury was

selected after the prisoner had exhausted the fourteen peremptory challenges allowed him by statute and had sought unsuccessfully to excuse one of the trial jurors by a challenge to the poll.

When the trial jury was thus completed, the prisoner moved the court that such jury be sent from the courtroom while the evidence of three Negroes, to wit, A. V. Sykes, L. E. Sykes, and Freddie Hicks, was offered "in continuation of the motion challenging the array of petit jurors." This motion was denied, and these three witnesses were called to the stand in the presence of the trial jurors. A. V. Sykes, L. E. Sykes, and Freddie Hicks testified that they were aged 42, 41, and 39 years respectively; that they were Negroes residing and owning property in Warren County; that they had never been summoned to jury service in Warren County; and that they knew of only one or two Negroes who had ever acted as grand or petit jurors in Warren County. When the presiding judge made his findings of fact on the prisoner's challenge to the array, he found that "there is no evidence that these three Negroes, or any one of them, were qualified to be selected by the Board of County Commissioners of Warren County to be put into the jury box. The burden of proof to show this is upon the defendant, which he has not shown. The court takes judicial notice of the fact that thousands and thousands of taxpayers in the United States not only do not file and pay their taxes but cheat and defraud the Government in respect to the payment of income taxes—not only small tax payers but tax payers who are due to pay income taxes in the hundreds of thousands of dollars. In the face of such common knowledge it would be a rash presumption to assume that any man has paid all the taxes assessed against him for the preceding year."

After presenting the evidence of these three witnesses, the prisoner rested in respect to his challenge to the array, and court adjourned for the day. On the following morning, to wit, Wednesday, 17 November, 1948, the State offered certain officers of Warren County as witnesses on this phase of the controversy. They testified, in substance, that at every biennial revision of the jury list during the twenty years last past the Board of Commissioners of Warren County had put into the jury box the names of all adult residents of Warren County, irrespective of their race or color, who were of good moral character and sufficient intelligence and who had paid all taxes assessed against them during the preceding year. The prisoner elicited evidence on the cross-examination of the State's witnesses to the effect that in 1940 Warren County had a population of 23,145 people, of whom 8,036 were white and 15,109 were Negroes, and that during the four years next preceding the drawing of the special venire in the case at bar 1,077 whites and 28 Negroes had been called to jury service in Warren County.

The court made voluminous findings of fact to the effect that during the twenty years next preceding the trial of this action the Board of Commissioners of Warren County had fully complied with all of the provisions of chapter 9 of the General Statutes relating to jurors by putting on the jury list and in the jury box the names of all adult residents of the county, without regard to race or color, who were "of good moral character and of sufficient intelligence" and who had made timely payment of "all the taxes assessed against them," and that no Negroes had been excluded from the grand or petit juries of the county during such period because of their race or color. On the basis of these findings, the court overruled the prisoner's challenge to the array, and thereupon the trial jury theretofore chosen from the special venire from Warren County was impaneled and charged with the case.

Both the prosecution and the defense offered testimony as to the merits of the action. No good object will be served by recounting the facts in detail. It will suffice for present purposes to note that the State's evidence tended to show that shortly after 10:30 p.m. on 18 July, 1947, the prisoner assaulted and raped the prosecutrix with savage brutality in the yard at her home a mile and a half from Windsor, and the prisoner's testimony tended to establish an alibi.

The trial judge instructed the jury that it could return any one of the following four verdicts, to wit: (1) Guilty of the capital felony of rape; (2) guilty of an assault with intent to commit rape; (3) guilty of an assault on a female person; and (4) not guilty. The jury found the prisoner guilty of the capital felony of rape, and the court pronounced judgment of death against him on the verdict. He appealed, assigning errors.

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

Herman L. Taylor and C. J. Gates for the prisoner, appellant.

ERVIN, J. The evidence of the State was sufficient to warrant a finding that the prisoner had unlawful carnal knowledge of the prosecutrix by force and against her will. Consequently, the motions for a compulsory nonsuit under G.S. 15-173 were properly denied. *S. v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234; *S. v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *S. v. Vincent,* 222 N.C. 543, 23 S.E. 2d 832; *S. v. Harris,* 222 N.C. 157, 22 S.E. 2d 229; *S. v. Johnson,* 219 N.C. 757, 14 S.E. 2d 792; *S. v. Lewis,* 177 N.C. 555, 98 S.E. 309; *S. v. Lance,* 166 N.C. 411, 81 S.E. 1092. The articles of clothing produced at the trial by the prosecution were rightly received in evidence. They were identified as garments worn by the accused and the prosecutrix at the time named in the indictment, and bore tears and stains corroborative of the State's theory of the case. *S. v.*

Wall, 205 N.C. 659, 172 S.E. 216; *S. v. Fleming,* 202 N.C. 512, 163 S.E. 453; *S. v. Westmoreland,* 181 N.C. 590, 107 S.E. 438; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295. Since the evidence indicated that they were voluntary in character, the court did not err in admitting the incriminatory statements made by the prisoner to the officers of the law soon after the alleged crime. *S. v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24; *S. v. Wagstaff,* 219 N.C. 15, 12 S.E. 2d 657; *S. v. Smith,* 213 N.C. 299, 195 S.E. 819; *S. v. Tate,* 210 N.C. 613, 188 S.E. 91; *S. v. Edwards,* 126 N.C. 1051, 35 S.E. 540. The charge of the judge to the petit jury was noteworthy for accuracy and clarity, and the exception of the accused to it is without merit.

This brings us to a grave question presented by the record: Did the trial court commit error in refusing to give counsel for the defense time to investigate the facts and to procure evidence from Warren County in support of the challenge to the array?

Both the State and Federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. N. C. Const., Art. I, sec. 11; U. S. Const., Amend. XIV. This right is not intended to be an empty formality. It would be a futile thing, indeed, to give a person accused of crime a day in court if he is denied a chance to prepare for it, or to guarantee him the right of representation by counsel if his counsel is afforded no opportunity to ascertain the facts or the law of the case. 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.'" Since the law regards substance rather than form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. *S. v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *S. v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322.

Since the prisoner was detained in custody on a capital charge, he necessarily relied on his counsel to look after his defense. The action pended in the Superior Court of Bertie County, and the attorneys for the accused were charged with knowledge that in the ordinary course of law citizens would be summoned from the body of that county to serve as jurors on the trial of the cause. Manifestly, they could not be expected to anticipate or guess that the presiding judge, acting on his own motion and without any notice to them, would enter an order subsequent to the convening of the term at which the case was calendared for trial

calling a special venire from a distant and unfamiliar county to serve as jurors in the cause, notwithstanding the order was authorized by a statute specifying that "upon suggestion made as provided by section 1-84 or on his own motion, the presiding judge, instead of making order of removal, may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve as jurors" in any action in the event there are probable grounds to believe that a fair and impartial trial of such action cannot otherwise be obtained. G.S. 1-86. Besides, counsel for the accused could not determine the desirability or the propriety of challenging the array until the panel was drawn and its character ascertained. For these reasons, the defense was justifiably unprepared to prove the validity of the challenge to the array when the special veniremen appeared in the Superior Court of Bertie County.

When he lodged his challenge to the array, the prisoner invoked the principle enunciated by repeated decisions of the Supreme Court of the United States that state exclusion of Negroes from grand and petit juries solely because of their race or color denies Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment to the Federal Constitution. *Brunson v. North Carolina,* 332 U.S. 851, 68 S. Ct. 634, 92 L. Ed. 1132; *Patton v. Mississippi,* 332 U.S. 463, 68 S. Ct. 184, 92 L. Ed. 76, 1 A.L.R. 2d 1286; *Akins v. Texas,* 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Hill v. Texas,* 316 U.S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Smith v. Texas,* 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Pierre v. Louisiana,* 306 U.S. 354, 59 S. Ct. 536, 83 L. Ed. 757; *Hale v. Kentucky,* 303 U.S. 613, 58 S. Ct. 753, 82 L. Ed. 1050; *Hollins v. Oklahoma,* 295 U.S. 394, 55 S. Ct. 784, 79 L. Ed. 1500; *Norris v. Alabama,* 294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074; *Rogers v. Alabama,* 192 U.S. 226, 24 S. Ct. 257, 48 L. Ed. 417; *Carter v. Texas,* 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Smith v. Mississippi,* 162 U.S. 592, 16 S. Ct. 900, 40 L. Ed. 1082; *Gibson v. Mississippi,* 162 U.S. 580, 16 S. Ct. 906, 40 L. Ed. 1078; *Bush v. Kentucky,* 107 U.S. 110, 1 S. Ct. 625, 27 L. Ed. 354; *Neal v. Delaware,* 103 U.S. 370, 26 L. Ed. 567; *Ex Parte Virginia,* 100 U.S. 339, 25 L. Ed. 676; *Virginia v. Rives,* 100 U.S. 321, 25 L. Ed. 670; *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664. As the text writer in16 C.J.S., Constitutional Law, section 540, has declared: "This does not mean that a jury must be composed of persons of each race in proportion to their respective numbers as citizens; nor does the equal protection of the laws give a Negro or other person the right to demand that the grand or trial jury, considering his case, shall be composed, wholly or in part, of persons of his own race or color, the only right to which he is entitled being that in the selection of jurors

persons of his race or color shall not be discriminated against or excluded on that account." Various aspects of this question are considered in these North Carolina cases: *S. v. Speller, supra; S. v. Brunson,* 229 N.C. 37, 47 S.E. 2d 478; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77, *certiorari* denied 332 U.S. 768, and rehearing denied 332 U.S. 812, 68 S. Ct. 106, 92 L. Ed. 390; *S. v. Henderson,* 216 N.C. 99, 3 S.E. 2d 357; *S. v. Walls,* 211 N.C. 487, 191 S.E. 232, *certiorari* denied 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494; *S. v. Cooper,* 205 N.C. 657, 172 S.E. 199; *S. v. Daniels,* 134 N.C. 641, 46 S.E. 743; *S. v. Peoples,* 131 N.C. 784, 42 S.E. 2d 814; *S. v. Sloan,* 97 N.C. 499, 2 S.E. 666; *Capehart v. Stewart,* 80 N.C. 101.

The trial court made findings that the special veniremen were drawn and summoned in accordance with the laws of the State, and that there had been no discrimination against persons of the prisoner's race in preparing the jury list. These findings were supported by evidence, and ordinarily would be conclusive on appeal in controversies of this nature. *S. v. Walls, supra; S. v. Cooper, supra; S. v. Daniels, supra; S. v. Peoples, supra.*

In the case at bar, however, the action of the presiding judge in calling trial jurors from a distant county took the prisoner and his counsel by surprise, and rendered them justifiably unprepared forthwith to sustain by testimony the challenge to the array, which was apparently interposed in good faith and on reasonable grounds.

Attorneys for the defense asked the court, in substance, for time to investigate relevant matters in Warren County, and to secure evidence there to substantiate the validity of the challenge to the array. The court refused this request. By virtue of this ruling, counsel for the prisoner were compelled to resort at random to the special veniremen and to bystanders in the courtroom at Windsor, eighty-two miles from the county seat of Warren County, to sustain the proposition that the Board of Commissioners of Warren County had purposely excluded Negroes from the jury list of Warren County and from the venire in question solely on account of their race or color. Despite the handicap under which they labored, counsel for the defense elicited testimony from their witnesses and from witnesses called to the stand by the State indicating that the case for the State might well have been so weakened, or the case for the prisoner might well have been so strengthened as to have required contrary findings and an opposite order in respect to the lawfulness of the panel if they had been granted a reasonable time for investigation, preparation, and presentation of the prisoner's case on the challenge to the array. Thus, the record discloses not only that the prisoner and his attorneys were denied a reasonable opportunity in the light of prevailing conditions to investigate, prepare, and present his defense on the chal-

lenge to the array, but also that such denial of such opportunity prejudiced the prisoner's rights.

The declaration of the Supreme Court of Pennsylvania in *Brown v. Hummel,* 6 Pa. State 86, 47 Am. Dec. 431, is apposite. "When the humblest citizen comes into court with the constitution of his country in his hand, we dare not disregard the appeal." Since it appears from the record that the prisoner has been denied the fundamental right of representation by counsel vouchsafed him by both the State and Federal Constitutions, the conviction and sentence are vacated, and the action is remanded to the Superior Court of Bertie County for a

New trial.

MRS. R. O. TARKINGTON v. ROCK HILL PRINTING & FINISHING CO. ET AL.,

and

R. M. DUNSTON v. ROCK HILL PRINTING & FINISHING CO. ET AL.

(Filed 4 May, 1949.)

1. Judgments § 32: Torts § 6—Fact that plaintiff might have joined another as defendant gives original defendant no right to force such joinder.

The owner and driver of a car recovered judgment against the driver and owner of a truck for damages sustained in a collision upon verdict of the jury establishing, *inter alia,* that the plaintiff therein was not guilty of contributory negligence. Thereafter the passengers in the car sued the owner and driver of the truck for injuries sustained in the same collision. *Held:* As between the parties thereto the prior judgment was *res judicata* on the question of whether the driver of the car was guilty of negligence contributing to the collision, and bars the right of the owner and driver of the truck from joining the driver of the car as a joint *tort-feasor* in the second action, G.S. 1-240, notwithstanding that the plaintiffs in the second action were not parties thereto or bound by the judgment, and could have joined the driver of the car as a party defendant had they so elected.

2. Automobiles § 18g (4): Evidence § 49—

Testimony of the driver of a car that he would have passed defendant's truck several feet before reaching a highway intersection if the truck had not pushed him off the road, *is held* competent as a "shorthand statement of fact" and not objectionable as a conclusional assertion invading the province of the jury.

3. Trial § 7: Appeal and Error § 39l—

Argument by counsel for plaintiff as to matters not in evidence will be held harmless when it appears that defendant's counsel brought out the identical matter in the hearing of the jury in their argument upon a

motion. Further, in this case, such matter appeared in the pleadings which were read to the jury.

4. Damages § 13a—

An instruction that the amount of damages rested solely in the discretion of the jury will not be held for reversible error when the charge, construed contextually, is to the effect that the discretion of the jury was within the bounds and under the instructions of the court which stated correctly the rule as to the measure of damages.

5. Trial § 31d—

The use of figurative scales by the court in its charge to the jury upon the burden of proof will not be held for reversible error, nor did the charge in this case, construed contextually, confine the jury's consideration to evidence offered by appellant but included all testimony favorable to appellant to be considered on its side of the scale.

6. Appeal and Error § 39f—

Exception to the charge for failure to state the evidence and declare and explain the law arising thereon will not be sustained when the charge construed contextually is without prejudicial error. G.S. 1-180.

APPEAL by defendants, Rock Hill Printing & Finishing Co. and William T. Floyd, from *Coggin, Special Judge,* October Special Term, 1948, of MECKLENBURG.

Separate actions by Mrs. R. O. Tarkington and R. M. Dunston to recover damages for injuries sustained when the automobile in which they were riding, owned and operated at the time by R. O. Tarkington, was struck by or collided with a truck owned by the corporate defendant and operated at the time by its agent and employee, William T. Floyd, it being alleged that the damages in both instances were caused by the negligence or default of the defendants. As both actions arose out of the same circumstances and rest upon the same evidence, they were by consent consolidated and tried as one case.

Proceeding under G.S. 1-240, the original defendants, by plea, cross-action and motion in each case, brought in the driver of the vehicle in which the plaintiffs were riding, as a joint tort-feasor, alleging contributory liability and demanding that he appear and answer the cross-complaint of the defendants, and that their respective rights be determined and enforced in this action.

Responding to the motion and cross-action of the original defendants, R. O. Tarkington, the owner and driver of the automobile in which the plaintiffs were riding, filed plea in bar and moved to dismiss the cross-action against him on the ground that in a previous action entitled "R. O. Tarkington *v.* Rock Hill Printing & Finishing Company and W. T. Floyd," involving the same collision, the issues of negligence, contributory negligence and property damage, as between the then parties litigant,

were submitted to a jury and determined in favor of the plaintiff therein. No appeal was prosecuted in the case. This being conceded, the motion to dismiss the cross-action was allowed and the original defendants noted an exception.

The trial then proceeded between the plaintiffs and the original defendants. The record discloses that on the afternoon of 19 February, 1947, the corporate defendant's truck driven by the individual defendant was traveling in a westerly direction on Highway No. 27, between Albemarle and Charlotte, at a speed of 35 or 40 miles an hour. Following and traveling in the same direction was R. O. Tarkington, driving his Oldsmobile Sedan, with his wife, Mrs. R. O. Tarkington, and R. M. Dunston, all sitting on the front seat. As the two vehicles approached an intersecting highway, about five miles from Charlotte, the driver of the Tarkington car started around the truck and speeded up in order to pass. The driver of the truck, evidently intending to make a left turn into the intersecting highway, pulled to his left across the center-line of the highway which caused the bumper of the truck to strike the fender of the sedan, and a collision ensued. The Tarkington car was damaged and each of the plaintiffs sustained serious and permanent injuries.

The evidence is conflicting as to who was to blame for the accident or collision. Issues of negligence and damages were submitted to the jury, and answered in favor of the plaintiffs, the damages in Mrs. R. O. Tarkington's case being assessed at $16,000, and in the Dunston case at $7,000.

From judgments on the verdicts, the defendants, Rock Hill Printing & Finishing Company and William T. Floyd, appeal, assigning errors.

Smathers, Smathers & Carpenter for plaintiffs, appellees.

Tillett & Campbell and James B. Craighill for original defendants, appellants.

Jones & Small for defendant R. O. Tarkington, appellee.

STACY, C. J. We have here for consideration, (1) the ruling on the plea in bar of the alleged joint tort-feasor, (2) the competency of evidence, (3) the argument of counsel to the jury, and (4) the correctness and adequacy of the charge.

1. *The Plea in Bar of Alleged Joint Tort-feasor:* The corporate defendant and the driver of its truck, by plea, cross-action and motion in each case, had the driver of the automobile in which the plaintiffs were riding, brought in as an alleged joint tort-feasor, for the purpose of enforcing contribution of his proportionate part of any recovery which the plaintiffs might obtain in these actions. The driver of the automobile, thus brought in, interposed a plea in bar to the maneuver of the original defendants on the ground that in a prior action wherein he was

plaintiff and they defendants, the jury exculpated him from any contributory liability for the collision in suit. The judgment in that case showing the jury's answers to the issues of negligence, contributory negligence and property damage, was before the court on the hearing of the plea, and there was no challenge to its significance or correctness. This judgment contains the recital that as between the parties then before the court, the plaintiff was not contributorily negligent or properly chargeable by the defendants therein with any joint tort-feasorship. *Charnock v. Taylor,* 223 N.C. 360, 26 S.E. 2d 911.

It is true that the right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit, and the present action was not then before the court. This right of contribution, however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. *Godfrey v. Power Co.,* 223 N.C. 647, 27 S.E. 2d 736. It is the joint tort and common liability to suit which gives rise to the right to "enforce contribution" under the statute. G.S. 1-240. The prior suit as between the then parties litigant determined the question whether the driver of the automobile was contributorily negligent or a joint tort-feasor with the owner and driver of the truck in bringing about the collision. Hence, as between the parties there litigant, this matter would seem to be *res judicata. Cannon v. Cannon,* 223 N.C. 664, 28 S.E. 2d 240; 30 Am. Jur. 908, *et seq.* But, of course, the judgment there would not be binding on the plaintiffs here. They were not parties to that suit, and they are entitled to pursue their rights in their own way. *Meacham v. Larus & Bros. Co.,* 212 N.C. 646, 194 S.E. 99; Anno. 133 A.L.R. 185.

The appellants contend, therefore, that as the judgment in the prior action between the owners and drivers of the two vehicles is not binding on the plaintiffs here, who were passengers in the Tarkington car, they, the appellants, are entitled to have the issue of joint liability as between themselves and the new defendant determined in the present suit. *Meacham v. Larus & Bros. Co., supra; Neenan v. Transp. Co.,* 261 N.Y. 159, 184 N.E. 744; Anno. 133 A.L.R. 181. The conclusion is a *non sequitur.* The issue of contributory liability as between the defendants has already been determined. Solicitude for the rights of the plaintiffs, which they may elect not to pursue, gives the defendants no cause of action. The right to contribution comes from the Act of Assembly, and it is to be enforced *secundum formam statuti*—"according to the form of the statute." *Hoft v. Mohn,* 215 N.C. 397, 2 S.E. 2d 23.

The procedure of the original defendants in bringing in the driver of the Tarkington car as an alleged joint tort-feasor, is quite permissible, *Freeman v. Thompson,* 216 N.C. 484, 5 S.E. 2d 434, but here they were

met at the threshold with a plea in bar as between themselves and the new defendant, and the plaintiffs have refused to join them in their allegation of joint tort-feasorship. Hence, they were left to their own resources as against the new defendant, who exhibited a judgment showing that the allegation of his contributory liability had already been tried out in an action between them.

The statute gives to one joint tort-feasor, who is sued, the right to bring in others jointly liable with him and to require them to contribute proportionately to the payment of any judgment which the plaintiff may recover, but this would not include the right to step into the plaintiff's shoes and prosecute any claim which he might have against them. The right here sought to be enforced is one of contribution, and not one of subrogation. *Charnock v. Taylor, supra.*

Moreover, the plaintiffs have elected not to sue the driver of the Tarkington car. They have alleged no cause of action against him, and can take no judgment against him. *Pascal and Lambert v. Burke Transit Co.*, 229 N.C. 435, 50 S.E. 2d 534; *Wilson v. Massagee*, 224 N.C. 705, 32 S.E. 2d 335, 156 A.L.R. 922. And even if they had sued the driver of the Tarkington car along with the present defendants and recovered against all on issues of joint and several liability as to them, this would have presented no more than a case of contrary verdicts by different juries and opposing judgments, such as were before the Court in *Neenan v. Transp. Co., supra,* cited by the appellants. This is not our case.

There was no error in sustaining the plea in bar.

2. *Exceptions to Admission of Evidence:* Over objection of defendants, the driver of the Tarkington car was allowed to state that he would have passed the defendant's truck several feet before reaching the highway intersection, if the truck had not pushed him off the road. It is the contention of the appellants that this was a conclusional assertion of the witness and necessarily invaded the province of the jury. *Tyndall v. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828. The statement, we think, falls more nearly under the ruling in *Myers v. Utilities Co.*, 208 N.C. 293, 180 S.E. 694, where on a similar objection, the testimony of the witness was characterized as a "shorthand statement of the fact," *Hudson v. R. R.*, 176 N.C. 488, 97 S.E. 388, or as "the statement of a physical fact rather than the expression of a theoretical opinion," and hence unobjectionable. *Burney v. Allen*, 127 N.C. 476, 37 S.E. 501. The exception appears insubstantial.

3. *Argument of Counsel to the Jury:* Over objection of defendants, counsel for plaintiffs in his argument to the jury, was allowed to comment on the prior suit between R. O. Tarkington and the defendants, and to call their attention to the fact that "this jury has no interest in any law suit that has been, or may be, between Mr. Tarkington and the

defendants. . . . We aren't trying any lawsuit that Mr. Tarkington has any interest in. . . . It appears to me that counsel for the defendants thinks we are trying a lawsuit between Mr. Tarkington and the defendants. . . . I say that lawsuit has been tried, and has been disposed of, and is not before this jury."

It is the contention of the defendants that there was no evidence offered on the hearing to support this argument. This may be conceded. The facts stated do appear in the pleadings, however, and they were read to the jury. 53 Am. Jur. 393. Moreover, R. O. Tarkington was brought into the case by the defendants, and his plea in bar was fully argued to the court in the presence of the jury. So, the jury was well aware of what counsel was saying, and to which the defendants objected. The argument seems to have been in reply to some contention advanced by the defendants. But however this may be, it appears harmless in the light of the record. *Hodges v. Wilson,* 165 N.C. 323, 81 S.E. 340. There was nothing significant in the argument which the jury had not already heard from defendants' counsel in their argument on the plea in bar. The exception seems feckless.

4. *The Correctness and Adequacy of the Charge:* The appellants have pressed their exceptions to the charge with assurance and manifest confidence.

At the beginning of the court's instructions on the amount of damages, if any, to be awarded, it was said: "Now, that, gentlemen of the jury, is a question which rests solely within your discretion." Exception.

The court then proceeded to call the jury's attention to the evidence in the case, and for their guidance, stated the rule of admeasurement correctly, and concluded as follows: "And finally, in other words, gentlemen of the jury, the matter rests entirely within your discretion and in the bounds and under the instructions which the court has endeavored to give you." Exception.

It must be conceded that the opening and concluding sentences of the instructions on the issue of damages were infelicitous, and but for the intervening correct application of the rule, the decisions in *Mooney v. Mull,* 216 N.C. 410, 5 S.E. 2d 122, and *Brewington v. Loughran,* 183 N.C. 558, 112 S.E. 257, would probably be controlling. Construing the charge contextually, however, or in the same connected way in which it was given to the jury, *i.e.*, as a whole, the conclusion is reached that no reversible error has been shown. The interpretation finds support in the last sentence where the discretion of the jury is confined to "the bounds and under the instructions" theretofore given. The court had previously told the jury that it was not within their province "to take money from one person and give it to another. It is only within the province of a jury to award to another person such damages, if any, as the law sanc-

tions and provides." Similar interrelated references in the charge were upheld in *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348.

Again, exception is taken to the use by the court of imaginary scales in defining what is meant by "the greater weight of the evidence." The illustrative use follows: "You take the evidence as you sift it out and find out, discover the truth and what you will accept as being the truth in the case for the plaintiffs and put that in one pan on this imaginary scale. You take the testimony as offered here in this case of the defendants, both from cross-examination of the witnesses and direct examination, and having taken that testimony which you consider as being the truth in the matter with reference to certain issues or matters, and place that into the scale of the defendant, and if then, having done so, when you come to decide on the issues of fact, if those pans are equally balanced and remain equally balanced, why then the plaintiffs, by reason of our law, have failed to satisfy you by the greater weight of the evidence and the plaintiffs' contentions would not prevail."

The appellants seem to think that this instruction confined the evidence to be placed on their side of the scales to "the testimony offered by them," and excluded any testimony favorable to them from plaintiffs' witnesses. The interpretation is regarded as too restrictive. The instruction includes all testimony, offered or elicited. We think the illustration will do, though as usual, figurative language, like rhetoric, invites scrutiny to make sure of its trueness. Clarity and precision are the goals to be sought in the court's charge to the jury. *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484. The rounded sentence or rhythmic phrase must often be sacrificed to the accurate expression, for in the law the exact word at the right time and in the right place is the "word fitly spoken" (Prov. 25:11). Of course, the polished phrase is always in order.

As a *dernier ressort,* the defendants stressfully contend that on the issue of liability, the court failed to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," as required by G.S. 1-180. *Yarn Co. v. Mauney,* 228 N.C. 99, 44 S.E. 2d 601. Again, considering the charge contextually, and not disjointedly, we think it sufficiently covers the case to withstand the challenge of inadequacy, and this without any expression of opinion on the facts. *Wells v. Burton Lines,* 228 N.C. 422, 45 S.E. 2d 569.

Viewing the record in its entirety, the conclusion is reached that the verdicts and judgments should be upheld.

No error.

STATE v. M. G. PERRY.

(Filed 4 May, 1949.)

Automobiles § 30c—

The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of G.S. 20-138 prohibiting drunken driving. G.S. 20-38 (cc).

BARNHILL, J., concurring.

DEFENDANT'S appeal from *Harris, J.*, December Criminal Term, 1948, WAKE Superior Court.

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

Hill Yarborough and W. H. Yarborough for defendant, appellant.

SEAWELL, J. The defendant was tried in the recorder's court of Zebulon on a warrant charging him with operating a motor vehicle on the highway while under the influence of intoxicating liquor. On conviction in the recorder's court he appealed to the Superior Court of Wake County, where he was tried upon the same warrant and again found guilty, and appeals to this Court.

The case on appeal presents substantially the following facts:

G. C. Massey, a deputy sheriff of Wake County, saw the defendant at the Texaco filling station in Zebulon. Witness was parked on the west side of the Esso station on the opposite side of the street. The first time he saw the defendant his car was in motion, backing away from the gas tank. Before backing out he had hit the gas tank and in backing out went three or four feet into the street and the witness pulled in front of him. Witness stated that he was very drunk.

Statement of witness was confirmed by Steve Blackley, who said that the defendant was staggering and he smelled whisky on his breath. Said he backed three or four or five feet into the street. "Mr. Perry backed up and we started towards him and he was turning to avoid his bumper hitting the gas tank." Several witnesses, including Brown, the operator of the gasoline station, were offered for the defendant, who stated that they observed him at the time and that he was not drunk, didn't talk out of the ordinary or in a strange manner, didn't stagger, and did not appear to be intoxicated.

In submitting this evidence to the jury the judge charged as follows:

> "I charge you gentlemen that if the State has satisfied you from the evidence beyond a reasonable doubt that if he was on the side-

walk, that part of the sidewalk that vehicles use to come in, used for ingress and egress from the filling station, going in and out, if you find that he was driving there and at the time he was on that part of the sidewalk, then under the influence of intoxicants, it would be your duty to find him guilty of driving on a public highway."

"I charge you that a street from curb to curb is a public highway and I charge you that the place used over the sidewalk, if they used sidewalk going to the filling station, that that is a public highway within the meaning of the law, and if the State has satisfied you from the evidence beyond a reasonable doubt that he drove that car at the time he drove it he was under the influence of intoxicants as I charged you, across that sidewalk, which was used as a public highway that would mean he would be guilty; or if he got out in the street or any part of the street that was a public highway he would be guilty. If he didn't go on any part but the premises of the filling station he wouldn't be guilty."

"The State contends that he went on the sidewalk and the defendant contends that he didn't go anywhere but near the pump. If he came down over any part of the sidewalk, if he drove his automobile on any part of that sidewalk, across the street, it would be your duty to find him guilty if you find from the evidence and beyond a reasonable doubt that he did drive over that sidewalk towards the street."

"That part across the sidewalk for all intents and purposes in this case is according to the Statute."

The question presented is whether a sidewalk is a "highway" within the meaning of the statute under which the defendant was tried, G.S. 20-138, which reads:

> "It shall be unlawful and punishable, as provided in G.S. 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this state."

The defendant contends that the essential definition of a sidewalk takes it out of the purview of the statute and purpose of the act. He is charged with driving a motor vehicle on the highway while intoxicated; and cites from 25 Am. Jur. 7, p. 343, the definition of a sidewalk as follows:

> "A sidewalk is a walkway along the margin of a street or other highway, designed and prepared for the use of pedestrians, to the exclusion of vehicles and horsemen."

This is plausible; and inasmuch as we are considering defendant's performance with a motor vehicle it might turn the scale in favor of the appellant except for the definitions given in Article 3, Motor Vehicle Act of 1937, in which the statute under review is found, and which, therefore, must serve as a specific definition of a "highway" in the construction of this statute. G.S. 20-38 (cc) reads: "Street and Highway. The entire width between property lines of every way or place of whatever nature, when any part thereof is open to the use of the public is a matter of right for the purposes of vehicular traffic."

Whatever may be said of the exclusion of the sidewalk proper, elsewhere, under the definition contended for by appellant, we are compelled to follow the dictionary of the law; and in this instance we do not think it can be denied that vehicular traffic would include ingress and egress over the sidewalk to any place "open to the use of the public as a matter of right for the purposes of vehicular traffic" and that the definition is specially framed to protect the public in any area of the State's jurisdiction where the public has a right to use is vehicular traffic. The fact that the use of the particular place, or crossing of the sidewalk, is to reach a private business is immaterial; since the public generally have the right to use it for that purpose.

While greater clarity of expression in the law might be desirable, the instructions given were not out of line with the construction we have given the statute.

So considered, we find no error in the record.

No error.

BARNHILL, J., concurring: We may not concern ourselves about the distance the vehicle traveled on the public highway, if at all. If defendant, while under the influence of intoxicating liquor, put the vehicle in motion and operated it for any distance on any part of a highway in this State, he is guilty as charged. The one question presented is as to whether a sidewalk is a part of a highway within the meaning of G.S. 20-138.

Decision is made to rest on the definition of "Street and Highway" contained in the statute which created the offense for which defendant was tried. G.S. 20-38 (cc). This is as it should be, for that definition is controlling.

But there is nothing unusual or exceptional about the meaning thus accorded the term. It is generally construed to include sidewalks within the bounds of a public way.

A street is a public highway in an urban community, and a sidewalk is a walkway along the margin of a street or other highway, designed and prepared for pedestrians. 25 A.J. 343.

All portions of a public street from side to side and end to end are for the public use in the appropriate and proper method. *Oliver v. Raleigh,* 212 N.C. 465, 193 S.E. 853; *Wood v. Telephone Co.,* 228 N.C. 605, 46 S.E. 2d 717.

"The courts have universally held that a street includes the roadway, or traveled portion, and sidewalks." *Willis v. New Bern,* 191 N.C. 507, 132 S.E. 286. "The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians." *Hester v. Traction Co.,* 138 N.C. 288; *Ham v. Durham,* 205 N.C. 107, 170 S.E. 137; 25 A.J. 343.

Thus the grass plot between the curb and sidewalk, *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799, and a parkway in the center, *Spicer v. Goldsboro,* 226 N.C. 557, 39 S.E. 2d 526, are parts of the street.

In respect to the duty of a municipality (1) to keep its streets free from obstructions and in proper repair, and (2) to furnish adequate lights, we have consistently held that the term "street" includes sidewalks. *Ham v. Durham, supra; Wall v. Asheville,* 219 N.C. 163 13 S.E. 2d 260; *Bunch v. Edenton,* 90 N.C. 431; *Russell v. Monroe,* 116 N.C. 720; *Wolfe v. Pearson,* 114 N.C. 621; *Neal v. Marion,* 129 N.C. 345; *Radford v. Asheville,* 219 N.C. 185, 13 S.E. 2d 256; *Waters v. Belhaven,* 222 N. C. 20, 21 S.E. 2d 840; and other cases too numerous to cite.

"The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street (including roadway and sidewalk) shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes." *Hester v. Traction Co., supra; Ham v. Durham, supra.*

When he and those whom he invites to visit his premises exercise this right of ingress and egress, they pass from private property to public way at the property line, and the right to use the public way is one conferred by the public. It is the use of this right the statute seeks to regulate.

Motorists are afforded the right to operate their vehicles, not only along and upon the center portion of the highway set apart primarily for vehicular traffic, but also across the sidewalk at designated points for the purpose of entering or passing from private alleys, private driveways, garages, filling stations, and the like.

Intersections and private or semiprivate entrances are used by both the motorist and the pedestrian. These are the real danger points. People who use them, as well as those who use the vehicular traffic lane, are protected against the peril created by the drunken driver.

To hold otherwise would be to say that an intoxicated person may operate his motor vehicle down a crowded sidewalk with impunity in so far as the Motor Vehicle Law is concerned. The Legislature never so

intended and the language used in the statute does not require such a narrow interpretation of the term "highway." The court below correctly concluded that it includes sidewalks.

ATLANTIC CONSTRUCTION COMPANY v. CITY OF RALEIGH.

(Filed 4 May, 1949.)

1. Municipal Corporations § 8b (2)—

A city may not compel owners of property outside its limits to avail themselves of water and sewerage services, and on the other hand the city may prescribe such rules and regulations and impose such fees as in its discretion are reasonable and proper as conditions precedent to the right of those living outside its limits to connect with its sewer and water mains, the matter being entirely contractual. G.S. 160-249.

2. Same—

An ordinance imposing a connection fee on residents outside the city who avail themselves of the privilege of using the city's sewerage system after the effective date of the ordinance will not be held invalid as discriminatory because no fee was imposed on those who had made such connections prior thereto.

3. Same—

A fee imposed upon residents outside the city limits for the privilege of connecting with the city's sewerage system is not a tax.

4. Same—

Plaintiff's predecessor in title had executed a contract with the municipality under which the owners of land in the subdivision were to be permitted to connect with the municipality's water and sewer mains "in accordance with the laws, ordinances, rules and regulations" of the municipality. *Held:* The contract does not preclude the municipality from charging such owners a connection fee under an ordinance later enacted imposing such fee on all persons living outside its limits who avail themselves of the municipal facilities.

APPEAL from *Hamilton, Special Judge,* at January Term, 1949, of WAKE.

This is an action to restrain the City of Raleigh from collecting any fees or charges, by virtue of the provisions of an ordinance duly adopted by the governing body of said city, on 18 November, 1947, which ordinance reads as follows: "Every property owner or occupant desiring to make a lateral connection with a sewer main lying outside of the corporate limits of the City, connecting with or emptying into the mains of the City sewerage system, shall pay to the City of Raleigh a fee of $100 for

each such connection before the connection is made." And the plaintiff also seeks to recover the fees heretofore paid to the City of Raleigh, pursuant to the terms of the ordinance, which fees, it is alleged, were paid under protest.

R. A. Bashford and J. C. Bashford entered into a contract, on 12 March, 1947, with the City of Raleigh, whereby the Bashfords, owners of a parcel of land outside the City limits of Raleigh, subdivided their land into building lots, and at their cost and expense laid water and sewer mains according to plans and maps submitted to and approved by the officials of the City of Raleigh, and connected the same with the water and sewer mains of the defendant City, as authorized by said contract.

The pertinent parts of the contract involved in this action are as follows: "That the connections by consumers of water in said subdivision or development with the pipe lines, water mains or sewer mains to be laid under this contract and agreement, shall be in accordance with the laws, ordinances, rules and regulations of the City of Raleigh, and its Department of Public Works, and the use of water through said pipe lines or water mains shall be in accordance with the said laws, ordinances, rules and regulations. City shall have supervision and control over said mains, pipe lines, laterals, taps and connections for the purpose of making any and all necessary inspections, reading of meters, and turning the water on or off. The water rents charged by City to the consumers of water through said water mains or pipe lines shall be the same as those charged all other consumers residing outside the corporate limits of the City, and City shall collect all water rents from consumers connected with said mains, pipe lines or laterals, and shall retain and have the same as its own."

The development or subdivision is known as Sunset Hills Extended. The plaintiff purchased from the Bashfords approximately forty-five building lots in said subdivision, on 18 April, 1947, for the purpose of building residences thereon, and has constructed a number of residences in the development; and since the adoption of the above ordinance the plaintiff has paid the defendant for nine sewer connections at $100.00 each, some of which payments were made under verbal protest.

It is alleged the contract referred to herein between the Bashfords and the defendant, runs with the land, and the plaintiff being a successor in title to R. A. and J. C. Bashford, is entitled to all the benefits, terms and conditions of the contract, and that the contract does not authorize the City of Raleigh to collect any fees for connections with the private sewerage system constructed and laid by the Bashfords.

His Honor heard this cause on an Agreed Statement of Facts, the parties having waived a trial by jury, and stipulated that the presiding

Judge should make his conclusions of law and enter judgment accordingly.

The court held the plaintiff is not entitled to injunctive relief nor to a refund on account of any payments made pursuant to the provisions of the ordinance referred to herein, and entered judgment in accordance therewith.

The plaintiff appeals and assigns error.

Brassfield & Maupin and J. Russell Nipper for plaintiff.

Wm. C. Lassiter and James H. Walker for defendant.

DENNY, J. The plaintiff does not challenge the authority of the City of Raleigh, acting through its governing board, to fix a different schedule of rates for services supplied outside of the corporate limits of the City from that fixed for such services rendered within the corporate limits. G.S. 160-249 and G.S. 160-256. Moreover, the plaintiff concedes in its brief that ordinarily municipalities may impose reasonable conditions and regulations in regard to making sewer connections and may fix and determine the fees and charges therefor, but it contends the regulations, as well as the charges for such connections, must be reasonable.

The validity of the ordinance set out herein is challenged on the following grounds:

1. That the sewer connection charge, or fee, imposed in the ordinance is, in effect and in fact, a revenue measure imposing an excise tax, and bears no relation to fees or charges imposed to defray the expense incident to the inspection of sewer connections. An inspection fee in addition to the charge or fee fixed in the ordinance, is charged and collected under and by virtue of Chapter XX, Sec. 64, of the Raleigh City Code.

2. That the ordinance is discriminatory for that: (a) No charge or fee is made by the defendant City of Raleigh to owners or occupants of property lying within the corporate limits of the City for sewer connections; and (b) owners or occupants of property lying outside of the City of Raleigh and who made sewer connections prior to 18 November, 1947, were not and are not required to pay any fee or charge for sewer connections and for the use of the sewerage system.

3. That the fees and charges provided for by said ordinance are not on a basis of equality, a flat charge or fee of $100.00 being made for each lateral connection, regardless of the number of outlets, the size of pipes, or the number of persons or families served.

4. That the fee provided for by said ordinance is unreasonable and unfair, since the defendant City has neither paid out any money nor incurred any expense in making said sewer connections.

5. That the connection fee provided for by the ordinance, is in violation of the contract between the Bashfords and the City of Raleigh, which contract is pleaded as a bar of the defendant's right to make any charges or collect any fees for connections with the private sewerage system constructed by the Bashfords.

A careful consideration of this record leads us to the conclusion that the defendant is free to require such sewer connection charges to consumers of water, residing in the development known as Sunset Hills Extended, as it may deem just and reasonable, unless the contract between the Bashfords and the City of Raleigh prohibits the City from charging a sewer connection fee.

The provision in the contract upon which the plaintiff relies, as a bar to the defendant's right to charge a connection fee, is as follows: "That the connection of consumers . . . with sewer mains to be laid under this contract . . . shall be in accordance with the laws, ordinances, rules and regulations of the City of Raleigh, and its Department of Public Works . . ." If it be conceded this provision is directed solely to the manner in which the connections are to be made and not to include conditions which might be imposed, we do not think the provision places any limitation upon the power of the City to enact an ordinance requiring the payment of a sewer connection fee by one residing in Sunset Hills Extended. But we think the provision is sufficient to require those requesting a sewer connection pursuant thereto, to pay such connection fee as may be fixed "in accordance with the laws, ordinances, rules and regulations of the City of Raleigh." It seems clear to us the provision was not inserted merely to insure proper installation. For it is further provided in the same paragraph of the contract that the City of Raleigh is also given "supervision and control over said mains, pipe lines, laterals, taps and connections for the purpose of making any and all necessary inspections," etc.

Furthermore, municipalities are expressly authorized by statute, G.S. 160-240, to require all owners of improved property which may be located upon or near any line of a sewerage system to connect with such sewer all water-closets, bathtubs, lavatories, sinks, or drains upon their respective properties or premises, so that their contents may be made to empty into such sewer, and may *fix charges for such connections.*

Obviously the municipality is not authorized by the statute, to compel owners of improved property located outside the city, but which may be located upon or near one of its sewer lines or a line which empties into the City's sewerage system, to connect with the sewer line. But since it is optional with a city as to whether or not it will furnish water to residents outside its corporate limits and permit such residents to connect their sewer facilities with the sewerage system of the city, or with any

other sewerage system which connects with the city system, it may fix the terms upon which the service may be rendered and its facilities used. G.S. 160-255; G.S. 160-256; *Kennerly v. Dallas,* 215 N.C. 532, 2 S.E. 2d 538; *Williamson v. High Point,* 213 N.C. 96, 195 S.E. 90; *George v. City of Asheville* (4 C.C.A.) 80 Fed. 2d 50.

The North Carolina Utilities Commission has no jurisdiction to fix or supervise the fees and charges to be made by a municipality for connections with a city sewerage system, either within or without its corporate limits. G.S. 62-30 (5); G.S. 62-122 (3). Therefore, a city is free to establish by contract or by ordinance such fees and charges for services rendered to residents outside its corporate limits as it may deem reasonable and proper. G.S. 160-240; G.S. 160-249; G.S. 160-284.

The status of a municipal corporation that extends the services of its public utilities beyond its corporate limits, is quite different from that of a public service corporation which holds a franchise from the State and whose rates are fixed by the North Carolina Utilities Commission, G.S. 62-27.

The relationship existing between the plaintiff and the defendant is contractual, whether it is based on the Bashford contract or the ordinances and rules and regulations adopted by the governing board of the City of Raleigh. The defendant has no legal right to compel residents living outside its corporate limits to avail themselves of the services which may be offered by its public utilities. On the other hand, in the absence of a contract providing otherwise, such residents are not in position to compel the City to make such services available to them. *Childs v. City of Columbia,* 87 S.C. 566, 70 S.E. 296; *Board v. Sup'rs. of Henrico County v. City of Richmond,* 162 Va. 14, 172 S.E. 354; *City of Phoenix v. Kasum,* 54 Ariz. 470, 97 Pac. 2d 210.

Likewise, the contention that the service connection fee fixed in the ordinance is a tax, is untenable. *City of Lexington v. Jones,* 289 Ky. 719, 160 S.W. 2d 19. We think the contract and ordinance constitute a tendered use of the sewerage system of the City of Raleigh to residents in Sunset Hills Extended, according to the terms of the contract. And in the absence of any constitutional or statutory restriction, the rates and fees that may be charged to such residents in connection with the use of its public utilities, are matters that may be determined by its governing body in its sound discretion.

The plaintiff in its brief also contends that the fee charged is not necessary in order to meet the payment of the defendant's bonded indebtedness or the repair, maintenance and operation of its water and sewer system, as authorized in G.S. 160-256. In our opinion the plaintiff is not in a position to challenge the validity of the fees or rates established by

the City pursuant to the provisions of this statute, since the property in question is located outside the city limits of the City of Raleigh.

In view of the conclusion we have reached, the plaintiff is not entitled to an order restraining the defendant from collecting further sewer connection fees, pursuant to the provisions of the ordinance it challenges, nor to a refund of the fees heretofore paid in accordance with its requirements.

The judgment of the court below will be upheld.

Affirmed.

J. C. WALDROP, FOR HIMSELF AND ON BEHALF OF ALL OTHER PROPERTY OWNERS IN THE GREENVILLE SCHOOL DISTRICT WHO MAY DESIRE TO MAKE THEMSELVES PARTIES HERETO, v. M. BROWN HODGES, G. H. PITTMAN, J. VANCE PERKINS, M. W. SMITH AND J. T. DUPREE, CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF PITT COUNTY; AND J. B. JAMES, J. M. TAFT, S. M. CRISP, MRS. E. W. HARVEY, MRS. L. M. BUCHANAN, J. KNOTT PROCTOR AND W. L. ALLEN, CONSTITUTING THE BOARD OF TRUSTEES OF THE GREENVILLE SCHOOL DISTRICT OF PITT COUNTY.

(Filed 4 May, 1949.)

1. Schools § 10c: Taxation § 38a—

Under the provisions of Chap. 599, P.L.L. 1935, an action questioning the validity of a bond election under the Act must be instituted within thirty days after the publication of the result of the election, but this limitation does not bar an action subsequent to the thirty day period seeking to enjoin the issuance of the bonds on the ground that the time within which the bonds must be issued had elapsed, or on the ground that the proceeds from the sale of the bonds were to be used for unauthorized purposes.

2. Schools § 10c: Taxation § 12—

Conceding that G.S. 153-102, prescribing that bonds must be issued within three years after the bond order takes effect, is applicable to the issuance of bonds under Chap. 599, P.L.L. 1935, the Legislature has extended the time within which such bonds may be issued to 1 July, 1949. Chap. 325, Session Laws 1943; Chap. 402, Session Laws 1945; Chap. 510, Session Laws 1947.

3. Limitations of Actions § 3—

While the General Assembly may not revive a remedy which has become barred by a statute of limitations, it may, at any time prior to the effectiveness of the bar, enlarge the time within which the remedy may be invoked.

4. Schools § 10h—

The allocation of the proceeds of a bond election by the board of commissioners of a school district is a matter resting within its sound discre-

tion, with which the courts will not interfere so long as their action is not arbitrary, capricious or in disregard of law.

5. Same—

The board of commissioners of a school district has authority to divert the proceeds of a bond issue to other projects within the general purpose for which the bonds were authorized provided the board finds in good faith that conditions have so changed since the bonds were authorized that the proceeds are no longer needed for the original purpose.

6. Same—In the absence of a bona fide finding of changed conditions, the proceeds of a bond issue must be used for the purposes stipulated in the bond order.

The order calling an election and the published notice of election stated that the proposed bonds were for the purpose of "erecting and equipping new school buildings and purchasing sites therefor." In this suit to enjoin the issuance of the bonds thus authorized it appeared that the board of commissioners proposed to use a part of the proceeds for enlarging existing schools and to build a new school, and reserve a percentage of the proceeds to be used in connection with a contemplated future bond issue, for a new high school building. *Held:* The proposed use recognizes the need of funds for the erection of new buildings and precludes a finding in good faith that the bonds were no longer needed for the purpose set out in the bond order, and therefore the use of part of the proceeds for the enlargement of schools is contrary to law, and the judgment of the lower court is modified to the end that the proceeds be used exclusively for the construction and equipment of new buildings and the purchasing of sites therefor.

APPEAL by plaintiff from *Frizzelle, J.*, in Chambers at Snow Hill, 26 March 1949, PITT.

Civil action to restrain and enjoin the issuance of proposed school bonds.

The Greenville School District is a duly and regularly created school district. On 28 October 1941, pursuant to call, an election was held in said district to determine whether the electors therein would approve the issuance of $250,000 in school bonds for the purpose set forth in the resolution of the defendant Board of Commissioners and the notice of election published pursuant thereto. The issuance of the bonds was approved by a substantial majority of the registered voters.

While the bond election was held on 28 October 1941, the result of said election was not published until 23 January 1943.

The purpose for which the bonds were to be issued as set forth in the order calling the election and in the published notice of election was "for the purpose of erecting and equipping new school buildings and purchasing sites therefor in said district," and it is admitted that it was generally publicized and represented to the voters of the district prior to the election that the proceeds of the bonds would be used for the purpose of pur-

chasing a site somewhere in the eastern section of said school district and erecting a new high school building thereon.

It is now the avowed plan and purpose of the defendants to use approximately seventy per cent of said bond proceeds for the purpose of enlarging the Third Street and West Greenville elementary school buildings, constructing a new elementary school for Negroes, making additions to the Eppes School building for Negroes, and to hold intact the balance of the bond proceeds to be used, in connection with a contemplated future bond issue, in the erection of a new high school building.

On 5 January 1943, the defendant Board of Commissioners adopted a resolution providing for the issuance of $25,000 in bonds under authority of said election, but the bonds were not issued and this resolution was rescinded on the first Monday in March, 1949.

On 7 March 1949, said Board, at the request of the defendant Board of Education, adopted a resolution providing for the issuance of the full amount of bonds authorized in said election and the levying of a tax for the payment thereof "for the purpose of erecting and equipping new school buildings and purchasing sites therefor in said district."

Thereupon the plaintiff instituted this action for injunctive relief against the issuance and sale of said bonds for the causes and upon the grounds set forth in his complaint.

When the cause came on for hearing on the rule to show cause why an injunction should not issue, the court below entered judgment that the defendant Board of Commissioners is fully authorized to issue and sell said bonds and to levy a tax for the payment thereof. It thereupon denied the motion for an order of injunction and dismissed the action at the cost of the plaintiff. Plaintiff excepted and appealed.

Harding & Lee for plaintiff appellant.

Sam B. Underwood, Jr., for defendant appellees.

BARNHILL, J. The Greenville School District was established and the bond election was held pursuant to the provisions of Chap. 559, P.L.L. 1935, as amended by Chap. 388, P.L.L. 1937, making the Act applicable to Pitt County. The 1935 Act, in sec. 9 thereof, provides in part: "The powers conferred by this Act shall be regarded as supplemental and in addition to powers conferred by other laws and shall not supplant or repeal any existing powers for the issuance of bonds . . ."

The plaintiff seeks to attack the issuance of the proposed bonds for irregularities in the registration of a voter, for delay in publishing the result of the election, and for other causes relating directly to the calling and holding of said election. But the doors of the courts are no longer open to plaintiff to assail, for the causes stated, the validity of the pro-

ceedings for the calling of the election or of the election, for it is expressly provided in the Act that "No right of action or defense founded upon the invalidity of such election . . . shall be asserted, nor shall the validity of such election . . . be open to question in any court upon any ground whatever, except in an action or proceeding commenced within thirty days after the publication of" the result of the election. Sec. 5, Chap. 559, P.L.L. 1935. See also G.S. 153-90 and G.S. 153-100.

But the limitation on the right to attack the irregularity or validity of the bond election and of the bonds to be issued pursuant thereto, thus provided, does not relate to or bar an action founded on the allegation that (1) the time within which the bonds may be issued has elapsed, or (2) the avowed purpose for which the proceeds derived from the sale of the bonds are to be used is contrary to law and constitutes an unauthorized use of said funds.

So then, the two questions posed for decision are these: (1) Has the time within which the proposed bonds may be lawfully issued now elapsed, and (2) May the proceeds derived from the sale thereof be used for the purposes now contemplated by defendant boards?

The statute under which the defendants proceed, Chap. 559, P.L.L. 1935, contains no limitation upon the time within which the bonds, once authorized, may be issued. However, G.S. 153-102 provides that "After a bond order takes effect, bonds may be issued in conformity with its provisions at any time within three years" thereafter unless the bond order is repealed or anticipation notes have been issued and are outstanding.

It would seem to be clear that this is a limitation upon the right to issue bonds authorized in an election held under the County Finance Act. G.S. Art. 9, Chap. 153. We may concede, without deciding, that, nothing else appearing, it is controlling here. Even so, the Legislature, by successive Acts, has extended the time within which bonds authorized under the provisions of the County Finance Act may be issued to July 1, 1949. Chap. 325, Session Laws 1943, Chap. 402, Session Laws 1945, Chap. 510, Session Laws 1947.

A right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly. *Johnson v. Winslow,* 63 N.C. 552; *Whitehurst v. Dey,* 90 N.C. 542; *Wilkes County v. Forester,* 204 N.C. 163, 167 S.E. 691; Annos. 36 A.L.R. 1316, 67 A.L.R. 297, 133 A.L.R. 384; 34 A.J. 37. But the Legislature may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute. *Johnson v. Winslow, supra; Pearsall v. Kenan,* 79 N.C. 472; *Tucker v. Baker,* 94 N.C. 162; *Vanderbilt v. R. R.,* 188 N.C. 568, 125 S.E. 387; Anno. 46 A.L.R. 1101; 34 A.J. 35, 37.

It follows that, even if G.S. 153-102 applies here, the time within which the bonds may be marketed has been extended and has not yet expired.

It is the duty of the Court to determine only whether defendants have the legal right to devote the proceeds of the bonds to the purposes now proposed. So long as their action is not arbitrary, capricious, or in disregard of law, the Court is not concerned with the wisdom of the course they intend to pursue. *Pue v. Hood, Comr.*, 222 N.C. 310, 22 S.E. 2d 896; *Atkins v. McAden*, 229 N.C. 752.

It is not charged that defendants have acted arbitrarily or capriciously. It is asserted only that the proposed use of the fund is not authorized and would constitute an unwarranted diversion thereof to purposes other than those authorized by the bond resolution.

The statute, Chap. 559, sec. 3, P.L.L. 1935, authorizes an election "for the purpose of voting upon the question of issuing bonds . . . for the purpose of acquiring, erecting, enlarging, altering, and equipping school buildings and purchasing sites in such district or unit, or for any one or more of said purposes." But the bond resolution and the published notice of election do not state that the proceeds of the bonds are to be used for these broad and comprehensive purposes. They are proposed only "for the purpose of erecting and equipping new school buildings and purchasing sites therefor." In this connection it is admitted that it was the purpose of the Board at the time to erect a new high school building, and that this purpose was generally publicized during the pre-election campaign.

While the defendants have a limited authority, under certain conditions, to transfer or allocate funds from one project to another, *included within the general purpose for which bonds are authorized*, the transfer must be to a project included in the general purpose as stated in the bond resolution and notice of election. *Atkins v. McAden, supra.* The funds may be diverted to the proposed purposes only in the event the defendant Board of Commissioners finds in good faith that conditions have so changed since the bonds were authorized that the proceeds therefrom are no longer needed for the original purpose.

In view of the fact the defendants now propose to erect a new elementary school building and to retain thirty per cent of the fund to be used in erecting a high school building, and assert that they plan another bond resolution and election to raise additional funds for that purpose, it would seem such a finding cannot now be made in good faith.

The law is founded on the principle of fair play, and fair play demands that defendants keep faith with the electors of the district and use the proceeds for the purpose for which the bonds were authorized—the erection and equipment of new buildings and the purchase of sites therefor.

We conclude that defendants are authorized to issue and sell the proposed bonds which, when sold, will constitute valid obligations of the district, but that the proceeds derived therefrom must be used for the purpose indicated. Use thereof for any other purpose would constitute an unauthorized diversion against which plaintiff is entitled to injunctive relief.

The cause is remanded for judgment accordant with this opinion.

Modified and affirmed.

STATE v. HUGH G. SPIVEY.

(Filed 4 May, 1949.)

1. Automobiles § 28c—

The evidence favorable to the State, though contradicted in material respects by defendant's evidence, tended to show that defendant was intoxicated, that he collided with a motorcycle which was traveling in the opposite direction, resulting in the death of the cyclist, and that the only marks on the highway tending to show the point of impact were on defendant's left side of the highway. *Held:* The evidence was sufficient to overrule defendant's motions to nonsuit in a prosecution for manslaughter.

2. Criminal Law § 78e (2)—

Misstatement by the court of the contentions of the State must be brought to the trial court's attention in order for an exception thereto to be considered.

3. Criminal Law § 78g—

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, G.S. 1-180, exceptions on this ground will not be considered.

APPEAL by defendant from *Harris, J.*, at February Term, 1949, of FRANKLIN.

Criminal prosecution upon a bill of indictment charging that defendant "feloniously, willfully, and of his malice aforethought, did kill and murder Felix Tant," etc.

Defendant pleaded not guilty. And "the Solicitor announced in open court that he would not ask for a verdict greater than second degree or manslaughter."

This indictment, as shown by the record, grew out of a collision on Sunday afternoon, 12 September, 1948, between an automobile operated by defendant, traveling west on the highway leading from Polly's

Kitchen, a store operated by one Theodore Medlin, toward Wake Forest, in which two others, Tink Hodge and Howard Harris, were riding, and a motorcycle, just acquired from Theodore Medlin, and operated by Felix Tant, traveling east on same highway, in which collision Tant was killed. The road runs east and west.

The State offered in chief no eyewitnesses to the collision. However, the evidence in chief, offered by the State, tends to show these facts: The accident occurred after noon on Sunday, at a point near the top and on the east side of a hill. Defendant's automobile was going upgrade, and the motorcycle was "coming down on incline." It was not steep at all for either vehicle. The wreck happened, as stated by one witness, about 90 feet down hill, and another stated "Spivey lacked about 75 or 100 yards getting to the crest." The hard-surfacing of the road was 18 feet in width. After the collision, defendant's automobile was off the highway on the left-hand side going to Wake Forest, that is, the south side, part in the ditch and part on the bank. The right wheel was in the ditch, and the left on the bank. The front of the automobile did not go directly in the bank. It whipped up the bank, headed to the left. It was 30 yards from "the cars to where they hit"—and it was 15 or 20 steps to the crest of the hill from "the cars going west."

The motorcycle of deceased, Felix Tant, was in front of the automobile to the left. It had hit the left part of the grill—about halfway between the radiator and the light.

The wheels of the automobile were standing up inflated. The brake "peddle" was not working. The windshield was cracked all over, the top was dented on the driver's side, the front was torn up and the steering wheel was dented. The motorcycle was "torn all to pieces."

The body of Felix Tant, stripped of clothes, was lying at the back bumper of the automobile on the left, and south side of the road, going toward Wake Forest. The neck was broken, skull fractured, both arms broken above the elbow, and the left leg broken above and below the knee. There was a gash, 7 inches long, and "nearly to the hollow" across the stomach, and several cuts and scratches on the face.

Marks on the highway were described by some of the witnesses: One stated that he saw one mark 12 or 14 feet up the highway and 2 feet from the south side of the road; and that it looked as if a part of "the motorcycle had drug" along the highway, 12 or 14 feet from "the back of the car where the boy was lying." Another testified: "The only marks that I saw on the highway were 18 inches or 2 feet from the left of the highway where the car hit the motorcycle on the left going toward Wake Forest, that is the direction in which the car was traveling. It looked like something off the motorcycle drug up the highway and continued up to where the motorcycle was." And a third, a State Highway Patrolman,

said: "My investigation of the wreck showed a mark on the road down toward Bunn from the car—some *30 yards* from the body, on the south side of the highway—approximately 2 feet from the dirt—there was one place in the road where the pavement was scraped out, which was the only place along the highway that could have possibly been the point of impact . . . The marks I found were *30 feet* east of the body. It was on the left-hand side of the road going toward Wake Forest. I didn't see any marks on the right-hand side of the road."

And one of the State's witnesses said the blood he saw was on the boy's face and on the ground where the body was lying.

Several witnesses for the State testified that when they saw defendant at the scene of the collision, he was drunk, his nose was cut and he had blood on his face; that he was talkative, and that he was stuttering. One said that defendant told him he had drunk a beer that afternoon; and another, that he smelled intoxicating liquor on him very strongly. And there was testimony tending to show that of the two men riding with defendant, one, an old man, was drunk.

Some of the State's witnesses testified as to statements made by defendant at the scene: One, that on being asked what he was doing driving on the left side of the road, defendant said, "Capt. when I looked up I was on that motorcycle," and on the witness saying, "You didn't try to stop," he answered "No, sir." Others said the defendant stated that when he saw he was going to hit the motorcycle he covered up his face and didn't try to stop, but just let the car go as it would.

And the State's evidence further tended to show that Felix Tant, the deceased, had that Sunday afternoon traded with Theodore Medlin, giving an automobile for the motorcycle; and that when the papers were fixed up, Tant got on the motorcycle and rode west from the store. In the language of Medlin "he rode off . . . riding as good as I could ride it,"—and that in 10 or 15 minutes he heard that Tant was dead. And there was evidence that Tant was not drinking.

On the other hand, defendant offered testimony tending positively to show: (1) That Felix Tant was drunk when he got on the motorcycle at Polly's Kitchen and started off on what proved to be the fatal ride for him; and that as he rode along the highway he was driving fast, the motorcycle wobbling from one side to the other, just before it went over the hill and the crash was heard by one it had passed; and (2) that defendant and his wife and three children had gone to church in the morning, and stayed for the afternoon session, at the opening of which defendant went up in church and put his contribution in the plate, and then went out to go to a store to get crackers for his children, and that he had not been drinking and was not drunk.

Defendant, as witness for himself, testifying as to event leading up to the collision, said: "Tink Hodge and Howard Harris were with me. Tink Hodge was drunk. Howard Harris had not had anything to drink. Tink Hodge was sitting next to me. Howard Harris was sitting up there on the front seat on the other side of Tink . . . I got in the car and I cranked it up, and he (Tink) opened the door and asked me where I was going, and I told him down to the store to get some crackers for my children, and he asked me to let him go down the road. I told him I could not, but he opened the door and got in the car anyway. I called Howard and told him to go with me to the store and he got in. I didn't stop at any place after I left the church until the wreck. I had not had anything at all to drink that Sunday . . . I don't know exactly what time it was when I left the church to go to the store. It was about three o'clock. I was driving about 35 miles an hour. I was on the right side . . . when the motorcycle hit me. I was not quite to the top of the hill. Mr. Tant was zigzagging across the road. I stayed on the right side of the road when I saw him coming that way. I did not pull out either way. The motorcycle was about as far as from here to the front corner of the courthouse when I first saw it. It was running as much as 70 or 80 miles an hour. I don't remember anything else that happened after it cut off my nose. I was hurt when the motorcycle struck me. It cut off my nose, a hurt on my knee, and a big bump up here on my forehead. I don't know what direction my car went after it was struck. I don't know what happened after it was hit. I don't remember talking to the officer and I don't remember talking to the colored preacher. The first I remember was next morning . . . in the bed. I don't remember anything about being sewed by Dr. Wheless . . . I didn't have time to do nothing before it hit me."

And Howard Harris, as witness for defendant, after corroborating defendant as to circumstances under which he and Tink Hodge entered defendant's automobile at the church, testified: "It was about 3½ miles to Polly's Kitchen. We went in sight of Polly's Kitchen and I told Hugh to turn around and go back since there was a big crowd of white people in front of the store . . . We turned around there at Mr. Coy Richardson's. Hugh had not been drinking any kind of intoxicating liquor at that time. We had not stopped at any place and when we turned around, we come back toward New Hope. There were some stores there but they were closed and the church was beyond New Hope. Hodge was sitting on the front seat of the car between Hugh and me. We did not have any whiskey, beer or alcoholic beverage of any kind in the car. After we turned around and started up the hill, he changed gears and was driving about 35 miles an hour on the right side of the road. Just before we got to the top of the hill, the motorcycle came over the hill . . .

swinging, and it hit the left side of Hugh's car. The motorcycle was a distance from this seat to the door there when we first saw it. My best judgment is it was 30 to 35 feet. The motorcycle was traveling 75 miles an hour. It never slowed down before it hit the front of the car. Hugh Spivey was on his right side. I just throwed up my hand when I saw the motorcycle coming . . . I couldn't tell you what the motorcycle did then. They just went to the left side of the ditch and it come to rest there. Hugh was cut across his nose and bleeding awful bad, and a knot on the side of his head. After I got out of the car I walked away from him and he said, go tell Papa . . . He was stuttering at the time. He always stutters bad all the time. I went back to the church and told his father . . . Wasn't any time at all when I saw the motorcycle coming and the time it hit. Hugh didn't have time to pull his car out of the road before he was struck . . . He was on the right side of the road and the car and motorcycle met in the car's right side of the road . . . When it hit, they met sideways to the left, across the highway. It went to the left side when it was hit . . ."

And defendant further offered numerous witnesses who testified that he was not drinking nor drunk at the church, and numerous witnesses who testified to his good character.

The State, in rebuttal, offered as witnesses: First, the Sheriff of Franklin County, who stated that he had not known defendant until the day in question, and gave it as his opinion that defendant "was under the influence of some intoxicating drink . . . considerably under the influence." The Sheriff further testified: "I examined the highway there. The only signs I saw was on the left-hand side . . . going west . . . There was some light marks, no skid marks leading from the left side . . . off the hard surface. They were not very long. I looked for indications of the point of impact. These marks were all I could find and I could not be governed by these marks,—some broken fragments of the headlights over on the bank on the south side of the road. I would say it come out of the car. From the signs where it looked like it hit to where it stopped was around twenty to twenty five feet . . . I examined the right side of the road carefully, the north side, for some distance, and there was nothing over there that could be seen. I could not tell by the signs on the road where they actually come together, except the indications of glass and these marks . . . in my opinion. The broken glass indicated that the wreck occurred a little east of the marks on the road,—possibly 8 or 10 feet."

The second witness in rebuttal was Dr. J. B. Wheless, who testified: ". . . I saw Hugh Spivey . . . My record states I saw him at 7 p.m. I made an examination. There was some odor of alcohol on his breath. He had a lacerated nose, brush burns on his right knee and had a mild

concussion. I observed his actions . . . I think he was entirely oriented. I mean he was aware of his situation with reference to time, place and identity of persons . . . Concussion is jarring of the brain."

And, testimony of other witnesses in rebuttal tends to show that Felix Tant, the deceased, was not drinking intoxicating liquor at Polly's Kitchen on the day of the collision.

Verdict: Guilty of manslaughter as charged.

Judgment: Imprisonment for a period of not less than five (5) nor more than ten (10) years.

Defendant appeals therefrom and assigns error.

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

Gaither M. Beam and Lumpkin, Lumpkin & Jolly for defendant, appellant.

WINBORNE, J. Is the evidence shown in the record and case on appeal here under consideration, taken in the light most favorable to the State, sufficient to support a verdict of guilty of manslaughter? While there are numerous other exceptions, this is the question on which decision here must rest. Testing the sufficiency of the evidence in the light of applicable principles of law, leads to the conclusion that the evidence is sufficient to take the case to the jury and to support the verdict rendered, and we so hold. See *S. v. Cope,* 204 N.C. 28, 167 S.E. 456, and the recent cases of *S. v. Wooten,* 228 N.C. 628, 46 S.E. 2d 868, and *S. v. Blankenship,* 229 N.C. 589, 50 S.E. 2d 724, and the cases therein cited. Applicable principles of law in respect to culpable negligence are fully stated and re-stated there. Hence, elaboration here would be repetitious.

There are groups of exceptions to the charge assigned as error: One group is directed to portions of the charge in which the court was stating contentions of the State. And it does not appear that the attention of the court was called to any misstatement of contention made. Hence, these exceptions are untenable. *S. v. McNair,* 226 N.C. 462, 38 S.E. 2d 514, and cases cited.

Another group is to portions of the charge as given, under which it is contended in the brief of appellant, that the court failed to charge the jury as required by G.S. 1-180. In this connection, it appears that there is in the record no assignment of error to the effect that the court failed to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon as required by G.S. 1-180. Hence, the question of failure to charge, debated in respect to portions of the charge as given, is not presented.

And other exceptions to the charge, as well as all other assignments of error, fail to show prejudicial error.

In conclusion, regardless of how we might or might not have been disposed to vote on the facts, had we been in the jury box, error in law is not made to appear on this appeal.

No error.

STATE v. EDWARD GREEN.

(Filed 4 May, 1949.)

1. Abortion § 10—

Where, in a prosecution upon a warrant charging that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, G.S. 14-44, the evidence tends to show that the acts of defendant were committed prior to the time the child was quick, nonsuit for fatal variance between the indictment and proof should have been allowed.

2. Abortion §§ 2, 4—

The offenses proscribed by G.S. 14-44 and G.S. 14-45 are separate and distinct: G.S. 14-44 relates to the destruction of the child, which must be quick before it has independent life, and G.S. 14-45 relates to the miscarriage of, or injury to, or destruction of the woman.

SEAWELL, J., dissents.

APPEAL by defendant from *Pless, Jr., J.*, at 29 November Term, 1948, of CALDWELL.

Criminal prosecution upon indictment found as a true bill at a regular term of Superior Court convening on 29 November, 1948, charging that "Edward Green late of the County of Caldwell on the 25th day of August in the year of our Lord one thousand nine hundred and forty eight, with force and arms, at and in the county aforesaid, did unlawfully, willfully and feloniously advise and procure one Sybil Winkler, a female person, who was pregnant with child, to take certain medicine, drug or other substance with intent thereby to destroy such child, same not being necessary to preserve the life of the said Sybil Winkler against the form of the statute," etc.

Defendant, upon arraignment, pleaded not guilty.

Upon the trial in Superior Court, the State offered Sybil Winkler as a witness. Her testimony may be summarized as follows: That defendant started going with her in May, 1948, and she became pregnant by him on June 14th; that she told defendant of her pregnancy, and he told her that

he would get for her something to get rid of the child; that at that time she had passed two or three periods; that he brought to her some medicine, quinine capsules, twice, 12 at a time, from a drug store; that she took all but two; that then defendant took her in his car to a doctor in Lenoir for shots, and said that would get rid of it; that she was given some kind of black pills, 12 in a box; that the doctor gave her a shot in the arm with a hypodermic needle; that she went back to the doctor and he gave her another shot; that after she had taken the medicine and the shots, defendant did not advise her "any further about how to get rid of the baby"; but that he took her to another doctor in Hickory for an operation and went into the doctor's office with her; that the doctor did not operate,—said she "was too far gone"; that this was about two weeks after she went to the doctor in Lenoir; and that the last time she went to the doctor was in October.

And this witness further testified that June 14th was the correct date "of her pregnancy"; that she first felt the movement of the child in her body at four months; that the doctor told her that is "when you are supposed to feel the movement"; that that was after 25 August, 1948, and about two and a half months before the time she was testifying; and that she was then six months pregnant.

And the State offered testimony of other witnesses tending to corroborate that given by Sybil Winkler.

Verdict: Guilty.

Judgment: That defendant be imprisoned in the State Penitentiary at hard labor for not less than two nor more than three years.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorneys-General Bruton and John R. Jordan, Jr., Member of Staff, for the State.

W. H. Strickland for defendant, appellant.

WINBORNE, J. Appellant's exception to the denial of his motion for judgment as in case of nonsuit at the close of all the evidence is well taken, for that there is a fatal variance between the offense charged in the bill under which defendant stands indicted, and the proof offered. *S. v. Forte,* 222 N.C. 537, 23 S.E. 2d 842, and cases cited. See also *S. v. Jordon,* 227 N.C. 579, 42 S.E. 2d 674. These decisions were by unanimous Court.

The bill of indictment against defendant is framed in accordance with the provisions of G.S. 14-44, formerly C.S. 4226, that is, that defendant advised and procured a certain female person, who was pregnant with child, to take certain medicine, drug or other substance "with intent

thereby to destroy such child," etc. But the proof, taken in light most favorable to the State, fails to show that at the time defendant so advised and procured the woman to take the medicine, drug or other substance, she was "pregnant or quick with child" within the meaning of G.S. 14-44, as interpreted by this Court in *S. v. Forte, supra,* and *S. v. Jordon, supra,* which is an essential element in the offense to which G.S. 14-44 relates.

Adverting to the decisions in those cases, it is seen that in this State there are two statutes pertaining to abortion, G.S. 14-44, formerly C.S. 4226, and G.S. 14-45, formerly C.S. 4227. The distinction between the offenses to which these two statutes relate is pointed out in this manner: In pertinent part G.S. 14-44, formerly C.S. 4226, makes it unlawful for any person to administer drugs to a woman "either pregnant or quick with child . . . with intent thereby to destroy such child" when it is not necessary to do so to preserve the life of the mother. On the other hand, in pertinent part G.S. 14-45, formerly C.S. 4227, makes it unlawful for any person to advise and procure a pregnant woman to take medicine "with intent thereby to procure the miscarriage of . . . or to injure or destroy such woman." That is, the first G.S. 14-44, formerly C.S. 4226, relates to the destruction of the child, and the second, G.S. 14-45, formerly C.S. 4227, to the miscarriage of, or to the injury or destruction of the woman,—manifestly two separate and distinct offenses.

Moreover, as to how far the pregnancy shall have advanced before the child is capable of being destroyed, it is held in *S. v. Forte, supra,* that the general rule is that the child with which the woman is pregnant must be so far advanced as to be regarded in law as having a separate existence, —a life capable of being destroyed. "Life" as stated by Blackstone, "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 Bl. Com. 129. This ordinarily does not occur until four or five months of pregnancy have elapsed. If pregnancy has not advanced sufficiently so that there is a living child, that is, a quick child, then the felonious destruction of the fetus would not constitute a destruction of the child. Indeed, in *S. v. Jordon, supra,* it is said that the words "pregnant or quick with child" as used in G.S. 14-44 means "pregnant, *i.e.* quick with child" or "pregnant with child that is quick."

Applying these principles to the case in hand, the evidence shown in the record on this appeal, taken in the light most favorable to the State, fails to show that at the time defendant advised and procured medicine for the pregnant woman to take, and at the time he took her to the doctor in Lenoir where she was given medicine and shots with hypodermic needle, her pregnancy had advanced to that stage when the child is capable of being destroyed. In this connection the visit to the doctor in Hickory is not of probative value since the purpose of it was in vain.

Hence, the evidence fails to make out a case for the jury on the charge contained in the present bill of indictment.

The judgment below is

Reversed.

SEAWELL, J., dissents.

JAMES ROBERT HUNTER, JR., v. KATHLEEN HUNTER NUNNAMAKER ET AL.

(Filed 4 May, 1949.)

1. Descent and Distribution § 6—

In this proceeding to determine the proper distribution of the estate to deceased's heirs, respondent introduced certified copy of her adoption by deceased issued by a charitable organization of another state authorized by act of the assembly of such other state to grant adoptions. Petitioner did not attack the validity of the act authorizing the charitable organization to grant adoptions. *Held:* It was error for the court to hold that the adoption was not valid and that therefore the respondent was not entitled to her distributive share of the estate.

2. Constitutional Law § 10b—

The courts will not declare an act of assembly unconstitutional even when clearly so, except in cases properly calling for the determination of its validity, and where the parties refrain from raising the question by plea or otherwise, the court may not determine that an act of assembly is unconstitutional but must act upon the presumption of constitutionality.

APPEAL by respondent, Kathleen Hunter Nunnamaker, from *Hamilton, Special Judge,* September Term, 1948, of WAKE.

Special proceeding to determine proper distribution of moneys paid into Clerk's office by administrator of estate of Eugenia E. Hunter pursuant to provisions of G.S. 28-160.

The petition alleges that Eugenia E. Hunter, late of Wake County, died intestate on 14 June, 1947; that T. Lacy Williams was duly appointed administrator of her estate, and that on 2 July, 1948, said administrator filed his final account, which was approved, and contemporaneously therewith deposited with the Clerk the net proceeds of the estate amounting to $4,957.32 for distribution among the lawful heirs-at-law, as this sum arose principally from the sale of lands of which the deceased died seized.

There is also allegation that the petitioner, James Robert Hunter, Jr., is an adopted son of the deceased and her late husband, James Robert

Hunter; and, as such, is an heir-at-law of the deceased. His adoption was had in the Commonwealth of Virginia on 27 September, 1917.

There is further allegation that the respondents, Kathleen Hunter Nunnamaker and Isabel Hunter Hilmer, also claim to be heirs-at-law of the deceased by adoption, but it is not known whether they are legally adopted daughters of the deceased, nor whether the deceased left her surviving any other heirs-at-law or next of kin.

The petition concludes with the prayer that the court judicially determine the respective rights of petitioner and respondents, and all other persons, who may have an interest in or claim upon the proceeds arising from the estate of the deceased.

The respondent, Isabel Hunter Hilmer, made no claim to any part of the funds in the hands of the Clerk and filed no answer to the petition. She has no interest in the proceeding.

Respondent, Kathleen Hunter Nunnamaker, filed answer, admitted all the allegations of the petition and alleged that she was legally adopted by the deceased and her late husband on 23 December, 1904, in the City of Columbia, South Carolina, which made her a lawful heir of the deceased and entitles her to share in the net proceeds of the estate now in the hands of the Clerk.

The answering respondent offered a certified copy of her adoption issued to the deceased and her husband on 23 December, 1904, by the Epworth Orphanage of the South Carolina Conference of the Methodist Episcopal Church, South, under and by virtue of authority vested in the Orphanage by Act of the South Carolina General Assembly, 22 St. at Large, 319, approved 28 February, 1896.

A jury trial was waived, the court found the facts and concluded that the petitioner was the sole heir-at-law of the deceased; that the respondent, Kathleen Hunter Nunnamaker, had not been legally adopted by the deceased and her husband, and was therefore not entitled to share in the distribution of the net proceeds of the subject estate.

The respondent, Kathleen Hunter Nunnamaker, excepts and appeals, assigning errors.

J. L. Emanuel for petitioner, appellee.

J. L. Morehead for respondent, appellant.

STACY, C. J. The appeal poses the question whether Kathleen Hunter Nunnamaker is entitled to share in the distribution of the net proceeds of the estate of Eugenia E. Hunter. The trial court answered in the negative. We are inclined to a different interpretation of the record.

On the hearing, the appellant offered a certified copy of her adoption by the deceased and her late husband in the City of Columbia, Richland

County, South Carolina, on 23 December, 1904. She had been a ward in the Methodist "Epworth Orphanage of the South Carolina Conference," a charitable organization chartered by Act of Assembly in that State and authorized to grant adoptions. 1 Am. Jur. 633. Nothing else appearing, this would seem, *prima facie* at least, to make her an heir-at-law of the deceased. 1 R.C.L. 598.

While no specific reason is assigned for holding the appellant's adoption illegal, it may be accepted as was stated on the argument, that the trial court regarded the legislative grant of adoptive powers to the Epworth Orphanage violative of the South Carolina Constitution, and hence the exercise of such authority by the Orphanage was a nullity. Evidently, the trial court, in reaching this conclusion, did not have before it the cases of *Epworth Orphanage v. Wilson* and *Same v. Manning,* 185 S.C. 243, 193 S.E. 644, where it was held by the Supreme Court of South Carolina that the statute incorporating this Orphanage could not be declared unconstitutional in the absence of a showing that the General Assembly in passing the statute did not comply with the pertinent constitutional requirement that it should have a concurrent resolution adopted by a two-thirds vote of each House authorizing the introduction of the bill. And no such showing is sought to be made here. Indeed, the constitutionality of the act incorporating the Epworth Orphanage and granting it powers of adoption was not before the court for determination. The courts do not declare Acts of Assembly unconstitutional even when clearly so, except in cases properly calling for the determination of their validity. *S. v. Lueders,* 214 N.C. 558, 200 S.E. 22. In the first place, they are presumed to be constitutional, and it is only in the exercise of judicial power, properly invoked, that the courts are authorized to render harmless or set at naught any Act of Assembly. *Wood v. Braswell,* 192 N.C. 588, 135 S.E. 529; *Moore v. Bell,* 191 N.C. 305, 131 S.E. 724.

The petitioner disavows any assault upon the legality of appellant's adoption. In respect of this question, which the parties have refrained from raising by plea or otherwise, he stands mute and rightly so, perhaps, for it may be doubted whether he would be permitted to interpose such a challenge in the circumstances of the case. *Cribbs v. Floyd,* 188 S.C. 443, 199 S.E. 677; 1 Am. Jur. 676.

Error and remanded.

STATE v. DEWITT SKIPPER, ROY STEELE, ANNA RUDERMAN, GRADY H. McMAHAN, ALIAS GEORGE H. RUDERMAN.

(Filed 4 May, 1949.)

1. Criminal Law § 52a (1)—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State.

2. Criminal Law § 52a (3): Larceny § 7—

Circumstantial evidence of defendant's guilt of larceny from the person *held* sufficient to be submitted to the jury and overrule defendant's motion to nonsuit.

APPEAL by defendant Skipper from *Shuford, Special Judge,* September Term, 1948, of MECKLENBURG. No error.

The four defendants were charged with larceny from the person of Elwin P. Joyce.

The evidence offered by the State tended to show that the prosecuting witness Joyce, a corporal in the U. S. Marine Corps, and another marine, were in a booth in a place near Charlotte known as "Ellie's Place," drinking beer, when defendants Skipper and Steele joined them. Skipper offered a bottle of whiskey from which they drank. Soon the party was augmented by defendants Ruderman and McMahan who seemed well acquainted with the other defendants. Neither Joyce nor his companion had ever seen any of the defendants before. Before long Joyce and the four defendants left in an automobile belonging to Skipper and driven by Steele to get some more whiskey. At this time Joyce had $180 in money in his pocket. After riding around the city, they drove out on a dirt road. Then they stopped and got some whiskey, and shortly thereafter Joyce said he "blacked out, due to the fact that the whiskey that Skipper gave me, it might have been doped, it could have." That was about 4 p.m. When Joyce woke up about 7 p.m. he was in some woods off the road. His erstwhile companions were gone, and so were his watch and money. He walked to a telephone and called the police.

The defendant Ruderman testified that at some drinking place Joyce who was very drunk became engaged in a quarrel with Steele in the course of which Steele knocked Joyce down and took his wallet and gave some money therefrom to the man in the house; that at this time Skipper was drunk and asleep in the car; that when they drove off again as Joyce continued trying to fight, McMahan and Steele put him out of the car off the road. The four defendants then drove to Monroe and returned to Ellie's place about 9:30 p.m., where they were shortly thereafter arrested. Ruderman testified, "Steele and Skipper repaired a car at Monroe."

When arrested officers found neither watch nor money on any of the defendants, save $2 in the possession of Ruderman which Steele said "the man had paid Skipper for working on his car." Joyce testified they were not in any fight; that he did not buy any whiskey, and did not leave the car after he got in it, "until I was robbed or thrown out"; that Skipper was on the back seat and did not get out while witness was conscious; that Skipper appeared to be or pretended to be asleep. Joyce's companion, who did not go on the ride, testified that when Skipper got in the car he seemed to walk all right.

Skipper did not testify nor did McMahan.

The jury rendered verdict of guilty as charged as to each defendant, and from judgment imposing sentence the defendant Skipper appealed.

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

Ben F. Wellons for defendant, appellant.

DEVIN, J. The only exception brought forward in the defendant's appeal is the denial by the trial court of his motion for judgment of nonsuit. We have hereinbefore set out a summary of the pertinent evidence, and considering this in the light most favorable to the State (*S. v. Massengill,* 228 N.C. 612, 41 S.E. 2d 713), we are of opinion that there was sufficient evidence, pointing to the guilt of the appealing defendant as having participated in the commission of the crime charged in the bill of indictment, to warrant submission of the case to the jury. This view is supported by what was said in the recent cases of *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Braxton, ante,* 312; and *S. v. Flynn, ante,* 293. The motion for judgment of nonsuit was properly denied.

In the trial we find

No error.

J. D. MARTIN v. TOWN OF HOLLY SPRINGS, A MUNICIPAL CORPORATION.

(Filed 4 May, 1949.)

Appeal and Error § 31e—

Where pending defendant's appeal from the denial of *mandamus* to compel a municipality to issue him an "off premises" license for beer and wine at his grocery store situate within 600 feet of a church, the General Assembly has passed an act proscribing the issuance of license for the sale of beer or wine within one and one-half miles of said church, the question sought to be presented has become academic, and the appeal will be dismissed.

MARTIN *v.* HOLLY SPRINGS.

APPEAL by plaintiff, J. D. Martin, from *Harris, J.,* at the November Term, 1948, of WAKE.

On 22 September, 1948, the plaintiff filed a duly verified application, which fulfilled all of the requirements of G.S. 18-75, with the governing body of the defendant, the Town of Holly Springs, a municipality in Wake County, for an "off-premises" license authorizing him to sell beer and wine at retail at his grocery store in Holly Springs under the provisions of the Beverage Control Act of 1939, and tendered to such governing body the sum of $15.00 in payment of the prescribed municipal license tax. G.S. 18-74. Such grocery store is located within six hundred feet of the Holly Springs Baptist Church in Holly Springs Township, Wake County. The plaintiff made it truly to appear to the governing body of the defendant by his application and other proof that he is not less than twenty-one years of age; that he has been a *bona fide* citizen and resident of North Carolina and the United States ever since his birth; that he has never been convicted of a felony or other crime involving moral turpitude; that he had not been adjudged guilty of violating the prohibition laws, either State or Federal, within the two years prior to the filing of his application; and that he had not completed a sentence for violation of the prohibition laws within two years prior to the filing of his application. On 24 September, 1948, the governing body of the defendant considered the plaintiff's application and adjudged it to be "regular and in order," but refused to grant him the license requested "due to circumstances beyond our control." The plaintiff thereupon brought this action against the defendant, tendering the amount of the prescribed municipal license tax and praying a *mandamus* to compel the issuance of an "off-premises" license authorizing plaintiff to sell beer and wine at retail at his grocery store in Holly Springs.

Upon the complaint, which averred the matters set out above, the court issued an order requiring the defendant to show cause why a writ of *mandamus* should not issue in accordance with plaintiff's prayer. The defendant did not deny the allegations of the complaint by answer or otherwise, but made a return to the order to show cause asserting that the plaintiff is "not a man of good character" and ought not to be granted the license sought on account of the things appearing in the ensuing paragraph.

Prior to 1 May, 1929, the plaintiff was convicted of minor assaults twice, of petty traffic violations five times, and of unlawfully possessing intoxicating liquors twice, and was compelled to pay fines totaling $70.00 and to serve six months "on the roads" as punishment therefor. On one occasion he was bound over to the Superior Court of Wake County on the charge of larceny and receiving, but the action was never brought to trial

and terminated in a *nolle prosequi* with leave in April, 1929. Since that time, the plaintiff has been law-abiding.

When the case at bar was heard, the court found facts conforming to the allegations of the complaint and adjudged that the plaintiff had not been convicted of any felony or other crime involving moral turpiture, but concluded that he "is a person of bad character and . . . not entitled to said license" because of his court record antedating 1 May, 1929. Assigning this conclusion as the basis for its action, the court declined to issue a *mandamus* and dismissed the action, and the plaintiff appealed, assigning errors.

Stanley L. Seligson and J. L. Emanuel for plaintiff, appellant.

N. F. Ransdell and Robert A. Cotton for defendant, appellee.

ERVIN, J. Since this case was argued in this Court, the General Assembly of 1949 has duly enacted Senate Bill No. 142 making it unlawful for any person to sell beer or wine "within one and a half miles of the Holly Springs Baptist Church in Holly Springs Township in Wake County," and prohibiting the governing body of the Town of Holly Springs and "any other agency within the State of North Carolina" from issuing any license to any person for the sale of beer or wine within such territory. The plaintiff applied for the "off-premises" license for a particular place, to wit, his grocery store in the Town of Holly Springs, as required by statute. G.S. 18-75. Since this place is situated "within one and a half miles of the Holly Springs Baptist Church in Holly Springs Township in Wake County," the question of whether the governing body of the Town of Holly Springs wrongfully refused to issue to plaintiff the license for which he applied has been rendered academic by the action of the General Assembly of 1949, and any decision thereof by this Court would be a useless performance. *Wilson v. Comrs. of Guilford,* 193 N.C. 386, 137 S.E. 151. In consequence, the appeal is

Dismissed.

H. L. WILSON, ADMINISTRATOR OF ESTATE OF WILLIAM N. WILSON, v. J. N. CHASTAIN, E. L. TORRENCE, AND RULANE GAS COMPANY, A CORPORATION.

(Filed 4 May, 1949.)

1. Death § 4—

The requirement that an action for wrongful death be brought within one year after such death is a condition annexed to the cause of action itself, and not a statute of limitation, and the personal representative must

allege and prove that his action is instituted within the time prescribed. G.S. 28-173.

2. Pleadings § 15—

Upon demurrer, the pleading must be construed liberally in favor of the pleader, giving him every reasonable intendment and presumption therefrom, and the pleading must be fatally defective before it will be wholly rejected.

3. Death § 6—

In this action for wrongful death it was alleged that death occurred "on or about midnight of November 21-22, 1947, and which is less than one year next preceding the institution of this action." The summons and complaint were stamped "filed Nov. 22, 1948, at 2:35 p.m." *Held:* Demurrer on the ground that it appeared upon the face of the complaint and record that the action was not brought within one year of death, was properly overruled.

APPEAL by defendant, Rulane Gas Company, from *Clement, J.,* at February Term, 1949, of MECKLENBURG.

Plaintiff sued defendants for damages for the death of his intestate upon a complaint alleging that such death, "which occurred on or about midnight of 21-22 November, 1947, and which is less than one year next proceeding the institution of this action, was due to, caused by, and followed as a direct and proximate result of the joint and concurrent negligence of the defendants and each of them" in specified particulars. Summons was issued and served 22 November, 1948. Both the summons and the complaint bear stamped notations reading as follows: "Filed Nov. 22, 1948, at 2:35 P. M. J. Lester Wolfe, C. S. C." The defendant, Rulane Gas Company, demurred "to the complaint of the plaintiff for that it affirmatively appears upon the face of the complaint and the record that the action is one for wrongful death, which said action was not instituted within a year of the plaintiff's intestate's death." The court overruled the demurrer, and the defendant, Rulane Gas Company, appealed, assigning such ruling as error.

Henry E. Fisher and Walter K. Covington, for plaintiff, appellee.

Jones & Small for defendant, Rulane Gas Company.

ERVIN, J. When a personal representative sues for damages for the wrongful death of his decedent, he must allege and prove that his action "is brought within one year after such death." G.S. 28-173. This is true because the statutory requirement that the suit must be commenced within that time is not a mere statute of limitations, but is a condition annexed to the cause of action itself. By this it is meant that the right given by the statute is one to sue within the specified period, and not thereafter.

McCoy v. R. R., 229 N.C. 57, 47 S.E. 2d 532; *George v. R. R.*, 210 N.C. 58, 185 S.E. 431; *Curlee v. Power Co.*, 205 N.C. 644, 172 S.E. 329; *Mathis v. Manufacturing Co.*, 204 N.C. 434, 163 S.E. 515; *Davis v. R. R.*, 200 N.C. 345, 157 S.E. 11; *Tieffenbrun v. Flannery*, 198 N.C. 397, 151 S.E. 857; 68 A.L.R. 210; *Neely v. Minus*, 196 N.C. 345, 145 S.E. 771; *Hanie v. Penland*, 193 N.C. 800, 138 S.E. 165; *McGuire v. Lumber Co.*, 190 N.C. 806, 131 S.E. 274; *Hatch v. R. R.*, 183 N.C. 617, 112 S.E. 529; *Bennett v. R. R.*, 159 N.C. 345, 74 S.E. 883; *Gulledge v. R. R.*, 147 N.C. 234, 60 S.E. 1134; 125 Am. St. Rep. 544 reh. den. 148 N.C. 567, 62 S.E. 732; *Best v. Town of Kinston*, 106 N.C. 205, 10 S.E. 997; *Taylor v. Iron Co.*, 94 N.C. 525.

A demurrer is "the formal mode of disputing the sufficiency in law of the pleading to which it pertains." *Conrad v. Board of Education*, 190 N.C. 389, 130 S.E. 53; *Manning v. R. R.*, 188 N.C. 648, 125 S.E. 555. The demurrer interposed by the defendant, Rulane Gas Company, asserts, in substance, that no cause of action is stated against it by the plaintiff because it "appears upon the face of the complaint and the record" that the action was not brought within one year after the death of plaintiff's intestate. In ruling on a demurrer to a pleading, the pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader, and the pleading must be fatally defective before it will be wholly rejected. G.S. 1-151; *Winston v. Lumber Co.*, 227 N.C. 339, 42 S.E. 2d 218. Although the allegations of the complaint relating to the date of the intestate's death may be somewhat lacking in desired plainness and conciseness of statement, they do set forth the specific averment that such event took place "less than one year next preceding the institution of this action." In consequence, the complaint is sufficient to survive the demurrer.

The other questions debated in the briefs and on the argument do not arise on the present record.

The judgment overruling the demurrer is

Affirmed.

JOHN A. WINFIELD v. ROBERT JACKSON SMITH AND COLONIAL STORES, INC.

(Filed 11 May, 1949.)

1. Trial § 22a—

On motion to nonsuit, the evidence supporting plaintiff's claim must be considered in the light most favorable for him, and he is entitled to every reasonable inference to be drawn therefrom.

2. Automobiles § 18h (2)—

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, *is held* sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. G.S. 20-141, G.S. 20-148, G.S. 20-150.

3. Negligence § 19c—

Nonsuit on the ground of contributory negligence is error unless this conclusion is the only reasonable inference that can be drawn from plaintiff's own evidence, taken in the light most favorable to him.

4. Automobiles § 18h (3)—Driver striking vehicle blocking highway in attempting to pass third vehicle held not contributorily negligent as matter of law.

Plaintiff's evidence was to the effect that a heavy fog limited visibility to 100 or 125 feet, that after rounding a curve and traveling some 100 feet he first saw defendant's truck approaching from the opposite direction when it was approximately 100 feet away and as it was in the act of passing another vehicle traveling in the same direction, that he immediately applied his brakes, that his tires skidded on the damp pavement, veering his car to the left, so that plaintiff's left front wheel was nineteen inches to his left of the center of the highway when he struck the side of defendant's tractor which had turned back to its right of the highway although the trailer still was blocking his lane of traffic, and that under the circumstances plaintiff did not have time to turn his car back to the right and, because of the fog, could not see to drive on the shoulder or in the ditch to his right if he had had room or time to do so. *Held:* Defendants' motion to nonsuit on the ground of contributory negligence was properly denied, defendants' evidence in conflict with that of plaintiff being ignored.

5. Trial § 22b—

On motion to nonsuit, defendants' evidence will not be considered except when not in conflict with that of plaintiff; it may be used to explain or make clear that of plaintiff.

6. Automobiles § 8g—

The mere fact of the skidding of an automobile, without other evidence, does not necessarily impute negligence to the driver.

7. Automobiles § 8j—

Where a sudden emergency is created by defendants' negligence, plaintiff will not be held to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made.

8. Automobiles § 18g (5)—

Physical evidence at the scene of the accident in suit *held* not such as to necessarily negative plaintiff's testimony as to speed.

9. Automobiles § 12a—

Driving at a speed of 30 to 35 miles per hour in a heavy fog limiting visibility to 100 or 125 feet does not compel the conclusion that the driver was exceeding the speed at which he could stop within the range of his visibility.

STACY, C. J., took no part in the consideration or decision of this case.

WINBORNE, J., dissenting.

BARNHILL, J., concurs in dissent.

APPEAL by defendants from *McSwain, Special Judge,* September Term, 1948, of WAKE. No error.

This was an action to recover damages for personal injury sustained as result of collision between an automobile plaintiff was driving and a truck of defendant Colonial Stores, Inc., being driven by defendant Smith. It was alleged that plaintiff's injury was caused by the negligence of defendant Smith who was at the time acting in the scope of his employment by the corporate defendant.

The collision occurred about 6:10 a.m., 18 June, 1947, on State Highway 70, six miles west of Smithfield. Plaintiff was driving a Chevrolet passenger automobile in an easterly direction and defendants' motor tractor-trailer truck was being operated in the opposite direction. At the locality of the collision the road was straight, though there was a curve west of this point 250 or 300 feet distant. The road was surfaced with asphalt pavement 18 feet wide with dirt shoulders 4½ feet wide on each side. At the time of the collision the scene was enveloped in a heavy fog, denser near the ground, and the surface of the asphalt was damp due to moisture condensed from the fog.

The plaintiff testified his automobile was in good condition, recently inspected, and brakes adjusted, and that he was driving at speed of 30 to 35 miles per hour on his right side of the road with his parking or fog lights turned on. Due to the fog, visibility was reduced to 100 to 125 feet. After he came around the curve he saw at a distance of 100 feet away the defendant's truck approaching at a speed of 35 to 45 miles per hour, and in the act of attempting to pass the automobile of T. H. Underwood proceeding in same direction (west), so that the truck occupied the south or plaintiff's right-hand lane of the highway. The front of the truck was just even with the front of the Underwood car, blocking the road. Confronted with this emergency plaintiff immediately applied his brakes, and his automobile continued in same direction about 6 feet

and then skidded slightly to the left. In the meantime the driver of defendant's truck apparently becoming aware of plaintiff's automobile at about the same time had turned to his right, and Underwood also had quickly turned to his right off the road and stopped. The tractor portion of defendant's vehicle had crossed the center line of the highway to its right side, leaving the trailer still on the left or southern traffic lane, at the instant plaintiff's automobile collided with defendant's truck, the left front of plaintiff's automobile striking the left side of defendant's tractor or between tractor and trailer. Plaintiff sustained serious injury.

Plaintiff testified there were lights on the Underwood car, but he saw none on the truck; that due to the fog he could see only 100 to 125 feet in front and for that reason was driving carefully at a moderate rate of speed; that due to the unchecked speed of the truck as the vehicles approached each other he calculated only a brief space of time elapsed from the instant he saw the truck loom out of the fog 100 feet in front of him until the impact—a "split second" as he termed it; that he had no reason to anticipate the approach of a truck traveling on his right or southern side of the highway; that the truck approached so quickly and the collision so imminent he could not turn his automobile to the right and due to the fog he could not see off on the shoulder or the ditch, and that he applied his brakes and held his course. He testified he did not at any time turn his automobile to the left side of the road; that the marks on the pavement showed his rear wheels skidded and the left front wheel was 19 inches over the center line; that if he had not collided with the front portion of the tractor he would have struck the trailer which was in plaintiff's lane of traffic. He offered evidence to show that defendant's tractor-trailer was 40 feet long, 8 feet wide and the trailer 12 feet high. He testified, "it was split second timing in there from the time I saw this truck. When the car started skidding I had my hands on the wheel. It might have been that the brake on the left wheel applied a little harder than on the right, and that pulled the car that way. I guess I could have turned to my right if I had enough time; I don't know about that. Evidently I didn't have enough time to turn it back in the split second of time I had. The car skidded. . . . When I threw the brakes, the minute the impulse was made to put the brakes on, the car skidded." He testified if he had turned into the ditch it might have been much worse—"you couldn't see." The defendant Smith, driver of defendant's truck, testified that plaintiff applied his brakes and skidded over to his left side of the road, and that he saw the marks where he skidded. It was also in evidence that Smith said when he was abreast the Underwood car he saw the lights on plaintiff's automobile as he came around the curve; that he himself was traveling 35 to 40 miles per hour, and when he

saw plaintiff's car he "speeded up a little." Underwood testified that at the time of the collision the truck had slowed up and was gradually coming to a stop. The patrolman who was offered as a witness by the defendants testified the only tire mark left by the truck was a slight dragging at the point of impact.

The defendants offered evidence tending to show that plaintiff's automobile struck the truck two feet over the center line; that the marks of plaintiff's tires gradually veered to his left; that from the point they started to the point of impact was 90 feet; that skid marks were straight down the highway on his right side for approximately 12 to 15 feet; then it was a sidewise skid leading to point of impact with all four tires making an impression; that at the beginning it was not sidewise, but as it got to about the center of the road it began sidewise sliding off toward the side. "The sidewise marks went in the neighborhood of 75 or 78 feet before the point of impact"; that at the time of collision the tractor was entirely on its right side of the road, and only the rear end of the trailer was in the left or southern lane of traffic, occupying some 4 or 5 feet of that lane, and that there was room for an automobile to pass by using a portion of the shoulder. Defendant Smith testified he could see 300 feet. Underwood testified he could see only 100 to 125 feet, that it was very foggy making it difficult to drive. He said while there was room for a car to have passed on the shoulder on the right, if the driver "could have seen where he was going. The fog was keeping him from seeing. I couldn't see." . . . "I got off the highway. It was quick work." He said if the plaintiff had kept straight on down the highway he would have hit the trailer. Plaintiff testified: "I skidded nothing like as much as 90 feet. I didn't travel that far between the time I saw the car and this happened. From the time I applied my brakes and went 3 or 4 or 5 feet straight and then started skidding to the left, I won't say it was over 10 feet altogether. The whole business wasn't over 10 feet. I didn't see a skid mark there approximately 90 feet." Defendant Smith, the driver of the truck, did not testify to the rate of speed of plaintiff's automobile other than to call it "a pretty good rate of speed."

Defendants' motion for judgment of nonsuit was denied, and their prayers for peremptory instructions were refused. The jury answered the issues as to negligence and contributory negligence in favor of the plaintiff and awarded damages in sum of $4,000. From judgment on the verdict defendants appealed.

J. M. Broughton and C. Woodrow Teague for plaintiff, appellee.

Ehringhaus & Ehringhaus for defendants, appellants.

DEVIN, J. The question chiefly debated on the defendants' appeal in this Court was the correctness of the ruling below denying the defendants' motion for judgment of nonsuit. While not conceding evidence of actionable negligence on the part of defendants, it was urged that from the plaintiff's evidence it necessarily followed as a matter of law that he was chargeable with contributory negligence, barring recovery.

Keeping in mind the established rule that on the motion for nonsuit the evidence tending to support the plaintiff's position must be considered in the light most favorable for him, and that he is entitled to the benefit of every reasonable inference to be drawn therefrom (*Nash v. Royster,* 189 N.C. 408, 127 S.E. 356), we think there was evidence of negligence on the part of the driver of defendants' truck, in that he drove on his left side of the road in attempting to pass another motor vehicle proceeding in the same direction at a time when he was within 300 feet of a curve, his vision obscured by a heavy fog, at a speed of 35 to 40 miles per hour, and meeting an oncoming automobile traveling in the lane of traffic into which he had thus driven his truck. Plaintiff's evidence would seem to indicate not only failure on defendants' part to observe the rule of the prudent man under the circumstances, but also to show violation of several provisions of the statutes regulating the operation of motor vehicles on the highway. G.S. 20-141 (c); G.S. 20-148; G.S. 20-150. Accordingly evidence of such improper and unlawful conduct, proximately resulting in injury to the plaintiff, warranted submission to the jury of the issue of defendants' negligence. *Joyner v. Dail,* 210 N.C. 663, 188 S.E. 209; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

The defendants both by their motion to nonsuit and by prayers for peremptory instructions to the jury present the question whether from the evidence of the plaintiff there was such a showing of contributory negligence on his part as to preclude recovery. For the determination of the question thus raised the rule is that judgment of nonsuit on the ground of contributory negligence should not be granted "unless the plaintiff's evidence, taken in the light most favorable to him, so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom." *Dawson v. Transportation Co., ante,* 36. And in the consideration of this motion the court "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." *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. To justify the allowance of the defendants' motion on this ground contributory negligence must be established by plaintiff's evidence so clearly that no other conclusion seems permissible. *Atkins v. Transportation Co.,* 224 N.C. 688,

32 S.E. 2d 209. "As the burden of proof upon the issue of contributory negligence was upon defendants, it is the settled rule in this jurisdiction that judgment of nonsuit on this ground can be rendered only when a single inference, leading to that conclusion, can be drawn from the evidence." *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Hobbs v. Drewer,* 226 N.C. 146, 37 S.E. 2d 121; *Cole v. Koonce,* 214 N.C. 188, 198 S.E. 637; *Manheim v. Taxi Corp.,* 214 N.C. 689, 200 S.E. 382.

Examining the evidence in this case in the light of these principles, we find this factual situation: According to plaintiff's testimony, on an early morning in June he was driving an automobile east along the highway at a speed of 30 to 35 miles per hour, a fog limiting his vision to 100 to 125 feet, when suddenly there loomed out of the fog the bulk of a large tractor-trailer bearing down on him in his or south lane of traffic at a distance of 100 feet. As the width of the pavement was only 18 feet, and the truck, 8 feet wide, was in the act of passing another automobile proceeding in same direction, the entire roadway was blocked, and the truck was traveling toward him at the rate of 35 to 40 miles per hour. As the plaintiff expressed it, this sudden emergency required "split-second" action. He immediately applied his brakes and kept his course. *Guthrie v. Gocking,* 214 N.C. 513, 199 S.E. 707. But the surface of the asphalt pavement was moist as result of the fog, and the application of brakes caused the tires to skid and the automobile after moving forward 6 feet veered slightly to the left, so that the left front wheel was 19 inches over the center line of the road when it struck defendants' tractor which had been pulled to the right, leaving the trailer still in the south lane of traffic. Under circumstances requiring instant action, according to his testimony, plaintiff did not turn his automobile to the left, and did not have time to turn it back to the right; could not, on account of the fog which was denser near the ground, see to drive on the shoulder or in the ditch on his right if he had had room or time to do so. He testified if he had not skidded but gone straight he might have missed the tractor but would have hit the trailer.

On the other hand the defendants call attention to the admitted fact that the collision occurred 19 inches over the plaintiff's left side of the center of the road, and it is argued that according to plaintiff's statement there is the reasonable inference to be drawn therefrom that he could and should have controlled the movement of his automobile and turned it back to the right in time to have avoided the collision. The defendants further call attention to the testimony of the highway patrolman as to the tire marks he observed on the highway tending to show that the brakes on plaintiff's automobile were applied 90 feet from the point of impact, and that after moving straight 12 to 15 feet, the tires slipped or skidded

sidewise for 75 or 78 feet to the collision, 2 feet over the center line of the road. The defendants deduce from this that plaintiff was driving at so high a speed that he could not control his automobile, and that under the circumstances of fog and moist pavement his speed showed a total disregard for the requirements of ordinary prudence, was under the circumstances negligent, and constituted a proximate contributing cause to his injury. However, the evidence of the patrolman was offered by the defendants and was not admitted by the plaintiff, and may not be considered on the motion to nonsuit. The credibility of the witness was a matter for the jury. The rule as stated by *Chief Justice Stacy* in *Harrison v. R. R.*, 194 N.C. 656, 140 S.E. 598, is that in considering the motion for nonsuit "the defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with the plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." *Gregory v. Ins. Co.*, 223 N.C. 124, 25 S.E. 2d 398; *Bundy v. Powell, supra.* The plaintiff testified the truck was only 100 feet away when he was first able to see it, and that it was approaching on his side of the road at 35 to 40 miles per hour. He points out that according to the testimony the driver of defendants' truck first slightly accelerated his speed, then slackened, so that though plaintiff applied his brakes and materially reduced his speed, not much more than a few seconds could have elapsed before the truck traversed the remaining portion of the space of 100 feet that on first view separated the meeting vehicles, and that if the plaintiff's evidence be accepted with all permissible inferences in his favor, his automobile could not have skidded 90 feet, or 75 feet sidewise, in the direction of the rapidly approaching truck within the time and space shown by plaintiff's testimony. Moreover, plaintiff testified to the contrary. He denied that he skidded anything like 90 feet. He said that when he applied his brakes he went straight 3 or 4 or 5 feet, and then skidded to the left, and that the entire distance covered was not more than 10 feet. He declared he did not turn his automobile to the left. It may be that plaintiff was mistaken, and that the distance between the vehicles was much greater than that stated by him; or he was traveling much faster than the limit he fixed. Here was a conflict in the testimony which the court properly submitted to the triers of the fact. Conflicting testimony necessitates trial by jury. *Stallings v. Ins. Co., ante,* 304; *Lavender v. Kurn,* 327 U.S. 645 (653). The mere fact of the skidding of plaintiff's automobile without other evidence of fault on his part, would not necessarily impute negligence to the driver. *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Butner v. Whitlow,* 201 N.C. 749, 161 S.E. 389; *Waller v. Hipp,* 208 N.C. 117, 179 S.E. 428; *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11; *Williams*

v. Thomas, 219 N.C. 727, 14 S.E. 2d 797; *Hoke v. Greyhound Corp.,* 227 N.C. 412 (420), 42 S.E. 2d 593. The circumstances here were materially different from those appearing in *York v. York,* 212 N.C. 695, 194 S.E. 486. In judging plaintiff's conduct on this occasion consideration must be given to the sudden emergency with which, according to his testimony, he was confronted, and he should not be "held to the same deliberation or circumspect care as in ordinary conditions." *Hinton v. R. R.,* 172 N.C. 587, 90 S.E. 756. The standard of conduct is that of the prudent man under like circumstances. According to plaintiff's testimony the emergency was created by the negligent conduct of the defendants. Under these circumstances the rule is stated in *Ingle v. Cassady,* 208 N.C. 497, 181 S.E. 562, as follows: "One who is required to act in emergency is not held by the law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated, would have made." *Hoke v. Greyhound Corp., supra; Butner v. Spease,* 217 N.C. 82, 6 S.E. 2d 808; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Sparks v. Willis,* 228 N.C. 25, 44 S.E. 2d 343.

We do not think the plaintiff's own testimony "proves him out of court" (*Hayes v. Tel. Co.,* 211 N.C. 192, 189 S.E. 499; *Godwin v. R. R.,* 220 N.C. 281, 17 S.E. 2d 137), nor are there indisputable physical facts which necessarily negative his oral evidence. *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88; *Wallace v. Longest,* 226 N.C. 161, 37 S.E. 2d 112. Driving at 30 to 35 miles per hour, with objects on or moving along the highway visible for 100 to 125 feet, would not seem to compel the conclusion that he was driving faster than his ability to stop within that distance. *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 251; *Allen v. Bottling Co.,* 223 N.C. 118, 25 S.E. 2d 388; *Caulder v. Gresham,* 224 N.C. 402, 30 S.E. 2d 312.

After careful consideration of the record in the case at bar, in relation to the defendants' motion, we cannot hold as a matter of law that on the evidence presented by the plaintiff his conduct on this occasion, under the circumstances as detailed by him, fell below the required standard of reasonable care and prudence, nor do we think on this evidence contributory negligence has been so clearly established that no other reasonable inference can be drawn therefrom. The issue of contributory negligence was for the jury rather than the court, and there was no error in refusing the peremptory instruction prayed for.

The defendants noted numerous exceptions to the judge's charge, but upon an examination of the charge as a whole we think the trial judge stated the principles of law applicable to the determinative issues in substantial accord with well considered decisions of this Court, and we are unable to find error therein, or in the rulings on the reception of testimony, which would warrant awarding another hearing. The jury

has determined the facts in favor of the plaintiff, and the result will not be disturbed.

In the trial we find

No error.

STACY, C. J., took no part in the consideration or decision of this case.

WINBORNE, J., dissenting: I am unable to agree that error prejudicial to defendants is not made to appear in the record on this appeal, particularly the exceptions (1) to denial of motions for judgment as in case of nonsuit and for directed verdict on the issue of contributory negligence, and (2) to admission of evidence to which Exception 1 relates.

In the first place, the evidence, even the testimony of plaintiff himself, as I read it, shows unmistakably that he was contributorily negligent in respect to the injury of which he complains, that is, that plaintiff was negligent and that his negligence was a proximate cause of his injury. *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Riggs v. Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *McKinnon v. Motor Lines*, 228 N.C. 132, 44 S.E. 2d 735; *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887.

All the evidence shows that the collision between plaintiff's automobile and the tractor of the corporate defendant's tractor-trailer-truck actually occurred on plaintiff's left, and on defendant's right side of the center line of the road. This constitutes a violation by plaintiff of the statute, G.S. 20-148, requiring that "Drivers of vehicles proceeding in opposite direction shall pass each other to the right, each giving to the other at least one-half of the main traveled portion of the roadway as nearly as possible." And all the evidence shows that the point of impact between the two vehicles was on the front of plaintiff's automobile and the front of the tractor of defendant's tractor-trailer-truck. Plaintiff testified, "The front part of the truck which I struck and which was in collision with me was 19 inches across the center line." P. 28 of the record. And again he says, "The actual parts of the two cars when they came together collided on 19 inches across from my side of the road." P. 28. And plaintiff's witness Underwood testified: "At the time of the collision the tractor part was on the right side of the line. I mean . . . of the white line of the highway." P. 46 of the record. And again he says: "Mr. Winfield didn't hit the trailer. The part that Mr. Winfield hit of the truck and tractor was the front of the tractor or truck, and that was on its right side of the road,—well over to the right. As he was on the right side of the road when the collision occurred, the wheel on Mr. Winfield's car that struck was on the left side of that center line." And plaintiff says further in his testimony, "When the car started skidding, I of course

had my hands on the wheel. It might have been that the brakes of the left wheel applied just a little harder than it did on the right, and that pulled the car that way. I guess I could have turned it back to my right." P. 34. To fail to turn to the right when plaintiff could and should have so turned, was negligence on his part which necessarily contributed to the injury. This is plaintiff's own estimate of the situation. If he says he could have turned to the right, how can we say it was not his duty to do so?

Moreover, plaintiff's own testimony is full of evidence of his violation of the statute G.S. 20-141 as to speed restrictions. That statute provides that "No person shall drive a vehicle on a highway at a speed that is greater than is reasonable and prudent under conditions then existing." And while this statute further provides that "Where no special hazard exists" certain speed limits shall be lawful, it provides that "the fact that the speed of a vehicle is lower than the foregoing *prima facie* limits does not relieve the driver of the duty to decrease speed . . . when special hazard exists with respect to . . . or by reason of weather or highway conditions . . ." And the statute further provides that "It shall be unlawful to violate any provision of this section . . ."

All the evidence shows that weather and road conditions at the time of and immediately before the collision constituted a special hazard. Plaintiff's evidence describes the condition of the road and of the weather. Plaintiff testified: "The pavement was slightly damp as result of the fog . . . the top of the black asphalt was damp just a little." Record P. 18. The plaintiff's witness Underwood testified: "I think the pavement was very damp from the fog." P. 47. Moreover, as to the fog, plaintiff testified, "The fog at that particular point immediately before the collision was as heavy as I ever remember traveling in . . . As I approached this point where the collision occurred the fog was very heavy." P. 18. And again plaintiff testified: "I would say I could see approximately 100 feet in front of me above 6 feet . . . I'd say I could see where I was around 100 feet. The fog was heavy above the 6-foot line but exceptionally heavy down near the ground . . ." P. 25. "The fog kept me from seeing very far." P. 26.

Then the record shows these questions and answers:

"Q. How far could you see ahead?

"A. You mean at the time the accident happened?

"Q. Just before the accident?

"A. You couldn't see over 20 feet. There were spots down the road where the fog was heavy in one spot.

"Q. You could see 125 feet away?

"A. I would say that was the maximum." P. 26.

And, continuing, "I would say that the particular stretch of road I hadn't been driving under those conditions more than 600 or 700 feet or possibly 1,000 feet. The fog happened to be heavier than at other spots." P. 26.

And plaintiff's witness Underwood testified: "As I drove along Highway #70, approaching the place where this automobile collision occurred the weather was very foggy. It was foggy to the extent of making it difficult to drive. I spoke of it to the man that was with me." P. 45.

Under these conditions plaintiff testified: "I was driving my car between 30 and 35 miles an hour immediately before this impact." P. 18. And again plaintiff says: "My highest estimate would not exceed 35 miles an hour." P. 25. And, again, "My speed that morning from Raleigh on was about 35 miles an hour." P. 26.

At the rate of 30 miles per hour, plaintiff would have been traveling 44 feet per second. And at 35 miles per hour, he would have traveled approximately 51 feet per second.

And it is significant to note that the collision did not occur at or on a curve. Plaintiff himself says, "I came around a slight curve to my right, but that curve was 250 or 300 feet from where this accident occurred." P. 18. "I was 200 feet beyond the curve before I saw this truck. The truck was approximately 100 feet in front of me when I saw it." P. 25.

And this further testimony of plaintiff is significant of negligence on his part,—contributing to his injury. He testified, "When I saw this truck first . . . I immediately applied the brakes to the Chevrolet . . ." P. 19. And, again, "From the time I applied my brakes and went 3 or 4 or 5 feet straight and then started skidding to the left, I won't say it was over 10 feet altogether. The whole business was not over 10 feet." P. 31.

This testimony means either one of two things. If plaintiff applied his brakes as he said he did, the truck could not have been 100 feet away when he saw it, and he was outrunning his lights. If, on the other hand, the truck was 100 feet away when plaintiff saw it, it is manifest that he delayed too long in applying the brakes, for he says he only skidded 10 feet. Thus taking either horn of the dilemma, he proves himself to be contributorily negligent.

For these reasons it is obvious on the record that one of the proximate causes of the injury to plaintiff was his own negligence, either in driving at excessive speed and recklessly under the conditions existing or in steering his car in the wrong direction, or in both respects.

And, in the second place, there is error in admission of evidence to which Exception 1 relates. Plaintiff was permitted, over objection by corporate defendant, to testify that "As soon as I came to Mr. Underwood

and Mr. Smith were at my car and I remember they wanted to help me and the first words I remember was Mr. Smith telling me not to worry about the situation that they expected to take care of it." This admission of this statement is manifestly error, and of the most prejudicial character.

"It is the rule with us that what an agent or employee says relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestæ,* and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer." *Hubbard v. R. R.,* 203 N.C. 675, 166 S.E. 802.

Indeed, as stated by Stansbury on N. C. Evidence, Sec. 169, page 365, "It is often said that a statement accompanying an act is admissible either for or against the principal, but this would seem to be true only when the statement characterizes or qualifies the act."

Moreover, "In the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment." See *Parrish v. Mfg. Co.,* 211 N.C. 7, 188 S.E. 817.

My vote is for a nonsuit. Failing in this, I vote for a new trial.

BARNHILL, J., concurs in dissent.

LEE KINNEY AND GEORGE LEVIN v. HARRY N. SUTTON, CHIEF BUILDING INSPECTOR OF THE CITY OF CHARLOTTE, AND THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION (ORIGINAL DEFENDANTS), AND R. H. BOULIGNY, R. E. BARRETT AND WIFE, OLIVET W. BARRETT; S. L. BAGBY, DR. CHARLES W. ROBINSON AND S. A. LESLIE (INTERVENING DEFENDANTS).

(Filed 11 May, 1949.)

1. Municipal Corporations § 37—

The operation of a restaurant or a public dining room for profit is a commercial activity.

2. Same—

A zoning ordinance proscribing commercial activities within a residential district unless carried on by members of the immediate family and

employing not more than two persons, excludes the operation of a public dining room employing nine persons in such district.

3. Same—

G.S. 160-172 authorizes municipalities to enact zoning ordinances prohibiting the use of property within a residential district for business or commercial purposes.

4. Municipal Corporations § 36—

A party attacking the constitutionality of an ordinance enacted by a municipality in the exercise of its delegated police power, has the burden of showing that the restrictions bear no substantial relation to the public health, safety, morals or general welfare of the community.

5. Municipal Corporations § 37—

A zoning ordinance covering all land within the municipality and separating commercial and industrial districts of the city from those set apart for residences, schools, parks, libraries, churches, etc., and which is uniform and operates alike on all territory within the respective zones, bears a reasonable relation to the health, safety, morals and general welfare of the entire community and is a valid and constitutional exercise of the delegated police power of the municipality.

6. Same—

Provision of a zoning ordinance which permits commercial and industrial activities within a residential district provided such activities are carried on by members of the immediate family and not more than two persons are employed therein, does not render the ordinance void as being discriminatory, since the commercial activities permitted thereunder in a residential district are so intrinsically different from unlimited commercial and industrial activities in general as to permit their separate classification.

7. Same: Constitutional Law §§ 11, 20a—

The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community.

APPEAL by Lee Kinney from *Patton, Special Judge,* at the February Term, 1949, of MECKLENBURG.

On 14 January, 1947, the City of Charlotte, acting through its legislative body, adopted a comprehensive zoning ordinance dividing the municipality into clearly designated business, industrial, and residential districts, and imposing restrictions on the alteration and erection of buildings and the use of premises in each of such districts.

The ordinance creates two classes of residential districts designated as residence 1 districts and residence 2 districts and provides that property in such areas may be used for the following purposes:

"SECTION III—RESIDENCE 1 DISTRICTS.

"(A) USES.

"In any residence 1 district, as indicated on the building zone map, no building or land shall be used and no building shall be hereafter erected or structurally altered, except for the following uses:

"1. Principal uses and buildings

"(a) (ONE-FAMILY DWELLINGS) A detached dwelling for only one family or for one housekeeping unit.

"(b) (TWO-FAMILY DWELLINGS) A two-family or duplex dwelling situated on a corner lot, having a single entrance or where the two entrances, if used, are on different streets.

"(c) (RELIGIOUS USES) Churches and other places of worship.

"(d) (EDUCATIONAL USES) Public and parochial schools, colleges, and universities, including dormitories, public libraries, public museums and public art galleries.

"(e) (SOCIAL USES) Municipal recreation buildings, playgrounds, and parks.

"(f) (GARDENING AND AGRICULTURE) Nurseries, truck gardens, and non-commercial greenhouses.

"2. Accessory Uses and Buildings

"Commercial activities, if carried on by members of the immediate family, and not more than two employed persons are permitted.

"Accessory uses customarily incident to any of the above permitted uses, but not including any activity conducted for gain. This shall not be construed to exclude the erection of or use of a building designed for living quarters for servants in the employ of the owner or occupant of a residence, which servants quarters shall be confined to the rear yard area.

"(a) (PROFESSIONAL OCCUPATIONS) The office of a resident professional person.

"(b) (SIGNS) Signs pertaining to the lease, sale or use of a lot or building may be placed thereon provided the total area of all such signs does not exceed eight (8) square feet, and provided further that on a lot occupied by a dwelling, the total area of signs placed on the lot or dwelling and pertaining to the use thereof, shall not exceed one (1) square foot. A sign or bulletin board not exceeding twelve (12) square feet in area may be erected upon the premises of a church, or other institution for the purpose of displaying the name and activities or services therein provided.

"SECTION IV—RESIDENCE 2 DISTRICTS.

"Within any residence 2 districts, as indicated on the building zone map, no building or land shall be used and no building shall be hereafter erected or structurally altered, except for the following uses:

"(A) USES

"Within any residence 2 districts, as indicated on the Building Zone Map, no building or land shall be used and no building shall be hereafter erected or structurally altered, except for the following uses:

"(I) RESIDENCE 1 DISTRICT USES

"Any use permitted by Section III of this ordinance in residence 1 districts.

"(II) OTHER USES

"(a) (DWELLINGS) A detached dwelling or an apartment house, where provision is made on the lot for parking at least one car for each housekeeping unit contained in the building.

"(b) (WELFARE USES) Hospitals, sanitariums, clinics, and physicians' offices, not primarily for contagious diseases or the care or treatment of drug or liquor addicts."

The ordinance expressly authorizes the continuance of nonconforming structures and uses existing at the time of its enactment.

Kinney owns a commodious dwelling located at 1122 East Morehead Street in the City of Charlotte, which he bought for $40,000.00 more than a year after the passage of the zoning ordinance. These premises are situated in a "residence 2 district." "The property to the south of the property fronting on Morehead Street, including 1122 East Morehead Street, in such residence 2 district, has been developed and is one of the most exclusive residential districts of the City, and the property to the north of the property facing on Morehead Street, in such residence 2 district, is devoted exclusively to residential use by people of moderate income." Only two nonconforming uses exist in this particular residence 2 district, these being a Woman's Club and an antique shop, which began operation "many years prior to January, 1947, the effective date of the zoning ordinance.

On 15 September, 1948, Kinney let the premises at 1122 East Morehead Street to Levin for a term of five years commencing on 15 October, 1948, for this rent: "$400.00 monthly in advance for the first year, and $525.00 monthly in advance for the remainder of said term." It was specifically stipulated that the property should "be used only for a restaurant and a residence for the lessee and immediate family" and that the lease should "terminate at option of lessee . . . if zoning restrictions prevent the use of the above described premises as a restaurant." The monthly rental value of the premises at 1122 East Morehead Street runs from $250.00 as a residence to $450.00 as a doctor's clinic.

After the lease became effective, Levin used the property at 1122 East Morehead Street as a residence, and as a public restaurant, where he served the evening meal daily to paying guests. Levin employed nine persons to assist him in the restaurant and had from fifty to one hundred and fifty customers a day. The operation of the restaurant "caused a further concentration of traffic in the vicinity of 1122 East Morehead Street, and there were in use at the restaurant three garbage cans and at least four waste cans."

After the restaurant had been in operation for five days, the City of Charlotte brought an independent action against Kinney and Levin, and obtained an order therein restraining them from using the premises as a public restaurant until they had exhausted administrative remedies under the zoning ordinance.

Thereafter, to wit, on 2 December, 1948, Kinney and Levin made application to Harry M. Sutton, Chief Building Inspector for the City of Charlotte, who is the administrative official charged with the enforcement of the zoning ordinance, for a certificate of occupancy under Section XI of the zoning ordinance entitling them "to use a part of the residence of George Levin, located at 1122 E. Morehead Street, for a high class public dining room." This request was refused by the Chief Building Inspector on the ground that "the use of the premises at 1122 East Morehead Street in the City of Charlotte partially for a restaurant or public dining-room was prohibited by the zoning ordinance of the City of Charlotte," and Kinney and Levin appealed from this decision to to the Board of Adjustment for the City of Charlotte. The Board of Adjustment heard the appeal in an open meeting, and took testimony from interested parties and their witnesses. Levin testified that he intended to resume operations of the previous size in the event the requested certificate of occupancy was granted. After hearing the evidence, the Board of Adjustment made finding of facts based thereon conforming to the matters hereinbefore set out, and affirmed in its entirety the decision of the Chief Building Inspector refusing to issue the certificate of occupancy "for the reason that granting of said permit for the operation of a commercial business in a residence 2 district would be a direct violation of the zoning ordinance."

Kinney and Levin thereupon procured a review of this decision of the Board of Adjustment in the Superior Court of Mecklenburg County by this "proceedings in the nature of *certiorari*" under G.S. 160-178. After permitting R. H. Bouligny, R. E. Barrett and wife, Olivet W. Barrett, S. L. Bagby, Dr. Charles W. Robinson, and S. A. Leslie, home owners residing in the residence 2 district in question, to intervene in the proceedings, and after considering the evidence presented by the record returned to it by the Board of Adjustment, the Superior Court concluded

that "the findings of fact of the Board of Adjustment are supported by the evidence," adjudged that no errors of law had been committed, and entered a judgment affirming the action of the Board of Adjustment. Kinney excepted to this judgment and appealed to this Court, assigning errors.

James L. Delaney for petitioner, Lee Kinney, appellant.

John D. Shaw for respondents, Harry N. Sutton, Chief Building Inspector of the City of Charlotte, and the City of Charlotte, a municipal corporation, appellees.

McDougle, Ervin & Horack for interveners, R. H. Bouligny, R. E. Barrett and wife, Olivet W. Barrett, S. L. Bagby, Dr. Charles W. Robinson, and S. A. Leslie, appellees.

ERVIN, J. The zoning ordinance under consideration was adopted pursuant to the authorizing act, which was originally enacted by the General Assembly of 1923 and which is now codified as Article 14 of Chapter 160 of the General Statutes.

The appellant asserts initially that he is entitled to the certificate of occupancy sought by him as a matter of right because the proposed use conforms to the use regulations prescribed by the ordinance for the district in which the premises at 1122 East Morehead Street are situated.

The zoning ordinance does not expressly stipulate that property in a residence 2 district may be put to use as a restaurant or a public dining-room. Hence, the operation of such a business cannot constitute a permitted use in such an area under the ordinance unless it can qualify as an authorized commercial activity under Section III (A-2), which permits "accessory uses and buildings" and "commercial activities, if carried on by members of the immediate family, and not more than two employed persons are permitted." The operation of a restaurant or a public dining-room for profit is undoubtedly a commercial activity for it is an undertaking relating to commerce or trade. 15 C.J.S., p. 576. But a restaurant or a public dining-room operated by an occupant of premises with the assistance of not less than nine employed persons does not find a place within the narrow category of commercial activities sanctioned by Section III (A-2) of the zoning ordinance. The number of employed persons involved, in and of itself, excludes such an enterprise from the commercial activities permitted by this section. Thus, it appears that the proposed use of the premises in question is prohibited as a nonconforming use by the provisions of the ordinance relating to residence 2 districts.

The appellant maintains secondarily, however, that the Legislature has not authorized a municipality to adopt a zoning ordinance prohibiting

the operation of a restaurant or a public dining-room in a residential area, and that the provisions of the ordinance invoked by the respondents and interveners on this phase of the controversy are void as being in excess of the power granted to the legislative body of the City of Charlotte by the authorizing statutes if such provisions are construed to bar the operation of a restaurant or a public dining-room in a residence 2 district. This contention overlooks the phraseology of G.S. 160-172 expressly providing that "for the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated towns is hereby empowered to regulate and restrict the height, number of stories, and sizes of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes." The power vested in municipalities by the zoning statute "to regulate and restrict the . . . use of buildings, structures and land for trade, industry, residence or other purposes" includes authority to exclude a business, otherwise lawful, from a residential district. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *S. v. Roberson,* 198 N.C. 70, 150 S.E. 674. See, also, the authorities collected in the following annotations: 117 A.L.R. 1117; 86 A.L.R. 662.

The appellant contends finally that the provisions of the zoning ordinance prohibiting the use of the premises in question for a restaurant or a public dining-room bear no substantial relation to the health, safety, morals, or general welfare of the community; constitute arbitrary, unreasonable, and discriminatory restrictions upon the property rights of the appellant in such premises; and deprive the appellants of their property without due process of law in contravention of Article I, Section 17, of the State Constitution, and the Fourteenth Amendment to the Federal Constitution.

The enabling act authorizing cities and towns to enact zoning ordinances expressly recognizes the established principle of constitutional law that zoning measures must find their justification in some aspect of the police power of the State exerted in the interest of the public. G.S. 160-172. A number of our cases have explicitly or implicitly sustained zoning ordinances, which were adopted under the authority of our enabling act and which established restricted residential districts, as being within the police power. *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128; *In re Appeal of Parker,* 214 N.C. 51, 197 S.E. 706; *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *S. v. Roberson,* 198 N.C. 70, 150 S.E. 674; *Harden v. Raleigh,* 192 N.C. 395, 135 S.E. 151.

The zoning ordinance under consideration covers all land, buildings and structures in the City of Charlotte and is designed by the legislative

body of the municipality to promote the health, safety, morals and general welfare of the entire community by separating the commercial and industrial districts of the city from those which are set apart for other purposes, such as art galleries, churches, hospitals, libraries, museums, parks, playgrounds, residences, and schools. The presumption is that the zoning ordinance as a whole is a proper exercise of the police power, and the appellant has the burden of showing that the provisions of the ordinance forbidding the operation of restaurants or public dining-rooms in the restricted residential district in question bear no substantial relation to the health, safety, morals, or general welfare of the community. *In re Appeal of Parker, supra; American Wood Products Co. v. Minneapolis,* 35 F. 2d 657; *Forbes v. Hubbard,* 348 Ill. 166, 180 N.E. 767. The court below adjudged, in substance, that the appellant has failed to carry this burden, and that the provisions of the zoning ordinance challenged by him are valid. This adjudication finds full support in the record.

The objection that the provisions of the zoning ordinance prohibiting the use of the premises in question for a restaurant or public dining-room constitute arbitrary, unreasonable and discriminatory restrictions upon the property rights of the appellant in such premises is untenable. They are aptly phrased to secure their object, *i.e.,* to establish and preserve a restricted residential district free from substantial commercial and industrial activities. They are uniform and operate alike on all property within the territory affected. *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29; *Broadfoot v. Fayetteville,* 121 N.C. 418, 28 S.E. 515, 39 L.R.A. 245, 61 Am. St. Rep. 668. The provision exempting nonconforming structures and uses existing at the enactment of the ordinance has a sound basis and is not unreasonable. *Elizabeth City v. Aydlett, supra.* The provision authorizing "accessory uses and buildings" and "commercial activities, if carried on by members of the immediate family, and not more than two employed persons are permitted" has a reasonable relation to the end in view, and is not an unlawful discrimination for such limited undertakings are so intrinsically and sufficiently different from unlimited commercial and industrial activities in general as reasonably to permit their separate classification. *Angelo v. Winston-Salem,* 193 N.C. 207, 136 S.E. 489, 52 A.L.R. 663, affirmed in 274 U.S. 725, 47 S. Ct. 763, 71 L. Ed. 1329; *S. v. Wheeler,* 141 N.C. 773, 53 S.E. 358, 5 L.R.A. (N.S.) 1139, 115 Am. St. Rep. 700; *Broadfoot v. Fayetteville, supra.* Furthermore, the fact that the property in question is more valuable for commercial purposes, such as a restaurant or a public dining-room, than for residential or other conforming uses is not sufficient of itself to invalidate the pertinent provisions of the ordinance as confiscatory. If the police power is properly exercised in the zoning of a municipality, a resultant pecuniary loss to a property owner is a misfortune

which he must suffer as a member of society. *Lee v. Board of Adjustment, supra; Elizabeth City v. Aydlett, supra.*

Since it appears that the zoning regulations prohibiting the use of property within the restricted residential district in question as a restaurant or public dining-room bears a substantial relation to the health, safety, morals or general welfare of the community and are not arbitrary, unreasonable, or discriminatory in character, it follows that they do not deprive the appellant of his property without due process of law in violation of Article I, Section 17, of the State Constitution or the Fourteenth Amendment to the Federal Constitution. *In re Appeal of Parker, supra; Village of Euclid, Ohio, v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016. It is noted, in closing, that the appellant acquired his right in the premises involved in this litigation with knowledge of the zoning ordinance.

For the reasons given, the judgment of the Superior Court is

Affirmed.

IN THE MATTER OF THE SALE OF LAND OF VAN B. SHARPE AND WIFE, LOUISE R. SHARPE, UNDER FORECLOSURE BY W. A. LELAND McKEITHEN, SUBSTITUTE TRUSTEE.

(Filed 11 May, 1949.)

1. Mortgages § 35e—

The mortgagor or trustor is entitled to purchase at the foreclosure sale under the power contained in the instrument.

2. Mortgages § 33b—

The mortgagor or trustor is entitled to procure resales through advance bids made in conformity with the statute. G.S. 45-28.

3. Same—

The fact that the trustor repeatedly procures resales through the making of advance bids in compliance with the statute works no legal wrong upon the *cestui* and is within the trustor's right, even though he procures such upset bids for the purpose of delaying foreclosure and the recovery by the *cestui* of the indebtedness.

4. Torts § 1—

Acts which are lawful in themselves cannot be rendered tortious by mischievous motives.

5. Mortgages § 33b—

The clerk of the Superior Court is required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid is made in accordance with the statute, regardless of how often an upset bid may be placed.

6. Same—

The provision of G.S. 45-28 that the clerk shall make such orders as may be just and necessary to safeguard the interests of all parties does not authorize him to enter orders abrogating rights conferred by the statute.

7. Same—

The clerk has no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. G.S. 45-28.

8. Appeal and Error § 31i—

An appeal from a void order cannot be dismissed as frivolous.

APPEAL by Van B. Sharpe and wife, Louise R. Sharpe, from *Phillips, J.*, at chambers in Rockingham, North Carolina, 10 December, 1948, in proceeding pending in the Superior Court of MOORE.

On 27 April, 1946, Van B. Sharpe and wife, Louise R. Sharpe, hereinafter designated as respondents, executed a deed of trust conveying land at Pinehurst in Moore County to Julius C. Smith, trustee, to secure the payment of a debt to the Pilot Life Insurance Company. Subsequently Julius C. Smith resigned his trust, and W. A. Leland McKeithen, hereinafter called the petitioner, was appointed substitute trustee in his stead. The respondents defaulted in the payment of the debt secured by the deed of trust, and the petitioner undertook to sell the property for the satisfaction of the debt under the power of sale in the deed of trust.

In conformity to such power, the substitute trustee exposed the land to sale on 8 March, 1948, and the Pilot Life Insurance Company made the last and highest bid therefor, to wit, $22,770. Within ten days thereafter, "H. F. Seawell, Jr., attorney for Van B. Sharpe," raised the bid, and paid the amount of the increase to the Clerk of the Superior Court of Moore County, who ordered the petitioner to resell.

Pursuant to this order, the substitute trustee offered the property to resale on 5 April, 1948, and Dr. L. H. Paschal became the last and highest bidder therefor in the sum of $24,000. Within the next ten days, "H. F. Seawell, Jr., attorney for Van B. Sharpe," placed an upset bid on the property by paying "the minimum amount required by the statute for an advanced bid" to the Clerk of the Superior Court of Moore County, who directed the petitioner to make a resale of the real estate.

In conformity to this order, the substitute trustee exposed the land to resale on 10 May, 1948, and Dr. L. H. Paschal made the last and highest bid therefor, to wit, $25,300. Within ten days from the date of this resale "H. F. Seawell, Jr., attorney for Van B. Sharpe, placed an upset bid in the same manner as on the two previous occasions," and the Clerk

of the Superior Court of Moore County again ordered the substitute trustee to resell the property.

Pursuant to this order, the substitute trustee offered the property to resale on 21 June, 1948, and H. F. Seawell, Jr., became the last and highest bidder therefor in the sum of $26,570. Within the next ten days, an upset bid was placed on the land in the name of Lamont Brown, and the amount of the increase was paid to the Clerk of the Superior Court of Moore County by means of a "check drawn on the account of H. F. Seawell, Jr., attorney for Van B. Sharpe."

In conformity to an order of resale thereupon entered by the Clerk of the Superior Court of Moore County, the substitute trustee exposed the property to resale on 2 August, 1948, and H. F. Seawell, Jr., made the last and highest bid therefor, to wit, $28,000. Within ten days from the date of this resale, an upset bid was put on the real estate in the name of W. D. Shannon, and the amount of the increase was paid to the Clerk of the Superior Court of Moore County by means of "a check drawn on the account of H. F. Seawell, Jr., attorney for Van B. Sharpe."

Pursuant to an order thereupon made by the Clerk of the Superior Court of Moore County, the substitute trustee offered the land to resale on 6 September, 1948, and W. D. Shannon became the last and highest bidder therefor in the sum of $29,400. Within the ensuing ten days, Dr. L. H. Paschal placed an upset bid on the property and deposited the amount of the increase with the Clerk of the Superior Court of Moore County, who directed the petitioner to resell the real estate after fifteen days advertisement.

In conformity to this order, the substitute trustee exposed the property to resale on 18 October, 1948, and Dr. L. H. Paschal made the last and highest bid therefor, to wit, $30,900. "Again within the ten-day period, there was an upset bid placed by H. F. Seawell, Jr., attorney for Van B. Sharpe."

On 10 November, 1948, the petitioner brought this proceeding against the respondents before the Clerk of the Superior Court of Moore County, who found as a fact that the respondent, Van B. Sharpe, "has used the statute providing for resales as a means of delaying the proper foreclosure of the deed of trust and the recovery by Pilot Life Insurance Company of the indebtedness thereby secured" and entered an order on the basis of such finding requiring the last and highest bidder at any subsequent resale of the property covered by the deed of trust and any person thereafter placing an advanced or increased bid on such property to deposit "with the Clerk of the Superior Court of Moore County cash or certified or cashier's check in the amount of fifteen per cent of the last and highest bid in each instance." This order was made after notice to the respond-

ents, who appeared before the Clerk, opposed the entry of the order, and appealed from it to the judge of the Superior Court under G.S. 1-272.

Upon notice to respondents, the petitioner moved before his Honor, F. Donald Phillips, Resident Judge of the judicial district embracing Moore County, at chambers in Rockingham on 10 December, 1948, for an order dismissing the appeal of the respondents from the Clerk as being "frivolous and utterly without merit." After finding "that the said Van B. Sharpe has used the statute providing for resales as a means of delaying the proper foreclosure of the deed of trust and the recovery by Pilot Life Insurance Company of the indebtedness thereby secured" and "that said appeal was made for the purpose of further delaying the proper foreclosure of the deed of trust and the recovery by Pilot Life Insurance Company of the indebtedness thereby secured," Judge Phillips entered an order dismissing the appeal of respondents from the Clerk "as being frivolous and made for the purpose of delaying the proper foreclosure of said deed of trust" and confirming the order of the Clerk "in all respects." The respondents thereupon excepted to the order of Judge Phillips and appealed therefrom to this Court, assigning error.

Smith, Wharton, Sapp & Moore for petitioner, W. A. Leland McKeithen, Substitute Trustee, appellee.

H. F. Seawell, Jr., for respondents, Van B. Sharpe and wife, Louise R. Sharpe, appellants.

ERVIN, J. The statute regulating the manner of exercise of the power of sale in a deed of trust securing the payment of a debt is embodied in G.S. 45-28 as amended by Chapter 1013 of the 1947 Session Laws of North Carolina and reads as follows:

"In the foreclosure of mortgages or deeds of trust on real estate, or by order of court in foreclosure proceedings either in the superior court or in actions at law, or in the case of the public sale of real estate by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will or sale under execution duly issued, the sale shall not be deemed to be closed under ten days. A report of such sale shall be filed in the office of the clerk of the superior court within five days from the date thereof: Provided, that failure to file such report prescribed shall not invalidate said sale. If within ten days from the date of the sale in a foreclosure proceeding or within ten days from the date of the filing of a report of sale in a judicial proceeding, the sale price is increased ten per cent where the price does not exceed one thousand dollars ($1,000.00) and in addition thereto five per cent on the amount of said increased bid in excess of one thousand dollars ($1,000.00) and the same is paid to the clerk of the superior court, the

mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and advertise the same in the same manner as in the first instance. It shall only be necessary to give fifteen days' notice of a resale. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. If upon any resale the person making an advance bid or his agent shall become the last and highest bidder at such resale and upon confirmation of his bid shall fail to comply therewith within ten days, the clerk shall order a resale of the property; and in such event the deposit made with the clerk of said court shall be forfeited as damages for failure to comply with the bid at such resale and shall be applied, under order of the clerk, first to the payment of all costs and expenses in advertising and conducting the resale, and the balance of said deposit, if any, shall be applied as a credit on the indebtedness on account of which the sale was authorized: Provided, however, that no such forfeiture shall be allowed if, at the resale ordered because of such failure to comply, the property shall sell for an amount equal to or more than said advance bid so offered but not complied with, plus the costs of such resale. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between the parties. This section shall not apply to the foreclosure of mortgages or deeds of trust executed prior to April first, nineteen hundred and fifteen."

Both equity and law permit the grantor in a deed of trust to purchase at the foreclosure sale of his own property by the trustee. 59 C.J.S., Mortgages, section 577; *Wilson v. Vreeland,* 176 N.C. 504, 97 S.E. 427. Besides, G.S. 45-28 empowers him to procure resales of his property by the trustee through advanced bids in the amounts stipulated.

Consequently, it is plain that the acts of the respondent, Van B. Sharpe, in the premises have been done in the exercise of clear legal rights, and have caused third persons to increase by $8,130 their offers for the property covered by the deed of trust being foreclosed. Furthermore, it is clear that no legal wrong has been inflicted upon the petitioner or the beneficiary of the deed of trust. Certainly they have no right to ask that

the deed of trust should be foreclosed otherwise than in the manner and at the time appointed by law.

Nevertheless, the orders entered below undertake to deprive the respondents of substantial legal rights given them by legislative enactment upon the supposition that acts lawful in themselves become illegal merely because of the absence of a commendable motive on the part of the person doing the acts. This theory is insupportable. While mischievous motives may make a bad case worse, they cannot make that wrong which in its own essence is lawful. 52 Am. Jur., Torts, section 5; *Bell v. Danzer,* 187 N.C. 224, 121 S.E. 448; *Biggers v. Matthews,* 147 N.C. 299, 61 S.E. 55.

When the pertinent statute is analyzed, it becomes manifest that the Legislature has aptly declared it obligatory for a trustee selling real estate under a power of sale in a deed of trust for the satisfaction of a debt secured thereby to make resale of the property covered by the deed whenever "the bid or offer is raised as prescribed" by the statute and the amount of the increase in the bid or offer is paid to the Clerk of the Superior Court. It inevitably follows that the provision in the order of the Clerk of the Superior Court of Moore County requiring any person hereafter placing an advanced bid on the real property in question to deposit with such clerk "cash or certified or cashier's check in the amount of fifteen per cent of the last and highest bid" runs counter to the legislative will by attempting to exact from any person desirous of making an advanced bid as a prerequisite to a resale of the property a deposit or payment in excess of that specified by the statute. Moreover, the provi sion of the order in issue requiring the last and highest bidder at any future resale of the property to deposit with the Clerk "cash or certified or cashier's check in the amount of fifteen per cent" of his bid is void under the decision of this Court in *Alexander v. Boyd,* 204 N.C. 103, 167 S.E. 462, holding, in substance, that it is unreasonable to require the last and highest bidder at a sale of real property under the power of sale in a deed of trust to make a cash deposit in excess of the amount required by the statute for an advanced or upset bid. The cases cited by appellee have no application here for they involved foreclosures by action or suit.

The order of the Clerk of the Superior Court of Moore County finds no warrant in the statutory provision that "the clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties." This authorization extends to orders securing the rights of the parties as defined by the statute, but not to orders abrogating or abridging such rights. Moreover, the conclusion that the clerk cannot require an advanced bid in excess of that prescribed by the statute finds support in the legislative declaration that "the clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale

should the person offering the advance bid be declared the purchaser at the resale." *Expressio unius est exclusio alterius.*

The order of the Clerk of the Superior Court is void for it undertakes to deprive the respondents of rights granted them by the Legislature. Since an appeal from a void order cannot be frivolous, the order of the Judge dismissing the appeal must be

Reversed.

W. F. ELLER v. M. R. ARNOLD, CHARLES B. DOUGLASS AND L. A. BAZAKIS.

(Filed 11 May, 1949.)

1. Registration § 1: Vendor and Purchaser § 27b: Brokers § 13: Contracts § 26—

Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by statute, G.S. 47-18, third parties may deal with the *locus* as if there were no contract, since no notice, however full and formal, will take the place of registration.

2. Same—

Plaintiff broker alleged that he had been given exclusive contract to sell certain property, that he secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the prospect, after the expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split commission. *Held:* In the absence of allegation that plaintiff's option was registered, the complaint fails to state a cause of action.

3. Same: Conspiracy § 1—

Allegations that third persons conspired to deprive plaintiff of his rights under an unregistered option does not state a cause of action against such third persons, since in the absence of registration such third persons have a legal right to deal with the property as if there were no option and an agreement to do a lawful act cannot constitute a wrongful conspiracy.

APPEAL by defendants Charles B. Douglass and L. A. Bazakis from *Harris, J.*, in Chambers 12 February, 1949, of WAKE.

Civil action to recover commissions on sale of land,—heard upon demurrers to the complaint.

Plaintiff alleges in his complaint, in pertinent part: That in Fall of 1947 defendant L. A. Bazakis requested plaintiff to locate for him a duplex house in the city of Raleigh; that in accordance therewith plaintiff showed him the house of M. R. Arnold at No. 2505-7 Fairview Road; that Bazakis indicated interest in purchasing it, provided the price was

satisfactory; that plaintiff secured from M. R. Arnold a price of $22,500, —his "rock-bottom price" therefor, and reported same to Bazakis, who stated to plaintiff that the price was too high, and if not lowered he was not interested, and was unwilling to purchase at that price; "that at about this time plaintiff secured the exclusive right to sell said house for a period ending June 1, 1948; that as this plaintiff is informed and believes the said Bazakis then called upon Charles B. Douglass and represented to him that plaintiff had the exclusive right to sell said house until June 1st and stated that if the said Douglass would divide his commission of 5% with him that he would purchase the property through Douglass; thereupon, as this plaintiff is informed and believes, the said Douglass and Bazakis entered into an agreement that immediately upon the expiration of plaintiff's option that Bazakis would purchase the house through Douglass, and Douglass would give the sum of $625 or some other large amount out of his commission;

"7. That the said Bazakis and Douglass, well knowing that plaintiff had first shown the house to Bazakis and that he had expended much time and great effort in attempting to sell the said house to Bazakis and that the plaintiff was entitled to the commission of 5% on the purchase price of $22,500, entered into a conspiracy to defraud the plaintiff of his just and earned commission, sealing their bargain with the aforesaid division of the commission and to this end the necessary preliminaries, such as securing a loan and other necessary details were commenced by the said Douglass and Bazakis, while the plaintiff's option was still in force; that by selling the house to Bazakis through Douglass, having possession of the facts as to plaintiff's efforts, Arnold ratified and entered into said conspiracy.

"8. That plaintiff had talked to Arnold several months before the sale by him to Bazakis concerning this matter and Arnold well knew that Bazakis was the client and prospect of plaintiff and that he could not sell this house to Bazakis either directly or through another agent than plaintiff and defraud plaintiff of his commissions; that it was the duty of said Arnold, when he was approached by Douglass and Bazakis, to have informed them that this property could only be sold to Bazakis by the plaintiff as agent. . . .

"9. That, as plaintiff is informed and believes and therefore alleges, the said Arnold could not take advantage of the work and labor of plaintiff in interesting Bazakis in this house, at great trouble and expense to plaintiff, and then sell the same through another agent . . .

"9½. That on or about the ..... day of .....1948, the said house and lot was sold by M. R. Arnold and wife to L. A. Bazakis for the sum of $22,500; that Charles B. Douglass was the real estate broker in said transaction.

"10. That the defendants are indebted to plaintiff in the sum of $1,125, the same being 5% upon the sum of $22,500, said sum of 5% of the purchase price having been agreed upon between plaintiff and M. R. Arnold."

Defendants, separately and individually, demurred to the complaint for that (1) it does not state a cause of action as to each defendant, and (2) there is a misjoinder of parties defendant.

In respect to the first ground, defendants Douglass and Bazakis point out in their respective demurrers, in substantial accord, that the complaint fails to allege: (1) Any contract between plaintiff and either of them; (2) that plaintiff at any time secured a purchaser ready, able and willing to buy said property; and (3) that either defendant, acting jointly with other defendants, or either of them, in any manner hindered or prevented plaintiff from carrying out and performing the conditions of the alleged exclusive sales contract. And the defendant Douglass further points to the failure of the complaint to allege that the exclusive sales contract was registered in the office of the register of deeds for Wake County as required by law in such cases.

The court overruled each demurrer, and allowed to defendants time in which to file pleadings.

The defendants, and each of them gave notice of appeal to Supreme Court. Defendant M. R. Arnold has not perfected his appeal. The other defendants assign error.

John W. Hinsdale for plaintiff, appellee.

Howard E. Manning for Charles B. Douglass, appellant.

Brassfield & Maupin and J. Russell Nipper for L. A. Bazakis, appellant.

WINBORNE, J. The question here is this: Does the complaint state facts sufficient to constitute a cause of action against defendants Douglass and Bazakis, or either of them? In the light of applicable principles of law in effect in this State, and considering as true the allegations of fact alleged in the complaint, we hold that the question must be answered in the negative.

It is noted at the outset that plaintiff does not allege that he had a contract with either defendant Douglass or defendant Bazakis. But it is alleged in effect that the defendants conspired to defraud plaintiff of his commissions, that is, that they unlawfully interfered with his contract with defendant Arnold. In this connection, accepting as true the allegation that plaintiff secured from defendant Arnold the exclusive right to sell the house in question for a definite period, the agreement therefor would not be effective as against purchasers for value unless it were registered as required by statute, G.S. 47-18, the Connor Act of 1885, Chapter

147, later C.S. 3309. See also *Bruton v. Smith,* 225 N.C. 584, 36 S.E. 2d 9, and compare *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218.

The Connor Act, G.S. 47-18, provides, among other things, that no contract to convey land shall be valid to pass any property as against purchasers for a valuable consideration, from the bargainor, "but from the registration thereof within the county where the land lies . . ." This act protects purchasers for value against an unregistered contract to convey land, that is, where an owner of land contracts to convey land, such contract, until registered in the county where the land lies, is ineffective as against any who purchases for value from him. *Durham v. Pollard,* 219 N.C. 750, 14 S.E. 2d 818, and cases cited.

Applying the statute, the Connor Act, the decisions of this Court are uniform in holding that no notice however full and formal will take the place of registration. Among the cases so holding are these: *Wood v. Tinsley,* 138 N.C. 507, 51 S.E. 59; *Smith v. Fuller,* 152 N.C. 7, 67 S.E. 261; *Wood v. Lewey,* 153 N.C. 401, 69 S.E. 268; *Eaton v. Doub,* 190 N.C. 14, 128 S.E. 494; *Turner v. Glenn,* 220 N.C. 620, 18 S.E. 2d 197; *Grimes v. Guion,* 220 N.C. 676, 18 S.E. 2d 170.

And, while in this State an action will lie against a person who, otherwise than in a legitimate exercise of his own rights, procures the breach of a contract, *Elvington v. Shingle Co.,* 191 N.C. 515, 132 S.E. 274, the principle does not apply in respect to an unregistered contract to convey land. *Bruton v. Smith, supra.* However, if the contract be registered as required by law, it does apply. *Winston v. Lumber Co., supra.* In the *Bruton case,* this Court held that the failure of the plaintiff to have his contract to convey land registered in the public registry left the appealing defendant free to purchase without incurring any liability to plaintiff. And in the *Winston case,* the Court, holding that standing timber is a part of the realty, stated: "Where there is a duly registered contract to sell and convey timber, any interference with the relation and rights created thereby is a violation of a legal right recognized by law . . . for which an action will lie for the recovery of compensatory damages." Thus the line of demarcation as to liability for interference with contracts to convey land is distinctly drawn. That is, until such contract is registered, third parties may deal with the property to which it relates as if no contract existed.

Moreover, this Court treating the subject of a conspiracy, in the case of *S. v. Martin,* 191 N.C. 404, 132 S.E. 16, adopted this quotation from *Ballentine v. Cummings,* 70 Atl. 548, "Whether it is a wrongful or illegal conspiracy depends not upon the name given by the pleader, but upon the quality of the acts charged to have been committed. If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy." And in *Bell v. Danzer,* 187

N.C. 224, 121 S.E. 448, the Court, quoting from Cooley on Torts, 685, said: "'The exercise by one of a legal right cannot be made a legal wrong to another.'" See also *Bruton v. Smith, supra.*

Applying these principles to the case in hand, the complaint fails to allege such a state of facts as would put defendants Douglass and Bazakis on legal notice of the existence of the contract, that is, the complaint fails to allege that the contract plaintiff had with Arnold was registered as required by the statute, G.S. 47-18. In the absence of such notice these defendants had the legal right to deal with the property to which the contract relates as if no contract existed. Hence, no cause of action is stated against them.

Other grounds upon which appellants rely need not be considered.

For reason here stated, the judgment below overruling the demurrers of defendants Douglass and Bazakis is

Reversed.

G. A. FOOTE, G. S. FOOTE, C. C. HAYES AND R. C. OWEN, TRADING AND DOING BUSINESS AS FOOTE BROS. & COMPANY; AND GUGGENHIME & COMPANY, DRIED FRUIT DIVISION OF HUNT FOODS, INC., v. C. W. DAVIS & CO., INC.

(Filed 11 May, 1949.)

Pleadings § 19b: Sales § 22—

Plaintiff instituted action to recover for breach of contract by defendant to purchase a shipment of prunes. Upon defendant's allegation that plaintiff was merely broker, a third party was brought in on plaintiff's motion, which third party alleged that it was vendor and entitled to recover against defendant for breach of the contract. *Held:* Defendant's demurrer for misjoinder of parties and causes should have been sustained, since defendant was confronted with two parties plaintiff each of which asserted that it was the vendor, and the validity of the claim of either one of them against defendant would render the claim of the other untenable.

APPEAL by defendant from *Burney, J.*, December Term, 1948, NEW HANOVER.

Civil action to recover damages for breach of contract to purchase a shipment of prunes.

Plaintiff Foote Bros. & Company alleges that defendant, on 28 August 1946, placed with it an order for one hundred cases of prunes to be shipped from California to Norfolk and thence to Wilmington; that it purchased the prunes and had them shipped to Norfolk where they were held until after January 1 at defendant's request; that later the prunes were shipped to defendant at Wilmington, but the shipment was refused. It instituted this action to recover damages for the breach of said contract.

The defendant, answering, alleged in part that it dealt with Foote Bros. & Company only as agent or broker and that Guggenhime & Company was the vendor and is the real party in interest.

Thereupon, Guggenhime & Company, on motion of counsel for plaintiff, was made party plaintiff. It thereafter filed complaint in which it alleges that defendant placed the order for prunes with Foote Bros. & Company as its agent and that it, through Foote, sold one hundred cases of prunes to defendant, delivery of which was refused. It seeks to recover, in its own right, damages for the alleged breach of contract.

Defendant demurred for misjoinder of parties and causes of action. The demurrer was overruled and defendant appealed.

Stevens, Burgwin & Mintz for plaintiff appellee.

Isaac C. Wright for defendant appellant.

BARNHILL, J. The record before us presents this situation: Defendant contracted to purchase one hundred cases of prunes but later breached the contract. Plaintiff Foote Bros. & Company asserts that it was the vendor and as such is entitled to damages for the wrongful breach of contract. On the other hand, Guggenhime & Company alleges that it, as vendor, sold the merchandise to defendant through Foote Bros. & Company as agent or broker, and prays that it recover the damages resulting from the defendant's breach of contract.

Thus defendant is faced with two separate and distinct demands. Foote Bros. & Company pleads one contract, Guggenhime another. One is asserted by one plaintiff and one by the other. Each plaintiff says it was the vendor. There is no joint or common interest in the claim asserted. Instead, each contradicts the other. If Foote's claim is well founded, Guggenhime has no interest therein. If Guggenhime was the vendor, such claim as Foote Bros. & Company may have for commissions and other charges is against Guggenhime and not the defendant. If Foote Bros. & Company was the vendor, Guggenhime must look to it for payment.

This presents a clear case of misjoinder of parties and causes of action. Hence the demurrer was well advised. The order overruling the same must be held for error on authority of numerous decisions of this Court, among which the following are in point: *Davis v. Whitehurst,* 229 N.C. 226; *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; *Burleson v. Burleson,* 217 N.C. 336, 7 S.E. 2d 706; *Smith v. Land Bank,* 213 N.C. 343, 196 S.E. 481; *Vollers Co. v. Todd,* 212 N.C. 677, 194 S.E. 84.

The new party was not brought in on motion of defendant. It acted voluntarily. Hence, *Grant v. McGraw,* 228 N.C. 745, 46 S.E. 2d 849, is not controlling here.

The judgment below is

Reversed.

CHARLES L. PAKE, ET UX. v. LAMBERT R. MORRIS.

(Filed 11 May, 1949.)

1. Nuisances § 4—

In an action to enjoin the operation of a lawful business on the ground that it constituted a nuisance, an issue as to whether the business was operated in a manner so as to create a nuisance is proper.

2. Trial § 36—

Where the issue submitted arises on the pleadings and is determinative of the controversy, appellant's objection thereto on the ground of insufficiency is untenable.

3. Trial § 38—

It is not error for the court to refuse to submit issues tendered which relate only to evidentiary matter.

4. Nuisances §§ 3a, 4—

A fish scrap factory is a lawful business and does not constitute a nuisance *per se,* but may constitute a nuisance only in regard to the situation, environment and manner of its operation, and in plaintiffs' action to enjoin its operation an instruction to this effect and that its operation must create some substantial annoyance materially affecting plaintiffs' health, comfort or property in order to constitute a nuisance, is without error.

5. Nuisances § 4—

In an action to enjoin the operation of a lawful business on the ground that it constitutes a nuisance, verdict establishing that its past manner of operation did not constitute a nuisance would not preclude plaintiffs from instituting subsequent suit if in the future the plant should be so operated as to create a nuisance.

SEAWELL, J., dissents.

APPEAL by plaintiffs from *Edmundson, Special Judge,* December Term, 1948, from CARTERET.

Civil action to enjoin an alleged threatened nuisance in the operation of a fish factory in close proximity to plaintiffs' home near the Town of Beaufort in Carteret County.

The complaint alleges:

1. That in 1939, the plaintiffs purchased a tract of land on Taylor's Creek Canal in Carteret County, built their home and have continued to reside therein ever since.

2. That thereafter, the defendant acquired the adjoining property (site of the former Atlantic Fisheries Factory) situate about 500 feet from plaintiffs' home, and in November, 1947, commenced the operation of a fish-scrap factory, which so polluted the waters of the canal and permeated the air with such offensive odors as to render plaintiffs' home unfit for residential purposes and greatly annoyed their entire family, disturbing their comfort and injuring their health.

3. That the plaintiffs complained of the annoyance and nuisance and requested the defendant to desist from further operation of his factory, which he declined to do.

4. That on or about 23 June, 1948, the defendant's factory was destroyed by fire.

5. That plaintiffs' home, while defendant's factory was in operation, was rendered practically uninhabitable, and the comfort and health of their family greatly impaired.

6. That the defendant is now planning to rebuild and operate his factory on the same site, and threatens to continue the same offensive operations as heretofore to the irreparable injury of plaintiffs.

Wherefore, plaintiffs ask for a perpetual injunction.

Upon denial of the material allegations of the complaint and issues joined, the jury returned the following verdict:

"1. Are plaintiffs C. L. Pake and wife, Eleanor, the owners and in possession of the land described in the complaint? Ans. Yes (by consent).

"2. Has the defendant L. R. Morris maintained and operated the factory referred to in the complaint so as to create a nuisance, as alleged? Ans. No."

The plaintiffs objected to the second issue and tendered others in its stead.

From judgment on the verdict dismissing the action, the plaintiffs appeal, assigning errors.

R. A. Nunn for plaintiffs, appellants.

C. R. Wheatley, Jr., A. L. Hamilton, and J. F. Duncan for defendant, appellee.

STACY, C. J. We are here confronted with (1) the sufficiency of the issues to determine the controversy, and (2) the correctness of the charge.

The issues were taken from the case of *Mewborn v. Rudisill Mine,* 211 N.C. 544, 191 S.E. 28, and they seem quite sufficient to settle the present

controversy. *Roper v. Leary,* 171 N.C. 35, 87 S.E. 945. The issues submitted were evolved from the pleadings, *secundum allegata,* while those tendered by the plaintiffs relate only to evidentiary disputations. *Kirk v. R. R.,* 97 N.C. 82, 2 S.E. 536. The verdict suffices to determine the controversy. McIntosh on Procedure, 545. *Cf. McManus v. R. R.,* 150 N.C. 655, 64 S.E. 766.

A fish factory of the character disclosed by the record is not a nuisance *per se;* situation, environment, and manner of operation determine its status. *Webb v. Chemical Co.,* 170 N.C. 662, 87 S.E. 633; *Redd v. Cotton Mills,* 136 N.C. 342, 48 S.E. 761. Speaking to a similar situation in the adjoining County of Craven, it was said: "This Court would be slow to declare a lawful business a nuisance *per se.*" *Duffy v. Meadows,* 131 N.C. 31, 42 S.E. 460.

The following is the heart of the instruction which forms the principal exception to the court's charge to the jury: "The mere fact that there is a fish scrap plant there does not constitute a nuisance *per se,* within itself. It must affect the health, comfort or property of those who live near. It must work some substantial annoyance, some material physical discomfort to the plaintiffs, or injury to their health or property."

The instruction was patterned after the opinion in *Duffy v. Meadows, supra,* and is fully supported by what was said therein.

Of course, the verdict here which negatives any past nuisance settles no more than the present controversy. It affords the defendant no license to operate its plant in the future so as to create a nuisance. The defendant is at all times subject to the law of the land. So conceded. *Sic utere tuo,* etc., is good law as well as good morals. *Cherry v. Williams,* 147 N.C. 452, 61 S.E. 267.

There is no error appearing on the record. The verdict and judgment will be upheld.

No error.

SEAWELL, J., dissents.

STATE v. CORRIE CAMEL.

(Filed 11 May, 1949.)

1. Intoxicating Liquor § 9a: Indictment § 11—

A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, *is held* sufficient to survive a motion to quash. G.S. 15-153.

2. Intoxicating Liquor § 9a: Indictment § 10—

A count in an indictment which does not name the person charged is insufficient to support a verdict and judgment.

3. Indictment § 13—

Where the warrant upon which defendant is tried contains two counts, and one of them is sufficient to empower the court to render judgment, defendant's motion to quash is properly denied.

4. Intoxicating Liquor § 9d—

Evidence of defendant's illegal possession of a considerable quantity of nontax-paid whiskey *held* sufficient to carry the case to the jury on that count, and defendant's motion to nonsuit thereon was properly denied.

5. Criminal Law § 81c (5)—

Where it appears that the verdict of the jury found defendant guilty upon both of two counts in a warrant, one of which counts was legally insufficient to support a verdict or empower the court to render judgment thereon, a single judgment rendered on the verdict will be remanded for proper judgment on the valid count.

APPEAL by defendant from *Clement, J.*, January Term, 1949, of BUNCOMBE.

Attorney-General McMullan and Assistant Attorney-General Bruton and John R. Jordan, Jr., Member of Staff, for the State.

Sale, Pennell & Pennell for defendant, appellant.

DEVIN, J. The criminal prosecution of the defendant was inaugurated by the issuance of a warrant out of the Police Court of Asheville charging that "Corrie Camel did unlawfully, wilfully and feloniously have and/or keep in her possession a certain quantity of illegal nontax-paid whisky, to-wit, in violation of the ABC Store Act. Second count: Have or keep in her possession for the purpose of selling or giving away a certain quantity of illegal nontax-paid whisky." Upon the defendant's appeal from conviction in the Police Court, the case was tried on the same warrant in the Superior Court, where the jury returned verdict of "guilty of unlawful possession of whisky, and keeping liquor for sale." Judgment on the verdict was rendered, imposing prison sentence of twelve months. The defendant appealed to this Court. Error is assigned in the trial below in three particulars.

(1) The defendant in apt time moved to quash the warrant on the ground that it did not express a charge against the defendant in a plain, intelligible and explicit manner. While the warrant was inexpertly drawn, we think the first count therein stripped of nonessential words does set out a charge of unlawful possession of whisky, sufficiently ex-

pressed to survive a motion to quash. G.S. 15-153; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705.

As to the second count in the warrant, it is obvious that the failure to name the person charged renders it insufficient to support verdict and judgment on that count. *S. v. McCollum,* 181 N.C. 584, 107 S.E. 309; *S. v. May,* 132 N.C. 1020, 43 S.E. 819; *S. v. Phelps,* 65 N.C. 450. Apparently the jury by the verdict of guilty of unlawful possession, and also of keeping liquor for sale, found the defendant guilty on both the first and second counts. However, so much of the verdict as found the defendant guilty of unlawful possession of whisky as charged in the first count was sufficient to empower the court to render judgment thereon. The motion to quash was properly denied.

(2) The defendant's exception to the denial of her motion for judgment as of nonsuit cannot be sustained. There was sufficient evidence of unlawful possession of a considerable quantity of nontax-paid whisky to carry the case to the jury on the first count in the warrant. *S. v. Barnhardt, ante,* 223, 52 S.E. 2d 904.

(3) It appears, however, that a verdict was rendered which must be interpreted as specifically finding defendant guilty upon both of two counts in the warrant, one of which counts was legally insufficient to support a verdict or warrant the imposition of judgment. On this verdict a single judgment was rendered. Presumably this was based upon consideration of guilt on both charges. We think the defendant entitled to have the case remanded for proper judgment only on the count to which there was no valid objection. This view is supported by what was said in *S. v. Braxton, ante,* 312 (315), 52 S.E. 2d 895.

Remanded for judgment.

JAMES FRANKLIN WITHERS, EMLOYEE, v. J. M. BLACK, GENERAL CONTRACTOR, AND ARTHUR REID, SUB-CONTRACTOR, EMPLOYERS, NON-INSURERS.

(Filed 25 May, 1949.)

1. Master and Servant § 55d—

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence *contra* upon which the courts might have reached a different conclusion. G.S. 97-86.

2. Master and Servant § 40b—

An assault on an employee is an "accident" within the meaning of the Workmen's Compensation Act.

3. Master and Servant § 40d—

An injury suffered by an employee during the hours of employment while he is at the place of employment and is actually engaged in the performance of the duties of his employment, necessarily arises in the course of his employment.

4. Master and Servant § 40c—

There must be some causal relation between the employment and the injury in order for the injury to arise out of the employment, but it is not necessary that the injury could have been foreseen or expected, it being sufficient if, after the event, the injury may be seen to have had its origin in the employment.

5. Same—

Where the evidence discloses that the two employees had no personal contacts outside of the employment, and there is evidence that the dispute between them arose over the work they were performing for their common employer, the evidence is sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment, even though there be evidence *contra* that the dispute grew out of matter entirely foreign to the employment.

6. Master and Servant § 38—

Where a contractor sublets a part of the contract to a sub-contractor without requiring from the sub-contractor certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer, G.S. 97-19, such contractor is properly held secondarily liable for compensation to an employee of the sub-contractor, even though the contractor regularly employs less than five employees. G.S. 97-2 (a).

7. Master and Servant § 53b (1)—

Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, an award for permanent and total loss of vision of each eye is proper. G.S. 97-31 (q); G.S. 97-31 (t), as amended.

APPEAL by claimant, James Franklin Withers, from *Edmundson, Special Judge,* at October Term, 1948, of DAVIDSON.

This is a proceeding under the North Carolina Workmen's Compensation Act.

The matters stated in this paragraph are not in dispute. In September, 1947, J. M. Black, as principal contractor, was engaged in constructing a dwelling in Thomasville, North Carolina. He sublet the contract for plastering the ceilings and walls to the claimant's immediate employer, Arthur Reid, who kept five or more employees regularly employed in his business as a plastering contractor and who had not exempted himself from the provisions of the Workmen's Compensation Act, without requiring from Reid or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that Reid had complied with

the provisions of G.S. 97-93 with respect to procuring insurance to secure payment of compensation to his employees or satisfying the Industrial Commission of his financial ability to pay compensation directly to them. Reid had not, in fact, complied with either of the two alternative requirements of this statute. Moreover, the principal contractor, Black, did not carry any workmen's compensation insurance. The claimant had worked for Reid during the seven or eight months next preceding September 8, 1947. On that day he and six others were engaged in plastering the ceiling and walls of the dwelling in Thomasville under the personal supervision of their immediate employer, Reid, when Sonny Gannoway, one of the fellow employees, purposely threw a hod of mortar composed of sand and lime into the claimant's face, seriously injuring the claimant's eyes. The record does not disclose that the claimant and Gannoway had ever had any previous contacts with each other apart from their labor.

Both Reid and Black denied the validity of the claim filed against them by Withers for compensation for the injury occasioned by Gannoway's assault. The parties offered testimony conflicting in nature before Commissioner Buren Jurney, who presided at the initial hearing, with respect to the circumstances preceding and accompanying the attack upon the claimant.

When the evidence is viewed in a light favorable to claimant, it justifies the inferences that Gannoway, a comparative youth, had been working with claimant and the other employees of Reid for two or three weeks to learn the plasterer's trade; that claimant and his experienced co-workers frequently charged Gannoway with being too slow in his work; that on the day of the assault the claimant and Gannoway were at work in a hallway in the dwelling at Thomasville, and claimant considered that Gannoway's position in the hallway impeded claimant's efforts to plaster a wall at which claimant was working; that claimant ordered Gannoway "to get out of the way," and Gannoway stepped aside so as not to interfere with claimant's work; that in consequence of this event an argument ensued between claimant and Gannoway in which claimant asserted "that if he couldn't whip Sonny Gannoway that he would relieve him of his job" and in which Gannoway warned claimant not to "let his mouth get him in trouble"; that Gannoway thereupon left the hallway and entered an adjacent bathroom, where he worked for approximately ten minutes; that Gannoway then returned to the hallway, where claimant was peaceably pursuing his labor, and without a word hurled the hod of mortar into the claimant's face; and that the lime in the mortar so injured claimant's eyes as to destroy permanently at least ninety-five per cent of his vision in each eye.

But when the testimony is construed adversely to claimant, it warrants the conclusions that the claimant, acting without apparent reason, sud-

denly addressed an obscene threat to Gannoway; that Gannoway thereupon threw the mortar into claimant's face on account of anger and fear aroused by such threat; and that there was nothing whatever in either the conduct or language of the parties suggesting any connection between the quarrel and the employment.

After hearing the evidence, Commissioner Jurney found that both the claimant and Reid were bound by the Workmen's Compensation Act. He made further findings of fact accordant with the testimony tending to support the claimant's case as set out above, concluded on the basis of such further findings that the claimant had suffered an injury by accident arising out of and in the course of his employment, and awarded the claimant compensation as against his immediate employer, Reid, for the total and permanent loss of his eyes. He dismissed the claim as against Black, however, on account of the fact "that there is no evidence showing that J. M. Black had as many as five employees."

The award of Commissioner Jurney was reviewed by the Full Commission on the appeal of Reid from the adjudication against himself, and on the appeal of the claimant from the exoneration of Black from liability. Upon its review, the Full Commission approved the findings of fact made by Commissioner Jurney, but disagreed with his ruling exonerating Black from liability to the claimant. After finding and concluding for itself on the basis of the testimony at the hearing "that the claimant sustained an injury by accident arising out of and in the course of his employment with Arthur Reid September 8, 1947, when lime mortar was thrown into his face by a fellow employee causing total blindness," the Full Commission found and adjudged that the principal contractor, Black, was liable to claimant after the exhaustion of the immediate employer, Reid, under G.S. 97-19 because Black sublet the contract for the plastering to Reid without requiring from Reid or obtaining from the Industrial Commission a certificate that Black had complied with the provisions of G.S. 97-93 and amended the award of Commissioner Jurney so as to hold the immediate employer, Reid, primarily liable and the principal contractor, Black, secondarily liable for compensation to claimant for total and permanent loss of his eyes. The Full Commission made an award accordingly, and Reid and Black appealed from the Full Commission to the Superior Court.

The Superior Court entered judgment setting aside the award of the Full Commission and exonerating both Reid and Black from all liability for compensation to claimant on the ground "there was not sufficient or competent evidence upon which to base a finding that the injury arose out of and in the course of claimant's employment." The claimant excepted to this judgment, and appealed therefrom to this Court, assigning errors.

Schoch & Schoch and Smith, Wharton, Sapp & Moore for claimant, James Franklin Withers.

Gold, McAnally & Gold for defendant, Arthur Reid.

Carl C. Wilson for defendant, J. M. Black.

ERVIN, J. The Full Commission made findings of fact sufficient in form as to the occurrence of the threefold conditions antecedent to the right to compensation under the North Carolina Workmen's Compensation Act, namely: (1) That claimant suffered a personal injury by accident; (2) that such injury arose in the course of the employment; and (3) that such injury arose out of the employment. G.S. 97-2 (f); *Bolling v. Belk-White Co.*, 228 N.C. 749, 46 S.E. 2d 838; *Taylor v. Wake Forest*, 228 N.C. 346, 45 S.E. 2d 387; *Wilson v. Mooresville*, 222 N.C. 283, 22 S.E. 2d 907; *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324; *Pickard v. Plaid Mills*, 213 N.C. 28, 195 S.E. 28; *Holmes v. Brown Co.*, 207 N.C. 785, 178 S.E. 569; *Winberry v. Farley Stores, Inc.*, 204 N.C. 79, 167 S.E. 475; *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 266.

Under G.S. 97-86, "findings of fact by the Industrial Commission, on a claim properly constituted under the Workmen's Compensation Act, are conclusive on appeal, both in the Superior Court and in this Court, when supported by competent evidence." *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869. This is so even in proceedings where the courts would reach different conclusions if they were clothed with fact-finding authority. *McGill v. Lumberton*, 218 N.C. 586, 11 S.E. 2d 873. Thus, we encounter this paramount question at the threshold of this appeal: Was there competent evidence at the hearing supporting the finding of the Full Commission that the claimant suffered a personal injury by accident arising out of and in the course of his employment with his immediate employer, Reid, when his fellow employee, Gannoway, purposely injured him by throwing the hod of mortar into his face?

The testimony plainly warranted the conclusion that claimant sustained a personal injury by accident because an assault is an "accident" within the meaning of the Workmen's Compensation Act "when from the point of view of the workman who suffers from it it is unexpected and without design on his part, although intentionally caused by another." Schneider's Workmen's Compensation Text (Perm. Ed.), section 1560; *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320; *Conrad v. Foundry Co., supra.*

It has become axiomatic that under the Workmen's Compensation Act the words "arising in the course of the employment" relate to the time, place, and circumstances under which an accidental injury occurs, and the term "arising out of the employment" refers to the origin or cause of the accidental injury. *Wilson v. Mooresville, supra; Lockey v. Cohen,*

Goldman & Co., 213 N.C. 356, 196 S.E. 342; *Plemmons v. White's Service, Inc.*, 213 N.C. 148, 195 S.E. 370; *Walker v. Wilkins, Inc.*, 212 N.C. 627, 194 S.E. 89; *Goodwin v. Bright*, 202 N.C. 481, 163 S.E. 576; *Hunt v. State*, 201 N.C. 707, 161 S.E. 203. Manifestly, the finding that the claimant's injury arose in the course of the employment was required by the evidence that it occurred during the hours of the employment and at the place of the employment while the claimant was actually engaged in the performance of the duties of the employment. *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294.

This brings us to the final inquiry on this phase of the controversy, *i.e.*, whether the evidence supports the conclusion of the Industrial Commission that the injury arose out of the employment. An injury is one "arising out of the employment" within the purview of the Workmen's Compensation Act, when it occurs in the course of the employment and is a natural or probable consequence or incident of it. *Ashley v. Chevrolet Co.*, 222 N.C. 25, 21 S.E. 2d 834. The test for determining whether an accidental injury arises out of an employment is this: "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Conrad v. Foundry Co., supra.*

The defendants, Reid and Black, assert that the entire evidence engenders the single conclusion that Gannoway assaulted claimant "solely under the impulse of anger, or hatred, or revenge, or vindictiveness, not growing out of but entirely foreign to the employment," and that by reason thereof they cannot be held liable for compensation for the resulting injury. *Holmes v. Brown Co., supra; Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728. This position is untenable upon the present record. The claimant and Gannoway had no personal contacts extraneous to their employment. There was testimony at the hearing tending to show that a quarrel arose between the claimant and his fellow employee, Gannoway, over the work which they were performing for their common employer, Reid, and that such quarrel led Gannoway to throw the hod of mortar into claimant's face. Thus, it appears that the finding of the Industrial Commission that the resulting injury to the claimant originated in his employment and arose out of it was supported by evidence. It necessarily follows that the award made against Reid by the Industrial Commission on the basis of this finding conforms to well considered decisions of this Court holding that where a workman is injured by a fellow employee because of a dispute about the manner of doing the work he is employed to do, the accident to the injured workman grows out of the employment and is compensable. *Hegler v. Mills Co.*, 224 N.C. 669, 31 S.E. 2d 918; *Ashley v. Chevrolet Co., supra; Wilson v. Boyd &*

Goforth, Inc., 207 N.C. 344, 177 S.E. 178; *Conrad v. Foundry Co., supra.* These cases are bottomed on the sound judicial recognition of this industrial truth: "Where men are working together at the same work, disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment." *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N.E. 530.

The defendant Black asserts, however, that in any event the Superior Court properly vacated the award of the Industrial Commission as against him for the reason that all of the testimony disclosed and the Commission found that his personal employees numbered less than five. It is undoubtedly true as a general proposition that the only private employments covered by the Workmen's Compensation Act are those "in which five or more employees are regularly employed in the same business or establishment." G.S. 97-2 (a). But this general rule is subject to the exception created by G.S. 97-19, which was manifestly enacted to protect the employees of financially irresponsible sub-contractors who do not carry workmen's compensation insurance, and to prevent principal contractors, immediate contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency of direct employees.

As amended by Chapter 766 of the 1945 Session Laws, this statute reads as follows: "Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with section 97-93 hereof, shall be liable, irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within this state, to the same extent as such sub-contractor would be if he had accepted the provisions of this article for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of sub-letting such contract to sub-contractor, he shall not thereafter be held liable to any employee of such sub-contractor for compensation or other benefits under this article. The Industrial Commission, upon demand, shall furnish such certificate, and

may charge therefor the cost thereof, not to exceed twenty-five cents. Any principal contractor, intermediate contractor, or sub-contractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof. Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer. The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor." Cases from other jurisdictions interpreting somewhat similar statutes have been collected in the following annotations: 58 A.L.R. 872-901; 105 A.L.R. 580-597.

Since it appeared from his own admissions and from other undisputed testimony on the hearing that Black undertook to construct the dwelling involved in this proceeding in the capacity of principal contractor and sublet the contract for the plastering of its ceilings and walls to Reid without requiring from Reid or obtaining from the Industrial Commission the prescribed certificate stating that Reid had complied with G.S. 97-93 either by procuring compensation insurance or by satisfying the Industrial Commission of his financial responsibility as a self-insurer, it necessarily follows that the Industrial Commission properly adjudged that Black was liable to the claimant for compensation after the exhaustion of Reid, and that the Superior Court erred in setting aside the award against Black.

The Workmen's Compensation Act makes specific provision for compensation "for the loss of an eye." G.S. 97-31 (q). Furthermore, it prescribes that the "total . . . loss of vision of an eye shall be considered as equivalent to the loss of such . . . eye." G.S. 97-31 (t).

The court expressly adjudged that "even if this case is compensable there is no sufficient evidence to support a finding of fact, or conclusion of law, or an award allowing the claimant compensation for total blindness." It is to be noted that there was testimony on the hearing to the effect that the accident permanently destroyed ninety-five per cent of the vision of each of the claimant's eyes. The defendants assert that this evidence is insufficient as a matter of law to establish a total loss of vision and cite *Logan v. Johnson,* 218 N.C. 200, 10 S.E. 2d 653, which was decided in 1940, as authority for their position in this respect.

This decision lends color of support to the present contention of the defendants. In the *Logan case,* this Court corrected one of the erroneous

judgments rendered by the writer of this opinion while he was serving as a Superior Court judge and by reason thereof was still subject to what *Chief Justice Bleckley* of the Supreme Court of Georgia was pleased to call "the fallibility which is inherent in all courts except those of last resort." *Broome v. Davis,* 87 Ga. 584, 586. The defendants overlook the significant fact, however, that the General Assembly of 1943 converted the unsound notions which led the writer astray in the *Logan case* into sound law by amending the statute now embodied in G.S. 97-31 (t) so as to provide that "in cases where there is eighty-five per centum, or more, loss of vision in an eye, this shall be deemed 'industrial blindness' and compensated as for total loss of vision of such eye." 1943 Session Laws, c. 502, s. 2. Thus it appears that the Industrial Commission rightly ruled not only that claimant's loss of vision was permanent, but also that it was total rather than partial.

For the reasons given, the award of the Full Commission was proper in all respects, and the judgment of the Superior Court setting it aside is hereby

Reversed.

W. B. CARROLL v. NORTH CAROLINA STATE FIREMEN'S ASSOCIATION AND BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF WILMINGTON, NORTH CAROLINA.

(Filed 25 May, 1949.)

1. State § 3—

Where a statute creates a corporate State agency with capacity to sue and be sued, but expressly limits actions which may be brought against it, the limitation on the right to sue the agency is effective.

2. Firemen's Relief Fund § 2—

A fireman may not sue the State Firemen's Association on a claim for benefits under the Act. G.S. 118-12.

3. Firemen's Relief Fund § 3—

A claim for hospital expenses incurred as a result of an injury received by a fireman in the course of his duties does not come within the benefits provided for members of the State Firemen's Association.

4. Firemen's Relief Fund § 12—

A fireman may not accept benefits afforded by Ch. 26, Private Laws of 1937, and then assert that he is entitled to recover benefits for a single item covered by the general law, Ch. 41, Laws of 1925, which the private law supersedes in his community.

5. Firemen's Relief Act § 11—

Where a claimant states no cause of action against the local Firemen's Pension Fund, it is not necessary to consider his challenge of the validity

of the act creating the local pension fund as successor to the Relief Fund theretofore existing under the general law, and the judgment that he recover nothing against the trustees of the pension fund will be affirmed, and the appeal dismissed.

APPEAL of plaintiff and defendant N. C. State Firemen's Association from *Burney, J.*, October Term, 1948, NEW HANOVER Superior Court.

John D. Bellamy & Sons and Walton Peter Burkhimer for plaintiff, appellant-appellee.

Hartsell & Hartsell and James & James for defendant, appellant.

Wm. B. Campbell for defendant Board of Trustees of the Firemen's Pension Fund of Wilmington, appellee.

SEAWELL, J. The plaintiff, a resident of the City of Wilmington, sued to recover $499.88, alleged to be a loss sustained by him in the course of his employment as a member of the Wilmington Fire Department, in payment of a hospital bill occasioned by an injury alleged to have occurred in the performance of his duty as fireman on January 18, 1940.

The suit was first brought against the State Firemen's Association. Because of the answer filed by the State Association, and an allegation therein that the Trustees of the local Board were at least primarily liable, if any liability existed, the Board of Trustees of the Firemen's Pension Fund was made a party.

As the pleadings were finally adjusted by amendment and undisputed facts made the subject of stipulation, the three-way controversy finally emerged in the following form:

Plaintiff, a resident of the City of Wilmington, and a member of the Wilmington Fire Department in good standing, while upon duty at the fire station January 18, 1940, fell and received an injury to his head which required hospitalization. The hospital bill incurred on this account was $499.88, which constitutes the basis of the suit.

For the period beginning January 8, 1940, to and including May 31, 1940, the City of Wilmington paid to Carroll his full monthly salary and compensation according to his then rating and salary in the sum of $133.33 per month.

On May 11, 1940, the plaintiff addressed a letter to the Chairman of the Board of Trustees of the Firemen's Pension Fund, requesting that he be put upon the retired list and be paid the pension benefits to which he was entitled. In pursuance of this request the plaintiff was retired as of June 1, 1940, and has been on the retired list since that time, receiving from the Trustees of the Firemen's Pension Fund the sum of $76.76 monthly in accordance with the provisions of Chapter 26, Private Laws of 1937.

The N. C. State Firemen's Association was created by Chapter 251, Laws of 1889, with corporate name and powers, for statistical research and fraternal purposes, without appropriation.

By Chapter 468, Public Laws of 1891, the sum of $2,500 was appropriated annually, constituting a "Firemen's Relief Fund" which the Treasurer of the State was required to pay to the Treasurer of the N. C. State Firemen's Association to be used for the relief of firemen, members of the association, who might be injured or rendered sick by disease contracted in the active discharge of duty as firemen, and for the relief of widows, children or dependent mothers of firemen killed or dying from disease contracted in discharge of duty.

By Chapter 831, Laws of 1907, there was created a Firemen's Relief Fund to be expended in the several towns and cities of the State qualifying under the law. Under this Act fire insurance companies were required to pay a tax of fifty cents on each one hundred dollars of premiums collected upon policies insuring property within the municipalities affected, to be used as a relief fund under the act. This was required to be paid directly by the Insurance Commissioner to the Treasurer of each town or city, subject to the use of the Board of Trustees of the Firemen's Relief Fund in each town or city created by that act. The act authorized the creation of such a board and provided for member succession.

The object of the relief therein, substantially stated, was (1) to safeguard the men in active service from loss of time from daily work occasioned by sickness contracted or injury received in the performance of duties, conditions to be prescribed by the North Carolina State Firemen's Association; (2) to provide reasonable support for those dependent upon the services of firemen who might lose their lives in the fire service of the town by accident or disease contracted by reason of the service; (3) to safeguard any fireman qualified by length of service in becoming dependent upon charity. In this act it was further provided that a sum not exceeding five per cent of the gross proceeds received by each town or city should be turned over to the State Firemen's Association for general purposes.

These laws were brought forward, with amendments immaterial to this case, except as noted, in the Consolidated Statutes of 1919, as Chapter 98, Articles 1 and 2.

Chapter 98 was amended by Chapter 41, Laws of 1925, by adding at the end of Section 6058, of Chapter 98, of the Consolidated Statutes, the following: "No fireman shall be entitled to receive any benefits under this section until the Firemen's Relief Fund of his city or town shall have been exhausted." (The amendment applies to direct appropriation paid into the hands of the Treasurer of the State Firemen's Association.) The 1925 Act also amended C.S., Sec. 6069 (relating to the disbursement

by local trustees) by striking out subsection 1 and inserting in lieu thereof the following: "1. Safeguard any fireman in active service from financial loss occasioned by sickness contracted or injury received while in the performance of his duties as fireman." Substantially in that form the laws were collected and revised in unimportant details and enacted as they appear in G.S., Chapter 118, "The Firemen's Relief Fund." Article 1 relates to the fund derived from fire insurance companies, and Article 2, to the State appropriation.

Throughout these laws the statute relating to the organization of a local Board of Trustees of Firemen's Relief Fund remained the same, and the requirements as to the disbursement of the fund were practically unaltered in scope and objective until the amendment of 1925, just noted, changing the phraseology of the Consolidated Statutes into the phrase, "To safeguard any fireman in active service from financial loss . . ."

Chapter 26, Private Laws of 1937, applicable only to the City of Wilmington, creates an entirely new Board under the name, "Trustees for the Firemen's Pension Fund of Wilmington, North Carolina," for the purpose of establishing and administering a permanent fund for the purposes set out in the act. It provides for the appointment of trustees for the fund, the payment to them by the treasurer, who is appointed collecting officer, of two per cent of the salaries of those employed as firemen; payment into the fund of fines by way of discipline; the investment and holding of property, with other powers. Summary of disbursements authorized are: (1) To safeguard members of the fire department from becoming dependent; (2) to provide reasonable support for widows and minors actually dependent, among those who may lose life in the fire service by accident or injury or disease contracted by reason of the service; (3) to pension permanently disabled or superannuated members of the fire department as defined in the act.

In section 2 of that act it is provided:

> "That funds now held by the Board of Trustees of the Firemen's Pension and Relief Fund of the City of Wilmington, or at the time of the ratification of this Act being administered by it, shall be paid over by the said Trustees to the Treasurer of the Board of Trustees of the Firemen's Pension Fund of Wilmington, North Carolina, created by this Act, and by the latter Board held, administered, managed and disbursed under the provisions of this Act for the purposes and benefits herein defined."

Under the authority of the quoted section of the 1937 Act an aggregate amount of $32,531.94, effective as of June 3, 1937, was turned over to the present defendant "Board of Trustees for the Firemen's Pension Fund" by the then existing "Board of Trustees for the Firemen's Pension

and Relief Fund" of the City of Wilmington. Thereafter the Treasurer of the "Firemen's Relief Fund" of the City of Wilmington continued to receive checks from the Treasurer of North Carolina which were endorsed and turned over to the Treasurer of the Pension Fund as follows:

> "In 1937, $1148.62; in 1938, $1272.67; in 1939, $1091.45; in 1940, $1114.92; in 1941, $1074.46; in 1942, $1314.33."

It is stipulated that Article 3, of Section 1, of the Bylaws of the State Firemen's Association reads as follows:

> "Any member of this Association injured or made sick by disease contracted in the actual discharge of his duties as a fireman shall be entitled to the benefits from the 'Firemen's Relief Fund' of this Association, as follows: At the rate of $4.00 per day while totally unable to attend to his ordinary business by reason of such injury or sickness for a period not exceeding one hundred days; . . ."

The defendant local Board exhibits several pages of accounts tending to show that the income and output of the funds in its hands are practically equal so that there currently remains no fund in its hands applicable to plaintiff's demand, even if it were under the law liable therefor.

The defendant State Association sets up the defense that the plaintiff under pertinent statutes is forbidden to sue the State Association directly upon this or any other cause relating to the subject; and that at any rate the law itself requires local funds to be exhausted before any resort may be had to other funds under its control; and in this connection contends that Chapter 26, Private Laws of 1937, is invalid in that it is an attempt to repeal a general State law and change the character of funds expressly put in trust and to be disbursed for specific purposes inconsistent with that directed by the private Act; and that this repeal has not been accomplished because there is no expression of that purpose in the caption of the act as required by G.S. 12-1, the law then in force; or other indication of its intent to repeal; and that, therefore, this fund is constructively in the hands of the present pension board and should be, in law, available for payment of plaintiff's claim, if just and legal.

The plaintiff, while making no direct allegation aaginst the local Pension Board in the nature of the statement of cause of action against it, does claim that if the above mentioned Chapter 26, Private Laws of 1937, is invalid, in that event his claim ought to be settled out of funds left in the hands of the Pension Board received from State sources.

By agreement of the parties, Judge Burney heard the matter without the intervention of a jury, and under the stipulation of facts and admissions in the pleadings, and upon the laws affecting the matter in controversy, rendered judgment that the plaintiff recover nothing of the defend-

ant Pension Board and that it recover of the defendant State Firemen's Association the sum of $400 with cost of action. From this judgment the plaintiff and the defendant State Firemen's Association appealed.

While the plaintiff appealed generally, it appears from the record that the appeal from that part of the judgment rendered in its favor against the State Firemen's Association was based on the fact that the recovery was restricted to $400 instead of the larger amount demanded; and its appeal from the judgment of non-recovery against the defendant Pension Board was out of precaution and in the hope that it might be awarded the judgment against certain funds in the hands of the Pension Board in case ultimately the statute under which this defendant has received these funds from State sources should be pronounced invalid under the attack of the defendant State Firemen's Association. The anomalous character of this appeal will be noted later.

The death of plaintiff, pending appeal, having been suggested, his executors have come in, made themselves parties, and adopted their testator's pleadings.

Under the law as it now stands and as it stood when the defendant Pension Board was created and took over, there were three sources from which the State Firemen's Association received moneys: (a) Its proportionate part of the State's annual appropriation of $2,500, (b) the five per cent of the insurance tax, going into its general purpose fund, and (c) the amount contingently payable to it upon failure of the local Board of Trustees to perform certain duties, and after the matter had remained unadjusted for a given period. There is no intimation that this contingency has been productive. We are, therefore, left to consider whether the State Firemen's Association may be liable under the statute with respect to the State appropriation.

Although the State Firemen's Association has been created a corporation with capacity to sue and be sued, a suit for recovery upon a claim against funds in its hands is expressly inhibited. G.S. 118-12. It is apparently the purpose of the Act to create a State agency and in doing so the doorway to court action is opened no wider than the statute permits. Moreover, the statute defines its purposes,—the character of relief afforded,—which is quite different from the obligation imposed upon the local Relief Board under G.S. 118-7—"to safeguard from financial loss" (see C.S. 6069 as amended by Chapter 41, Laws of 1925). Whatever that may mean as applied to funds in the hands of the local Board, the disbursements of funds in the hands of the State Association cannot be liberalized, or the strict requirements of the law rationalized, to include a financial loss of the character claimed; nor will the bylaws of the Association bear that construction. The pertinent provisions of the bylaws above quoted are too evidently based on loss of earnings since

compensation is based on a per diem, running during a defined period of disability, with provision for extension in exceptional cases, at the discretion of the Association. His Honor was in error in analogizing or confusing this kind of benefit with the plaintiff's unrelated claim for reimbursement for a hospital bill, applicable, if at all, only to the funds to be disbursed by the local Relief Board as organized under the general law.

On the appeal of the defendant Association the judgment must be reversed. It is so ordered.

We have not found it necessary to deal with or mature the contingency from which plaintiff expresses the hope to be a standby beneficiary—a finding that the Private Act through which the present Pension Board has succeeded to the funds provided by the General Statute is invalid as an abortive attempt to repeal the general public laws, with the result that the defendant local Board is to be held constructively in possession of funds impressed with a trust, subject to plaintiff's demand.

The plaintiff has in effect pitched his claim against the local Pension Board in the alternative; that he should recover against it only provided the statute under which it holds the disputed funds should be declared invalid, and the funds impressed with a trust which he supposes would subject them to his demands. As stated, there are no allegations or positive averments in his pleadings upon which the trial court could have predicated any judgment against the defendant Pension Board; and the Court has not found it necessary to consider the suggested invalidity of the statute at all.

It does not appear from the record that the Trustees of the Firemen's Relief Fund have been made parties to this action, although by order of Judge Olive the fund itself seems to have been made a party—but has not yet spoken.

However, if the Act of 1937 should be declared invalid with respect to the transfer of funds from the Trustees of the Firemen's Relief Fund, there would still be hurdles for the plaintiff to overcome. One is whether he has not elected to take the benefits under the 1937 law rather than pursue another fund under the general law having only in the particular respect a broader coverage, but upon the whole presenting much less social and financial security. It seems rather obvious that he would not be entitled to take all the benefits of the Pension Fund plus the benefits of a single item picked from a different law.

At present we can only say that plaintiff's pleading does not put him in position to recover anything from the defendant Trustees of the Firemen's Pension Fund.

On plaintiff's appeal, therefore, the judgment that he recover nothing from the defendant Trustees of the Firemen's Pension Fund is affirmed

and the appeal dismissed; and on his appeal respecting the judgment against the State Firemen's Association, the appeal is dismissed.

On appeal of defendant State Firemen's Association, the judgment is reversed.

UNIVERSAL C. I. T. CREDIT CORPORATION v. JOHN E. WALTERS, SHERIFF OF GUILFORD COUNTY; A. M. KRIEGSMAN, MAMIE W. JONES, ARCH K. SCHOCH AND GUILFORD MOTOR CORPORATION, T/A JACK'S U-DRIVE-IT.

(Filed 25 May, 1949.)

1. Courts § 14—

Comity does not operate in opposition to settle statutory policy or enactments.

2. Chattel Mortgages § 8b—

The uniform sales act of the state wherein the property was purchased and the conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of our registration statutes, G.S. 47-20, G.S. 47-23, since our statutes make no exception in favor of a conditional sale contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this State.

3. Chattel Mortgages § 8a: Registration § 1—

Where personal property subject to a conditional sale contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a *situs* here within the meaning of our registration statute, and such lien is not required to be registered in any county of this State. G.S. 47-20, G.S. 47-23.

4. Chattel Mortgages § 8b: Execution § 8—

An automobile purchased by a nonresident in another state and subject to a conditional sale contract, registered in accordance with the laws of such other state, was brought into this State by the nonresident while on a temporary visit. The automobile was seized under execution of a judgment obtained here against the nonresident. *Held:* The lien of the conditional sale contract is superior to the lien obtained by levy under execution.

5. Same—

The lien against personalty acquired by levy under execution of a judgment cannot be superior to the interest of the judgment debtor in the property, and where the judgment debtor owns only an equity of redemption, the lien acquired by execution is subject to the prior lien of a chattel mortgage or conditional sale contract when such instrument is not required to be registered here.

APPEAL by defendant Kriegsman from *Gwyn, J.*, April Term, 1949, GUILFORD.

Civil action in claim and delivery for the possession of an automobile.

On 22 December 1947, one Charles R. Brumer, a resident of Chicago, purchased from K-F Motors, Inc., the Frazer Manhattan Sedan described in the pleadings, not for resale but for his personal use. He executed a conditional sale contract to secure the purchase price. This contract was duly registered in the office of the Secretary of State of Illinois as required by the Illinois uniform sales statute, but was not recorded under the Illinois general recording act. It has not been recorded in any county in this State.

On or about 22 January 1948, Brumer came to North Carolina on said automobile for a visit or other purpose and was on said date temporarily in North Carolina.

On 22 September 1947, defendant Kriegsman obtained a judgment against Brumer in Guilford County, N. C. On 22 January 1948, the sheriff of Guilford County, under authority of an execution issued on said judgment, seized and levied upon said automobile for the purpose of selling same to satisfy said judgment.

Thereupon the plaintiff, on 7 February 1948, instituted this action and sued out the ancillary writ of claim and delivery under which it acquired possession of said automobile. The automobile was advertised for sale under the provisions of the conditional sale contract and sold to a third party for the sum of $2,100.

At the time said automobile was levied upon by the sheriff and later delivered to plaintiff, Brumer was indebted to plaintiff on the conditional sale contract in the sum of $2,439.53, and to Kriegsman on his judgment in the sum of $800 with interest from 22 September 1947 and costs.

The automobile having been sold, the case resolved itself into a contest over the ownership of the proceeds of sale. The court below, on facts agreed, held that plaintiff is the owner and entitled to the possession of said automobile or the proceeds from the sale thereof, and its lien is superior to the lien acquired by defendant by levy under execution. It thereupon adjudged that plaintiff have and recover the proceeds of sale together with its cost, free and clear of any claim of defendant Kriegsman or any one of the other defendants herein. Defendant Kriegsman appealed. Other defendants, judgment creditors, did not appeal.

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

York & Boyd for defendant Kriegsman.

BARNHILL, J. The rule of comity, the effect of the Uniform Sales Act on the law of registration and the rights of the parties and other inter-

esting questions have been attractively and ably presented by counsel. However, it is conceded that the one question posed for decision is this: If the nonresident owner of an automobile, which is subject to a conditional sale contract, temporarily has the automobile in this State, is a lien thereon, acquired by levy under execution in this State, superior to the lien of the conditional sale contract? It would seem to us that the answer is no, without regard to whether the conditional sale contract is or is not registered in this State. That is, neither our registration statute nor the rule of comity has any substantial bearing on the question presented.

Illinois has adopted the Uniform Sales Act, Illinois Rev. Stat. of 1947, Chap. 121½, and the contract was registered in the office of the Secretary of State of Illinois as therein required. This Act recognizes the validity of conditional sales contracts and specifically provides that no title can be passed by the purchaser of goods under such a contract without the consent of the owner "unless the owner of the goods is by his own conduct precluded from denying the seller's authority to sell." *Sherer-Gillett Co. v. Long,* 149 N.E. 225; *Gordon Motor Finance Co. v. Aetna Accept. Co.,* 261 Ill. App. 536. Under such agreement, title never passes to the purchaser but is reserved to the seller even though there is an actual delivery, the possession of the purchaser being the possession of the seller. *Ford Motor Co. v. Investment Co.,* 14 N.E. 2d 306. The rights of one who acquires title through the purchaser are subordinate to the rights of the original vendor under the conditional sale contract. *Sherer-Gillett Co. v. Long, supra; In re Abell,* 19 F. 2d 965.

This being true, plaintiff insists that its lien takes priority under the rule of comity. But comity is not permitted to operate within a State in opposition to its settled policy as expressed in its statutes, or so as to override the express provisions of its legislative enactments. *Applewhite Co. v. Etheridge,* 210 N.C. 433, 187 S.E. 588; *Ritchey v. Southern Gem Coal Corp.,* 12 F. 2d 605. Our Legislature in enacting our registration statutes, G.S. 47-20, 23, made no exception in favor of a conditional sale contract or chattel mortgage executed and effective in another State where the property embraced in such instrument is subsequently brought into this State.

However, the requirements of our statute have no application to personal property in transit through or temporarily within the State. It provides, in respect to personal property, that no mortgage shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor but from the registration of such mortgage in the county where the donor, bargainor, or mortgagor resides; or in case the donor, bargainor, or mortgagor resides out of the State, then in the county *where the said personal*

estate, or some part of the same, is situated. G.S. 47-20; and the provisions as to mortgages apply to conditional sales contracts. G.S. 47-23.

"Where the said personal estate, or some part of the same, is situated" signifies something more than the mere temporary presence of the property within this State. "Situated" means having a site, situation or location; permanently fixed; located. Webster's New International Dictionary; *Oklahoma City v. District Ct.,* 32 P. 2d 318, 93 A.L.R. 489; *State Bank v. Nat. Bank,* 166 S.W. 499. See also 39 Words and Phrases, perm. ed., p. 350. "It connotes a more or less permanent location or *situs,* and the requirement of permanency must attach before tangible personalty which has been removed from the domicil of the owner will attain a *situs* elsewhere." *Brock & Co. v. Board of Supervisors,* 65 P. 2d 791, 110 A.L.R. 700; *Motor Sales, Inc. v. Lay,* 3 S.E. 2d 190; *Flora v. Motor Co.,* 193 P. 545; *Bankers' Finance Corp. v. Motor Co.,* 91 S.W. 2d 297; *C. I. T. Corp. v. Guy,* 170 Va. 16, 195 S.E. 659.

Brumer is admittedly a nonresident of this State, and the automobile was not situated in this State within the meaning of our registration statute. Hence there was no place in this State where the conditional sale contract could have been registered so as to give constructive notice to creditors and purchasers for value.

It would be manifestly unjust to hold that the mere crossing of the State line in the ordinary use of a mortgaged chattel subordinates the mortgage lien to other claims unless the mortgagee shall record his mortgage in every county in every State where the mortgagor is likely to go. Such a conclusion would create an intolerable situation and the attendant expense would be so burdensome that it would no doubt close the market for loans on motor vehicles.

It imposes less hardship to require a person who deals with another in respect to specific personal property to inquire where he lives than to compel the original vendor to foresee where he will take the chattel. *Acceptance Corp. v. Rogers,* 142 S.W. 2d 888. Indeed, he must ascertain the residence of the one in possession in order to determine where he must look for encumbrances.

The rule of justice and common sense, if not the rule of comity, compels the conclusion that, under the circumstances here disclosed, the lien of the conditional sale contract remains superior to those after acquired in this State by levy under execution. *Acceptance Corp. v. Rogers, supra; Finance Co. v. Motor Co., supra.* The lien of a mortgage or conditional sale contract validly executed and legally registered according to the laws of the State wherein the property was and the mortgagor resided will be recognized and enforced in this State against the claims of attaching creditors when the presence of such property in this State is of such a

temporary or transient nature that it has not come to rest in the State so as to acquire a *situs* here. See H.B. 185, Session Laws of 1949.

Brumer owned only an equity of redemption. That interest alone, as against plaintiff, was subject to sale under execution. As said by *Stacy, J.* (now *C. J.*) in *Spence v. Pottery Co.*, 185 N.C. 218, 117 S.E. 32: "A judgment creditor, or even a purchaser at an execution sale, acquires no greater lien or interest in the property of the judgment debtor than the latter had at the time the judgment lien became effective." The lien of the judgment or attaching creditor "is limited to and can rise no higher than the interest of the debtor; a stream cannot rise higher than its fountain. A purchaser under an execution takes all that belongs to the debtor, and nothing more." See also *Sherer-Gillett Co. v. Long, supra; General Motors Accept. Corp. v. U. S.*, 23 F. 2d 799.

"Where one of two persons must suffer loss . . . he who . . . by his negligent conduct made it possible for the loss to occur, must bear the loss," *Bank v. Liles*, 197 N.C. 413, 149 S.E. 377, is the underlying philosophy of the registration statute. A mortgagee who negligently fails to record his mortgage and thereby induces or permits a creditor or purchaser to deal with the mortgagor in respect to the mortgaged property as if it was his own must suffer any resulting loss. But here plaintiff has been guilty of no negligence. Nor has appellant suffered any loss by virtue of the fact plaintiff's lien was not recorded in this State. He is in exactly the same situation he was before execution was issued. Hence, he is in no position to invoke the protection of the registration statute.

A careful examination of the original record in *Truck Corp. v. Wilkins*, 219 N.C. 327, 13 S.E. 2d 529, discloses that the opinion in that case is directly in point. There the owner of the truck lived in Florida. The plaintiff held a title retention note duly registered in that State. The truck was brought to this State where it was seized under writs of attachment. There is nothing in the record to indicate that the property had acquired a *situs* here. We held that the lien of the title retention note was superior to the liens acquired by the attaching creditors.

The last paragraph in the opinion in that case was not material to the issue there presented. In this connection it must not be understood we suggest that the rule would be different, as between the lien acquired by levy under execution or attachment on the one hand, and the lien of a duly registered conditional sale contract on the other, if the property had acquired a *situs* here. We confine decision to the question presented and leave the other for its proper day.

For the reasons stated, the judgment below is

Affirmed.

STATE v. EARL BLACK AND CHARLIE FALES.

(Filed 25 May, 1949.)

1. Criminal Law § 29a—

Where defendants have elicited testimony disclosing delay in commencement of the prosecution against them in order to establish an inference that the State's witnesses were conscious of the weakness of the State's case against defendants, it is competent for the State to explain the delay for the purpose of showing that such inference was not warranted by the circumstances.

2. Criminal Law § 35—

The hearsay rule precludes the admission in evidence of extrajudicial assertions of a third person for the purpose of establishing the truth of the facts asserted by such third person, but it does not preclude testimony as to such assertions for the purpose of showing the state of mind of the witness in consequence of such assertions.

3. Same—

Defendants elicited testimony disclosing delay in commencing the prosecution against them. To controvert the inference sought to be established by defendants from such delay, a deputy sheriff was permitted to testify for the State that an S.B.I. agent, not a witness, told the deputy not to arrest defendants at the time because they were giving the agent some information on another, unconnected case. *Held:* The testimony of the deputy is not incompetent as hearsay since it was not admitted to prove the truth of the assertions by the S. B. I. agent.

4. Criminal Law § 53j—

The court correctly charged the jury as to the specific factors it might consider in determining the credibility of the witnesses and the weight to be attached to their testimony, and then charged that the jury might take into consideration "any other factors that suggest themselves to your good judgment and common sense to enable you to pass upon the credibility" of each witness. *Held:* The charge construed contextually merely instructed the jury that it might determine the credibility of the witnesses from the factors specially enumerated by the court and other circumstances in evidence tending to throw light upon these matters, and so construed, the charge is not erroneous.

5. Criminal Law § 78e (2)—

Asserted misstatement of the contentions of the State must be brought to the trial court's attention in time to afford opportunity for correction in order for an exception thereto to be considered.

APPEAL by defendants, Earl Black and Charlie Fales, from *Bobbitt, J.*, and a jury, at the October Term, 1948, of the High Point Division of GUILFORD.

The defendants were tried upon consolidated indictments in which they were charged with these offenses: (1) Breaking into and entering the

building of G. F. Waddell and wife, Goldie Waddell, with intent to commit the felony of larceny therein contrary to G.S. 14-54; and (2) robbery with firearms in violation of G.S. 14-87.

The State presented evidence at the trial indicating that the prosecuting witnesses, G. F. Waddell and his wife, Goldie Waddell, as partners, operated a restaurant known as "Waddell's Stop-N-Eat" in a building standing beside United States Highways 29 and 70 about half way between Greensboro and High Point in Guilford County; that after the restaurant had been closed for business, to wit, on the early morning of 19 April, 1948, two men, who were masked and armed with pistols, entered the building through a window, which they pried open, and took $1,750 belonging to the prosecuting witnesses from the presence of Goldie Waddell and from the person of G. F. Waddell by locking Goldie Waddell up in a closet and by beating, torturing, and threatening to shoot and kill G. F. Waddell; and that thereafter the intruders fled with the stolen money, leaving the prosecuting witnesses bound and gagged. In testifying for the State at the trial, both G. F. Waddell and Goldie Waddell positively identified the defendants as the perpetrators of the offenses set out above. Their evidence in this respect, however, was sharply contradicted by testimony adduced by the defendants tending to show that at the time in controversy they were at their respective homes in Wilmington, North Carolina, almost 200 miles distant from the restaurant.

On 20 April, 1948, G. F. Waddell advised the State's witness, D. S. Lee, a deputy sheriff of Guilford County, that he suspected the guilty parties to be a third person, whom he named, and the defendant, Earl Black, who in time past had lived in Guilford County and patronized "Waddell's Stop-N-Eat." The record does not disclose, however, that this suspicion was communicated to the State Bureau of Investigation by the Sheriff of Guilford County, who sought assistance in ferreting out the perpetrators of the offenses in question.

The State Bureau of Investigation undertook to solve simultaneously the occurrence at "Waddell's Stop-N-Eat" and a charge of the defendant, Earl Black, that on 31 October, 1947, he was assaulted in a secret manner by some unknown person while standing on the driveway at his service station in Wilmington.

The State Bureau of Investigation made separate requests of the prosecuting witnesses and Earl Black to visit the Sheriff's Office in Fayetteville, North Carolina, with a view to determining whether or not certain men confined in the Cumberland County jail were guilty of complicity in the matters set forth above. It happened by apparent coincidence that the prosecuting witnesses and Earl Black, who was accompanied by his personal friend, the defendant, Charlie Fales, arrived at the Sheriff's Office in Fayetteville at precisely the same time. D. S.

Lee and J. W. Donovant, another deputy sheriff of Guilford County, who had escorted the prosecuting witnesses from Greensboro to Fayetteville, and George Canady, the representative of the State Bureau of Investigation having these matters in charge, were present.

The State offered testimony at the trial tending to show that upon encountering Black and Fales at Fayetteville the prosecuting witnesses recognized that they were the men who had entered their restaurant and robbed them of $1,750 on 19 April, 1948, and that the prosecuting witnesses thereupon called Lee and Donovant aside and secretly informed them of that fact. The defendants elicited evidence on the cross-examination of the prosecuting witnesses and Donovant, who also testified for the State, that notwithstanding these facts no prosecution was instituted against the defendants until 15 September, 1948, when warrants were issued against them upon complaints made by Deputy Sheriff Lee charging them with the offenses involved in this case.

The State thereupon called on Lee to explain "the delay in the issuance of the warrants." He testified over the exceptions of the defendants that the following colloquy took place between him and George Canady, of the State Bureau of Investigation, immediately after he was advised by the prosecuting witnesses that the defendants were the men who had robbed them: "I called Mr. Canady around the corner and told him that they had identified Fales and Black as the men who robbed them up there, and asked him why we didn't grab them off. Mr. Canady said, 'We can't arrest them at this time due to the fact they are giving me some information on another case that doesn't have any relation to Black and Fales.' He said for me to wait awhile before they were arrested. He also asked me when I did get ready to arrest them to let him know, to be sure he had everything out of the way. I didn't issue a warrant until I got ready to arrest them and pick them up because I didn't want any information to leak out whatsoever. I didn't arrest them there that day in Fayetteville because I was asked not to by Mr. George Canady."

The conference between Lee and Canady occurred out of the presence of the defendants, and Canady did not testify on the trial. In admitting Lee's evidence as to his colloquy with Canady, the court gave this instruction to the jury: "This testimony, Gentlemen of the Jury, is not admitted as evidence bearing upon what happened, if anything did happen, upon the occasion referred to in the bill of indictment. It is admitted for your consideration only as it might bear—it being for you to determine to what extent, if any, it does bear—upon the matter of the delay in the issuance of the warrants."

The jury found the defendants guilty upon both of the charges, the court sentenced the defendants to imprisonment in the State's prison, and the defendants appealed, assigning as errors the evidence of the State's

witness, D. S. Lee, as to his colloquy with Canady and certain excerpts from the charge.

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

H. L. Koontz and C. L. Shuping for the defendants, appellants.

ERVIN, J. The defendants elicited the testimony relating to the delay in the commencement of the prosecution against them as an implied admission by conduct on the part of the State's witnesses that they were conscious of the weakness of the State's case against the defendants. Consequently, it became proper for the State to explain the delay, and to show that the inference which the defendants sought to draw from it was not warranted by the circumstances. *Collins v. R. R.*, 187 N.C. 141, 120 S.E. 824; *McCraw v. Insurance Co.*, 78 N.C. 149; Wigmore on Evidence (3rd Ed.), section 284; Stansbury's North Carolina Evidence, section 178; 31 C.J.S., Evidence, section 380. This the State undertook to do by the testimony of the State's witness, D.S. Lee, as to his conversation with George Canady, the representative of the State Bureau of Investigation.

The defendants insist with much earnestness that the ruling of the court receiving this testimony runs afoul of the Hearsay rule. They say that the soundness of their position becomes indisputably clear when the evidence of Lee as to the unsworn statements of Canady is laid alongside the well settled principle that evidence is hearsay if "its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *Randle v. Grady*, 228 N.C. 159, 45 S.E. 2d 35; *Teague v. Wilson*, 220 N.C. 241, 17 S.E. 2d 9; *Young v. Stewart*, 191 N.C. 297, 131 S.E. 735; *S. v. Lassiter*, 191 N.C. 210, 131 S.E. 577.

Manifestly this contention of the defendants arises out of a misapprehension of the part which the Hearsay rule is designed to play in the law of evidence. The true office of the rule is explained with rare accuracy and succinctness in these words of Dean Wigmore: "The Hearsay rule forbids merely the use of an extrajudicial utterance as an assertion to evidence the fact asserted. Such a use would be testimonial, *i.e.*, we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the Hearsay rule forbids is the use of testimonial evidence—*i.e.*, assertions—uttered not under cross-examination. If, then, an utterance can be used as circumstantial evidence, *i.e.*, without inferring from it as an assertion to the fact asserted, the Hearsay rule does not oppose any barrier, because it is not applicable." Wigmore on Evidence

(3rd Ed.), section 1788. This statement comports fully with the repeated decisions of this Court holding that the testimony of a witness as to what some third person has told him will not be admitted as evidence of the existence of the fact asserted by such third person. *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *Bailey v. R. R.,* 223 N.C. 244, 25 S.E. 2d 833; *Bunting v. Salsbury,* 221 N.C. 34, 18 S.E. 2d 697; *Jackson v. Parks,* 220 N.C. 680, 18 S.E. 2d 138; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Martin v. Crews,* 210 N.C. 776, 188 S.E. 316; *In re Barker,* 210 N.C. 617, 188 S.E. 205; *Jackson v. Scheiber,* 209 N.C. 441, 184 S.E. 17; *Trust Co. v. Blackwelder,* 209 N.C. 252, 183 S.E. 271.

The court admitted the testimony of Lee as to the extrajudicial statements of Canady for the consideration of the jury "upon the matter of the delay in the issuance of the warrants" and not for the purpose of establishing the truth of any matter asserted by Canady. As has been pointed out, it was proper for the prosecution to show in explanation of the evidence elicited by defendants on cross-examination of the State's witnesses that the delay in the issuance of the warrants was occasioned by some reason other than a consciousness of the weakness of the State's case on the part of its witnesses. The evidence objected to consisted of two parts: one, as to the state of Lee's mind, which certainly had a tendency to establish that the reason for his delay in commencing the prosecution was inconsistent with any consciousness of the weakness of the State's case on his part; and the other, as to the extrajudicial utterances made by Canady to Lee, which certainly had a relevancy to show the inducing cause of Lee's state of mind. The testimony was not concerned in any degree with the truth or falsity of any matter asserted by Canady in his unsworn statements. Hence, its probative force depended solely on the competency and credibility of Lee, the witness by whom it was produced.

The court rightly admitted the evidence in question for the specific purpose for which it was offered under the evidential rule that "whenever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned." Wigmore on Evidence (3rd Ed.), section 1789.

Instances of a similar use of a third person's extrajudicial statements to show another's state of mind are to be found in well considered decisions of this Court. *S. v. Mull,* 196 N.C. 351, 145 S.E. 677; *S. v. Hairston,* 182 N.C. 851, 109 S.E. 45. See, also, in this connection: *S. v. Dilliard,* 223 N.C. 446, 27 S.E. 2d 85.

The defendants assign as error the extract from the charge quoted below. After instructing the jury in complete accordance with time-

honored precedents as to specific factors it might consider in determining the credibility of the witnesses and the weight to be attached to their testimony, the court concluded the part of the charge devoted to this phase of the case with these words: "You may take into consideration any other factors that suggest themselves to your good judgment and common sense to enable you to pass upon the credibility or worthiness of belief of each witness and to determine the weight, if any, you will give to the testimony of each witness." When this excerpt from the charge is restored to its context and read with the other instructions of the court on this aspect of the case, it is plain that the court merely told the jury in the language claimed to be erroneous that it might determine the credibility of the witnesses and the value of their testimony from the factors specially enumerated by the court and any other circumstances in evidence tending to shed light on these matters. Assuredly, this instruction is subject to no just criticism. *Brown v. Jerrild,* 29 Ariz. 121, 239 P. 795; 23 C.J.S., Criminal Law, section 1257.

The remaining exceptions of the defendants other than those purely formal are addressed to portions of the charge in which the court stated contentions of the State. Since the defendants did not call these matters to the attention of the court at the trial and afford the court an opportunity to correct any inadvertencies in them at that time, any errors in the court's statement of these contentions are waived. *S. v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Dawson,* 228 N.C. 85, 44 S.E. 2d 527.

The defendants have had their day in court. Their rights have been fully safeguarded by the diligent efforts of able counsel. They have been accorded a fair trial according to relevant legal rules before an impartial and learned trial judge. The jury has found them guilty upon competent evidence under a clear and correct charge. The trial in the court below must be sustained for there is in law

No error.

T. F. DALRYMPLE v. E. ISADORE SINKOE, TRADING AS CHARLOTTE SALVAGE COMPANY.

(Filed 25 May, 1949.)

1. Sales § 30—

Where the seller represents that the article sold is suitable for a particular use when in fact it is eminently dangerous when so used, the seller is liable for injury resulting from such use to the same extent as if he had sold the article knowing it to be dangerously defective.

2. Same—

Plaintiff's evidence tended to show that defendant sold him a gas heater upon representations that such heater was constructed and equipped to burn liquid gas, wherein in fact it was designed only for the burning of natural or manufactured gas and was eminently dangerous when used to burn liquid gas, and that plaintiff was injured in an explosion when he struck a match in the room in which the heater was installed. There was evidence that plaintiff's other gas burners, which were designed to burn liquid gas, were functioning properly on the day in question. *Held:* The evidence was sufficient to be submitted to the jury on the issue of negligence, and it was error to grant defendant's motion to nonsuit.

3. Same—

The seller represented that the heater sold was equipped and designed for use with a particular fuel when in fact it was eminently dangerous when used in connection with such fuel. A metal label on the heater giving model, serial number, etc., contained a warning in small letters that the heater was not to be used with the type of fuel employed by the buyer. *Held:* The contributory negligence of the buyer in using the heater in connection with his type of fuel is a question for the jury, and nonsuit was improper.

4. Negligence § 19c—

Plaintiff will not be held guilty of contributory negligence as a matter of law unless plaintiff's own evidence so clearly establishes this defense that no other reasonable inference may be drawn therefrom.

APPEAL by plaintiff from *Coggin, Special Judge,* at November Term, 1948, of MECKLENBURG.

This is an action instituted by the plaintiff against the defendant to recover damages for injuries, alleged to have been sustained from an explosion of gas from a water heater which the plaintiff purchased from the defendant.

The plaintiff operated a filling station and cafe in Rockingham, N. C. He was burning liquid gas, purchased from Thomas Liquid Gas Company, High Point, N. C., in a stove, a steam table and coffee urn in his cafe. This gas was purchased in a drum and poured into a tank in the ground. A compressor motor was used to pump air into the tank, and as the liquid gas mixed with the air it vaporized and generated a gas which flowed into the burners.

On 9 February, 1946, the plaintiff testified, he went to the Charlotte Salvage Company, in Charlotte, N. C., the place of business of the defendant E. Isadore Sinkoe, for the purpose of purchasing a water heater. He asked Mr. Sinkoe if he had gas water heaters for use with liquid gas. Mr. Sinkoe informed him he did and showed the plaintiff some water heaters which were still in their crates. He then told Mr. Sinkoe he wanted one that used Thomas' liquid gas, from High Point, N. C.; and

that Mr. Sinkoe replied "That is what you want, we furnish them heaters." The plaintiff purchased one of the heaters.

According to the evidence, the heater was received by the plaintiff on the 1st or 2nd of March, 1946, and installed by him in the shower room of his service station. The heater was used from the 1st or 2nd of March until 6 March. About 8:15 p.m., on 6 March, 1946, the plaintiff sat down in the shower room to smoke a cigarette; when he struck a match to light the cigarette, there was a terrific explosion. He was seriously and permanently injured. The gas appliances in the cafe were working properly on the day of the explosion.

After the plaintiff returned from the hospital, his attention was called to a label on the water heater which he had purchased from the defendant. The label was located near the bottom of the heater, giving model, serial number, etc., and it was stated thereon that it was "equipped for use with MFRD gas," and also contained in very small lettering the following statement: "Warning: This heater is not to be used with bottled gas, butane or other liquified petroleum gases." The plaintiff testified he had not noticed this label, but had taken Mr. Sinkoe's word that it was the right heater. He further testified as follows: "When I went into the shower room on the night of the explosion I did not notice whether the pilot light was burning. The room could be ventilated by raising the window. You can smell the gas when you pour it in the ground tank, but you could not smell it in the building. If we had found that the pilot light had gone out we would raise the window. I used the heater which I bought from Mr. Sinkoe for about six days, and during that time I had to light it up once or twice. When the pilot light would cut off the gas would cut off; if there is no gas coming up the line the pilot light goes out. The pilot light works on a little valve or lever which you have to turn on in order to let gas in to light the pilot light after it has gone out. When the pilot light would go out I would have to turn the valve or lever to let gas come in before I could light the pilot light. I had never had any experience with one of these heaters before."

Mr. Edgar B. Terry was tendered by plaintiff as an expert, and the court found him to be such in the installation and repair of gas heaters and as a dealer in liquid gas. Mr. Terry testified: "I examined this water heater immediately after the explosion. It had a burner on it for manufactured gas and a thermostat for manufactured gas. The difference between the burner designed to burn natural or manufactured gas and one designed to burn liquid or propane gas is that the one that is manufactured to burn manufactured gas has a metal disk in the thermostat that controls the flow of gas. On the other hand, the disk in a burner designed to burn liquid gas is made of a hard bakelite, similar to rubber. . . . The one for liquid gas with a composition disk, or diaphragm,

would work on the same principle as the manufactured gas, but the reason that you use a disk with the composition on it, on the propane gas, as we say, is due to the fact it has no impurities in it to get in there and seal that, such as the manufactured gas has. Any gas gotten from oil has impurities taken out. . . . You cannot use liquid gas with the thermostat with the metal disk for the reason that when you do so it does away with the safety feature on the tank, due to the fact that the thermostat can't properly close itself and let(s) gas continue to come in when it should not. If liquid gas were used with the metal disk it would permit the gas to escape from the thermostat into the burner itself or into the pilot light which is governed by the thermostat. If a proper type of tank is used gas would not continue to come out when the pilot light goes out. If you put the liquid gas in a tank designed with the steel seal in the thermostat there is a possibility that the gas would escape or could seep by; that is the reason that liquid petroleum gas tanks use a little rubber seal to seal it. . . . I don't know whether there was anything wrong with the regulator when I saw it before the explosion or not. It had a regulator on it, you have a spring tension in that regulator that would adjust itself. You have a spring tension in that diaphragm that would adjust itself to a certain extent. If the regulator put too much pressure on it, you would not have anything burning then and the gas would escape. I saw the compressor that was on there when they were using Thomas' gas. He had to have a compressor. . . . If the regulator put on too much pressure it would blow gas right through the machine but you wouldn't have anything burning then. Then the gas would escape, but if Mr. Dalrymple had had the proper tank his gas would not have escaped since it would have been sealed off. . . . Before I considered myself qualified to connect one of these heaters, or service it, I was bound by certain instructions and rules and studied and passed an examination. I wouldn't have put one in unless I had had the benefit of those instructions, rules and experience. . . . To put the vent on any gas heater is the standard thing to do whenever the heater is pocketed up, but where there is ventilation it is not necessary. . . . This heater had no flue or vent. The purpose of a vent is to take the gas off or to take the heat out of the building." (This witness in his testimony often referred to the gas heater as a tank, but it clearly appears from his testimony as a whole, that when he referred to the "tank" he was referring to the heater in question.)

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.

McDougle, Ervin & Horack for plaintiff.
Henry L. Strickland and J. Laurence Jones for defendant.

DENNY, J. It appears the plaintiff has elected to bottom his action on the negligence of the defendant in falsely representing that the heater sold to the plaintiff, was a suitable and proper one for use with liquid gas.

"If a seller, not knowing or caring whether his representations are true or false, goes so far as to represent that the article sold is safe for a certain use, while it is imminently dangerous when put to that use, he is liable for negligence." 46 Amer. Jur., p. 943. *Cunningham v. House Furnishing Co.*, 74 N.H. 435, 69 Atl. 120; Annotations 42 A.L.R. 1255; *Ahrens v. Moore*, 206 Ark. 1035, 178 S.W. 2d 256; *Spry v. Kiser*, 179 N.C. 417, 102 S.E. 708. *Walker, J.*, in speaking for this Court in the last cited case, said: "Plaintiff alleges that the defendants represented the contents of the bottle to be genuine sweet oil of standard purity, and also expressly warranted it to be of that kind and quality, and he offered evidence to prove the truth of the allegations. He sues both on tort for negligence and on contract because of warranty. It is not required of us to lay down the rule of damages upon either cause of action, as if he shows the actionable wrong, or the contract and its breach, . . . this prevents a nonsuit."

A vendor who sells a stove that is equipped to burn one type fuel and represents that it is suitable for use with a different kind of fuel, when in fact it is imminently dangerous when so used, is liable to the same extent as if he had sold a stove knowing it to be dangerously defective.

The evidence tends to show the defendant represented that the stove purchased by the plaintiff was suitable for use with the particular type of liquid gas which the plaintiff was using in his place of business; when in fact, it was not suitable for use with that particular kind of gas. Moreover, it appears from the evidence that all the other gas appliances used by the plaintiff in his cafe were working properly on the day of the explosion. And there is no evidence tending to show that any of the gas equipment used by the plaintiff was not properly equipped for use with Thomas' liquid gas, except the burners and thermostat in the heater purchased from the defendant. However, there is evidence tending to show that the thermostat on this heater was not so constructed as to prevent the seepage of gas into the main burner when it was not burning, or to cut off the gas completely from the pilot burner when the pilot light went out.

The appellee insists there is no causal connection between the construction of the thermostat and the free gas in the shower room. But he insists there is a causal connection between the possible stopping of the

compressor and the failure to light the pilot light after the flow of gas was started under compression.

It is disclosed on this record that a compressor is a part of the necessary equipment when using Thomas' liquid gas. Conceding that the compressor might have stopped or permitted the pressure to become so low that the pilot light went out, one of the very purposes of the thermostat was to cut off the flow of gas into the pilot burner if the pilot light went out.

The appellee further insists that regardless of any negligence on the part of the defendant, he is not liable because of the negligent conduct of the plaintiff, which contributed to his injury. It is contended the heater had no latent defects and the use the heater could be put to was easily discoverable upon an ordinary examination by reading the label and instructions imprinted thereon, which contained a positive warning to the effect the heater was not to be used with liquid gas.

In 46 Amer. Jur., p. 931, it is said: "In spite of his negligence, a seller is, of course, not liable therefor to a buyer who, by his own negligent conduct, has contributed to the injury. And while the use of the purchased article in a particular manner which would otherwise appear to be negligent may be proper where the buyer relies, and has a right to rely, upon the seller's assurance that it is safe to use the article in such a manner, a buyer who uses the article after he discovers the danger will be held to have assumed all the risk of damage to himself, notwithstanding the seller's assurance of safety. As in other cases in which the question of contributory negligence is involved, it is generally for the jury to determine whether, under the circumstances, the buyer was contributorily negligent in relying upon the seller's assurance." See also *Smith v. Clarke Hardware Co.*, 100 Ga. 163, 28 S.E. 73; *Bulman Furniture Co. v. Schmuck*, 175 Ark. 442, 299 S.W. 765, 55 A.L.R. 1039; *Moody v. Martin Motor Co.*, 76 Ga. App. 456, 46 S.E. 2d 197.

Contributory negligence is an affirmative defense which must be pleaded and proven. *Bundy v. Powell*, 229 N.C. 707, 51 S.E. 2d 307. And a nonsuit will not be granted on this ground unless the plaintiff's evidence establishes such plea as a matter of law. Therefore, a plaintiff will not be held guilty of contributory negligence as a matter of law, unless his evidence so clearly establishes such negligence that no other reasonable inference may be drawn therefrom. *Dawson v. Transportation Co., ante*, 36, 51 S.E. 2d 921; *Hobbs v. Drewer*, 226 N.C. 146, 37 S.E. 2d 131; *Cummins v. Fruit Co.*, 225 N.C. 625, 36 S.E. 2d 11; *McCrowell v. R. R.*, 221 N.C. 366, 20 S.E. 2d 352; *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137.

Consequently, we think when the plaintiff's evidence is taken in the light most favorable to him and he is given the benefit of every reason-

able inference to be drawn therefrom, it is sufficient to carry the case to the jury. *Bundy v. Powell, supra; Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707; *Nichols v. Goldston,* 228 N.C. 514, 46 S.E. 2d 320; *Lumber Co. v. Power Co.,* 206 N.C. 515, 173 S.E., 427.

The motion for judgment as of nonsuit should have been overruled.

Reversed.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF REVENUE, v. SYLVIA SPEIZMAN.

(Filed 25 May, 1949.)

1. Taxation § 29—

A gain resulting from the involuntary conversion of a capital asset by fire is taxable under the State law as income, notwithstanding that the proceeds of the fire insurance, plus additional cash, are necessary for and are used in the restoration of the building. G.S. 105-141, G.S. 105-142 prior to the amendments of 1949.

2. Taxation § 23½—

G.S. 105-142 (1) stipulating that the Commissioner of Revenue shall follow the Federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Commissioner of Revenue to apply the provisions of sec. 112 (f), 26 U.S.C.A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset.

3. Same—

The administrative interpretation of a tax statute, acquiesced in over a long period of time, should be given consideration in the construction of the statute.

4. Taxation § 29—

The act amending sec. 1, Art. 4, schedule D, subchap. 1 of Chap. 105 (G.S. 105-144.1), adopting the Federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the Commissioner of Revenue to refund income tax legally assessed and collected upon such capital gain prior to the enactment of the 1949 statute, even though the tax was paid under protest.

APPEAL by plaintiff from *Clement, J.,* at February Term, 1949, of MECKLENBURG.

This is a proceeding to determine the validity of an assessment for additional income taxes against Sylvia Speizman for the year 1946, growing out of a gain resulting from the involuntary conversion of a capital asset.

The facts pertinent to this appeal are as follows:

1. Sylvia Speizman, hereinafter called the taxpayer, was the owner of a building in the City of Charlotte, that was partially destroyed by fire on 6 March, 1946. The appraised value of the building before the fire, according to the insurance adjusters, was $78,000. The adjusters estimated the damage caused by the fire at $55,000, and the fire insurance companies which had issued policies of insurance upon the building paid to the taxpayer during the month of April, 1946, the aggregate sum of $55,000, in settlement of the fire damages sustained by the taxpayer. The said sum of $55,000 was set aside by the taxpayer for the purpose of paying the cost of reconstructing and restoring the building, and this sum, together with an additional sum of $5,464.10, was paid to architects and the building contractor for their services and work in connection with the repair of the damaged building. The work of repairing the damaged building was completed in December, 1946.

2. The building in question was acquired by the taxpayer in 1943, at the price of $22,500 (exclusive of the cost of the land). At the time of the fire, depreciation in the amount of $2,700 had been taken for income tax purposes, leaving an unrecovered cost of the building of $19,800. When the taxpayer filed her income tax return for the year 1946, she did not include as taxable income the difference between the amount received from the insurance companies on account of the fire loss and the unrecovered cost of the building, such difference being $35,200.

3. Under date of 4 May, 1948, the Commissioner of Revenue, pursuant to G.S. 105-160, gave to the taxpayer a notice of proposed additional tax assessment on the capital gain of $35,200. Within the time fixed by statute, the taxpayer duly protested the proposed assessment and asked for and received a hearing by the Commissioner. The protest of the taxpayer was rejected and the additional tax, together with interest, was paid under protest on 3 August, 1948, which tax and interest amounted to $2,636.13.

4. Thereafter, the taxpayer requested a revision of the assessment against her, pursuant to the provisions of G.S. 105-162. After a further hearing and consideration of the matter, the Commissioner of Revenue found the facts as herein stated and concluded as a matter of law that the additional tax and interest in the amount of $2,636.13, had been legally and properly assessed against the taxpayer for the year 1946, and denied the request for a revision of the assessment.

5. The taxpayer filed exceptions to the Commissioner's conclusion of law and to his decision denying the request for a revision of the assessment. The exceptions were overruled by the Commissioner and the taxpayer duly appealed to the Superior Court of Mecklenburg County, pursuant to the provisions of G.S. 105-163. Whereupon the Commis-

sioner of Revenue certified to the Superior Court of the aforesaid county, his findings of fact and conclusion of law, the taxpayer's exceptions thereto, the order overruling the exceptions and the notice of appeal.

This appeal was heard in the Superior Court upon the record as certified. The decision of the Commissioner of Revenue was reversed by his Honor and judgment was entered in favor of the taxpayer in the sum of $2,636.13, together with interest as provided by law. The Commissioner of Revenue excepted to the judgment and appealed to the Supreme Court.

Attorney-General McMullan and Assistant Attorneys-General Abbott and Tucker for the State.

Elton B. Taylor for defendant.

DENNY, J. This appeal turns on whether or not a gain resulting from the involuntary conversion of a capital asset in 1946, was taxable income under the income tax law of North Carolina. We think such gain was taxable, and that the additional assessment against the taxpayer was legally and properly made.

Net income means the gross income of a taxpayer, less deductions expressly authorized by Article 4, Schedule D, Chapter 105 of our General Statutes.

G.S. 105-141, Subsec. 1, defines "gross income," and the essential part thereof reads as follows: "The words 'gross income' mean the income of a taxpayer derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce or sales, or dealings in property, whether real or personal, located in this or any other State or any other place, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transactions of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever and in whatever form paid."

Subsection 2 of G.S. 105-141, sets forth a list of items which are exempt from taxation under our income tax law, but the list does not include gains from involuntary conversion of capital assets.

The appellee contends the provisions contained in G.S. 105-142, subsec. 1, require the Commissioner of Revenue to follow the Federal law in respect to gains resulting from an involuntary conversion of a capital asset. This subsection is as follows: "The net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer, but such method of accounting must be consistent with respect to both income and deductions, but if in any case such method does not clearly reflect the income, the computation shall be made in accordance with such method as in the

opinion of the commissioner does clearly reflect the income, but shall follow as nearly as practicable the federal practice, unless contrary to the context and intent of this article."

The Federal statute governing involuntary conversion is Section 112 (f), Internal Revenue Code, 26 U.S.C.A. 95, and reads as follows: "If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain shall be recognized, but loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years and regardless of whether or not the money which is not so expended constitutes gain)."

It is clear that a gain resulting from the involuntary conversion of a capital asset is not exempted from taxation under the Federal income tax law unless the gain is "expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property," under regulations prescribed by the Commissioner, with the approval of the Secretary. Therefore, it seems clear the gain is taxable under our income tax law, unless G.S. 105-142 relative to the computation of net income, has the effect of incorporating in the income tax article of our Revenue Act, substantive features of the Federal income tax law. We do not think this provision has that effect. For example, the Federal statute provides for "long term" and "short term" capital gains on a different basis; while our Revenue Act recognizes no distinction between "long term" and "short term" capital gains. In fact our law recognizes no distinction between "capital gains" and any other type of taxable income. Therefore, it would seem to be just as reasonable to contend that the Federal law relative to capital gains should be taken into consideration in computing net income, within the meaning of G.S. 105-142, as it is to contend the Federal statute relative to involuntary conversion of a capital asset should be given effect in making such computation.

The appellee concedes that the capital gain of $35,200 would have been taxable as such, had the taxpayer not elected to expend it in the construction of a building similar or related in service or use to the building

destroyed by fire. This would be so under the Federal as well as the State law. While this is a case of first impression with us, the Commissioner of Revenue has consistently ruled that gain realized from involuntary conversions of capital assets are taxable, regardless of how such funds may be expended. See P-H, State and Local Service, North Carolina, Paragraph 13,179. The administrative interpretation of a statute, acquiesced in over a long period of time, should be given consideration in the construction of the statute by the Courts. *Knitting Mills v. Gill, Comr. of Revenue,* 228 N.C. 764, 47 S.E. 2d 240.

We think the conclusion we have reached is the correct one, and is supported by the recent action of our General Assembly. While this proceeding was pending in this Court, the General Assembly enacted House Bill No. 1099, amending Section 1, Art. 4, Schedule D, subchapter 1 of Chapter 105 of the General Statutes, to be designated Section 105-144.1, so as to provide under certain conditions for the exemption of gains resulting from the involuntary conversion of capital assets. This Act adopts in every essential particular the provisions of Section 112 (f), of the Internal Revenue Code, 26 U.S.C.A. 95, and further provides that the Commissioner may in his discretion prescribe the rules and regulations under which such capital gains may be expended or he may "apply the Federal rules, rulings and Federal Court decisions pertinent to the administration and construction of Sec. 112 (f) of the Federal Internal Revenue Code, but the Commissioner shall not be bound by such rules and regulations, rulings and decisions."

The Act also provides that it shall affect pending litigation and shall be in effect from and after its ratification, which was 22 April, 1949.

On 5 May, 1949, the Commissioner of Revenue of North Carolina promulgated a regulation for the purpose of administering House Bill No. 1099, in which he adopted the Federal rules and regulations, rulings and Federal Court decisions pertinent to the administration and construction of Section 112 (f) of the Internal Revenue Code, and filed a copy of the regulations in the office of the Secretary of State, as required by Chapter 754 of the Session Laws of 1943, G.S. 143-195.

In considering the provisions of House Bill No. 1099, we think it can affect only such claims for exemption from income tax as may arise from gain resulting from the involuntary conversion of capital assets where such gains are expended in good faith, pursuant to a regulation duly promulgated by the Commissioner of Revenue. The mere statement in the Act that it is to affect pending litigation, will not be construed as sufficient authority to authorize the Commissioner of Revenue to refund to a taxpayer a tax legally assessed and collected prior to the enactment of the Act; and the fact that the tax was paid under protest does not affect the legality of the assessment.

The court below committed error in reversing the decision of the Commissioner of Revenue, and the judgment is

Reversed.

STATE OF NORTH CAROLINA, ON RELATIONSHIP OF THE EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, v. CHAMPION DISTRIBUTING COMPANY, INC., 118 MARKET STREET, WILMINGTON, N. C., EMPLOYER No. 55-65-022.

(Filed 25 May, 1949.)

1. Master and Servant § 58—

The provisions of the Employment Security Act classifying and designating those persons who are subject to the provisions of the Act, rather than the common law definition of the relationship of master and servant, are controlling when not capricious or unreasonable.

2. Master and Servant § 62—

The findings of fact of the Employment Security Commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. G.S. 96-4 (m).

3. Master and Servant § 61—

The burden is upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services come within the exceptions enumerated in subsections A, B and C, G.S. 96-8 (g) (6).

4. Master and Servant § 58—Evidence held to support finding that defendant's salesmen were "employees" within definition of Employment Security Act.

The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were allotted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in Federal returns, and taxes deducted from the pay roll, and were required to turn in all money for goods sold and were paid weekly on a commission basis. *Held:* The evidence supports the finding of the Employment Security Commission that the salesmen were "employees" within the meaning of G.S. 96-8.

DEFENDANT'S appeal from *Nimocks, J.*, April Term, 1948, of NEW HANOVER Superior Court. No error.

This proceeding is prosecuted by the State *ex rel.* the Employment Security Commission, against the defendant as employer, to enforce con-

tribution under the State Employment Security Act, G.S., Chapter 96, (see Public Laws, 1947, Chapter 598, changing name), with respect to the alleged employment of eight or more persons, under conditions named in the statute, during the year 1946.

During that period the respondent was, and now is, a corporation having its principal place of business in Wilmington, North Carolina, engaged in the wholesale, and to some extent, in the retail business of selling automobile supplies, radios, sporting goods, and general merchandise. The proceeding was instigated by the report of a Field Representative of the Commission suggesting that it appeared that the Distributing Company, as an employing unit, had eight or more persons employed in its service during the year 1946, rendering it liable under the law for contribution or tax, with respect to said employment.

On notice to the respondent Distributing Company a hearing was had, at which respondent appeared with counsel, to determine the liability or non-liability of the Company for the tax; and evidence was taken.

The inquiry, in fact and by stipulation in the record, narrows down to the question whether certain distributing or route salesmen, selling and distributing goods and merchandise of the respondent, were employees as defined in the statute, and contemplated by it, or independent factors or consignees, handling the respondent's wares on a purely commission basis, inconsistent with the concept and legal definition of employment, as an independent business.

For convenience, relevant provisions of the statute, intended to arrive at an answer to the question here presented, are quoted below. The provisions are definitional, intended to present in more positive form, by way of analysis,—inclusion and exception,—the criteria which, in the statutory sense, must be considered in determining liability as an employing unit, or non-liability because of an independent status.

The quoted provisions of the statute are here given for comparison with the summary of the evidence immediately following, and with the findings of fact:

> "96-8 (m) From and after March 10, 1941, 'wages' means all remuneration for services from whatever source . . ."
>
> "96-8 (n) From and after March 10, 1941, 'wages' shall include commissions and bonuses and the cash value of all remuneration in any medium other than cash . . ."

These principles are comprehended succinctly in the following:

> "Section 96-8 (g) (6) (A) (B) (C):
>
> "(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Commission that:

"(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

"(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

"(C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business."

The evidence taken on the hearing may be summarized as tending to show:

1. The persons handling the respondent's products were assigned territory by the defendant.

2. They did not sell any competitor's goods, but were required to sell no goods except those received from the respondent. Sometimes, as a matter of accommodation, and at request, they brought in some small needed article, but for no profit, when making a trip, but never anything in competition with goods sold by respondent.

3. Field sellers and distributors were bonded.

4. The field men were remunerated for their service at a commission rate, determined by the respondent on a wholesole price, fixed by him. No part of the sales price, or commission, was retained by these salesmen, that is, all the money received was turned over to the respondent, and payment was made direct to them by it weekly.

5. The respondent deducted from the sums paid to each of the field representatives the withholding tax as required by the Federal Government and filed report as required; reporting the old-age benefit and social security tax for each of the salesmen.

6. The field representatives, or salesmen, came in to respondent's place to get the merchandise and return that unsold after each trip.

7. The merchandise remained that of the respondent until sold. That taken out, and that sold, listed;—two lists made, one given to the customer and one brought back in to the respondent. "When we check the merchandise in against that and what they have left, together with the receipt that they have sold should equal the amount of merchandise that they take out." (Isadore Swartz.)

8. The testimony of Ann Williams was to the effect that these parties (the salesmen) were carried on the "payroll" to keep out of trouble, on account of unfamiliarity with the laws of various tax collecting offices. However, they made the deductions and withheld tax from the amounts earned by the route salesmen, issuing the forms to the individuals re-

quired by the Federal practice, (W-2), of the withholding tax. The payments were not made to the men as they made trips, but weekly.

9. When necessary, the respondent sent a "trouble shooter" to straighten out difficulties occurring in the field.

As there is no challenge to the correctness of the procedure a more formal history of the case may be omitted. The evidence above summarized is that upon which the Commission acted in making its findings of fact, conclusions of law, and final orders.

Following its regular course the matter came to the final hearing before the Commission on July 18, 1947, and on August 20 following, the Commission made its findings of fact, concluded that respondent was liable for the contribution, or tax, as an employer of eight persons or more, subject to the Act, during the year 1946, and until the relationship should be terminated as provided by statute; and ordered that the respondent, as employer, report and pay contributions on all wages and remunerations received by individuals performing service for it during the period in question.

The findings of fact, omitting those merely formal, were as follows:

"3. These salesmen sell goods of the employing unit to dealers, garages, and service stations and other establishments located within a radius of 75 or 100 miles of Wilmington, North Carolina, this merchandise being sold by the individuals under the following arrangement between the salesmen and Champion Distributing Company, Inc.:

"a. The salesmen load merchandise on trucks at the employer's premises at which time an inventory is made of the goods loaded on the trucks.

"b. The salesmen cannot give credit to customers and must sell the merchandise for cash.

"c. The salesmen usually report back to the employer the next morning after loading the truck or car or two or three days after taking the merchandise out, at which time a check is made as to the goods sold and the salesmen pay the employer for all merchandise which is not returned.

"d. The salesmen are not permitted to sell any competitive line of merchandise of the employer.

"e. The merchandise remains the property of the employer until sold by the salesmen.

"f. The salesmen are paid a commission on merchandise sold, this commission varying according to the particular type of article sold.

"g. The employer fixes the commission earned by the salesmen, and the wholesale price at which the articles are sold by the salesmen.

"h. The salesmen are issued checks weekly by the employer for the services performed, based on a commission on sales as above stated.

"i. The salesmen own their cars and pay their own expenses.

"j. The employer deducts withholding tax and old age and survivors' insurance taxes on the net earnings of the salesmen.

"k. The salesmen are assigned a certain designated territory or route by the employer where the goods are sold.

"l. The salesmen work hours of their own choosing and are not required to work any definite hours by the employer.

"m. Salesmen are bonded by the employer.

"n. The salesmen do not pay any wholesaler's tax on goods sold by them, and do not pay any license or privilege tax to the city, county, or state.

"o. When a route or territory becomes vacant, the employer gives the oldest salesman in point of service the preference of the territory or route if he desires it.

"p. The employer has at least one individual who is paid upon a salary basis, and at times commission, who performs the same type of service as is performed by the other commission salesmen. This individual operates an employer-owned truck, and at times covers territory for which there is no salesman available."

The defendant filed exceptions to all the material findings of fact and to the conclusions of law, and to the final order. On the hearing these exceptions were overruled, and the defendant appealed, assigning as error the objections and exceptions theretofore made.

On the hearing before Judge Nimocks in the Superior Court, as indicated above, the judgment was affirmed, and defendant appealed.

W. D. Holoman, R. B. Billings, and D. G. Ball for Employment Security Commission of North Carolina, appellee.

Aaron Goldberg, John M. Walker, and Rountree & Rountree for defendant, appellant.

SEAWELL, J. Opposing counsel have stipulated that if the salesmen engaged in distributing the merchandise of the defendant in assigned territory should be classed as employees within the meaning of the statute, the Distributing Company, in that event, having as many as eight employees in its service, would be liable to the contribution; otherwise not. To determine the character or status of the field salesmen in that respect —whether employees or independent contractors, or consignees of the goods they sell, we can not any longer resort wholly to ordinary terms,

often themselves wanting in precision, and leaving the *criteria* of employment too nicely balanced. The cited sections of the Employment Security Act, intended to give a clearer legal concept of the incidence of the tax, constitute the dictionary of the law, which must be observed.

The distinctions and classifications, when not capricious and unreasonable, are within the legislative discretion. We do not understand that the power of the Legislature to make categories by which the statute applies its analytical definitions to employment is questioned. That power has been upheld and the formula here applied has been approved in *Unemployment Compensation Commission v. Jefferson Standard Life Insurance Co.*, 215 N.C. 479, 2 S.E. 2d 584, and again in *Unemployment Compensation Comm. v. Insurance Co.*, 219 N.C. 576, 14 S.E. 2d 689, and it is made plain that the statute, in its definitions, does not strictly adhere to the implication of the master-servant relation—although in the instant case that relationship might consistently be inferred.

Accepting the statute as it stands, the defendant contends that the evidence does not warrant the findings of fact which bring it under the law.

Here we may be reminded that on this review we are, by the statute, bound by the findings of fact when there is any competent evidence or reasonable inference from such evidence to support them, G.S. 96-4 (m). Conclusions of law based upon them may, of course, involve a matter of interpretation.

A comparison of the findings with the evidence before the Commission convinces us that in all material aspects the findings are supported by the evidence, in which respect only are they subject to review. Referring to the approach to a classification of these salesmen under the cited provisions of the law, we have no doubt that under the findings of fact, and the supporting evidence, they are properly declared to be employees, effecting liability of the defendant, under the provisions of this section. The burden is, by the statute, (consonant with the general rule), put on the defendant to show to the satisfaction of the Commission that those performing this service come within the exceptions provided in subsections A, B, C.

The Commission held that on the facts the defendant did not bring itself within the exceptions because, among other things, the salesmen were not free from direction or control of the defendant in the performance of the contract for service; that the service was not outside the usual course of business carried on by defendant, and, indeed, not performed wholly outside the place of business of the enterprise carried on by it, since the goods were loaded on the premises, unsold portions returned there, and check up and payment of remuneration made there.

On the question of control it is pointed out that the salesmen were not permitted to sell except for cash; not permitted to sell any competitor's line of merchandise; were assigned certain designated territory in which to work; gave bond to account for merchandise handled by them. It is also pointed out that these salesmen have no established business independent from the relationship between them and defendant, and paid no license or sales taxes, only peddling or selling the wares of defendant in the territory assigned by him, under the restrictions mentioned—for a remuneration, of course, but in furtherance of defendant's enterprise rather than their own. They were reported as employees in Federal returns and taxes deducted from the pay roll, and withheld by the defendant as required with respect to employees.

We think the view taken by the Commission is inescapable on the facts presented; and so holding, the case needs no further elaboration, *arguendo*.

What is said in the cited cases does not need repetition. We find no error in the record. The judgment of the Superior Court is

Affirmed.

STATE v. JACK FOWLER.

(Filed 25 May, 1949.)

1. Criminal Law § 29b—

As a general rule, testimony of defendant's guilt of a prior crime which is separate and distinct from the crime charged, is incompetent as substantive proof.

2. Same—

As an exception to the general rule, testimony of defendant's guilt of a crime separate and distinct from the crime charged is competent when the offenses are similar and such other crime is so connected with the offense charged that it tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestæ*, or establish a chain of circumstances relevant to the offense charged.

3. Criminal Law § 33—

While defendant is entitled to have his confession admitted in its entirety, including any explanatory or exculpatory statements contained therein, where defendant at the time of confessing to the crime charged also confesses to another and distinct offense, and the part pertaining to the crime charged can be separated from the part relating to such other offense without distorting or twisting the relevant part, only the part of the confession material to the inquiry should be received in evidence. In this case testimony of the extraneous confession was elicited over objection upon direct and independent question by the solicitor after the confession in chief had been admitted in evidence.

4. Criminal Law § 29b—

Defendant was charged with murder. *Held:* Testimony of defendant's confession that he was a fugitive from a life sentence for a prior murder, entirely separate and unconnected with the offense charged, is incompetent, and its admission constitutes prejudicial error.

5. Same—

There was no evidence that deceased knew defendant's prior criminal record or had it in mind when she threatened to call the sheriff shortly before defendant killed her, but to the contrary the evidence supported the inference that deceased threatened to "call the law" because of present difficulty with defendant. *Held:* The inference that defendant killed deceased to prevent her from disclosing his past, rests upon mere surmise, and evidence of defendant's guilt of a prior murder and that at the time he was a fugitive from a life sentence therefor, is not competent to show motive for the offense charged.

6. Criminal Law § 51—

The competency of evidence is for the court, not the jury.

7. Criminal Law § 40d—

Where defendant offers no evidence and does not put his character in issue, testimony of a State's witness of defendant's confession of a prior offense, separate and distinct from the offense charged, violates the rule which forbids the State initially to attack the character of the accused and also the rule that bad character may not be proved by particular acts.

APPEAL by defendant from *Bobbitt, J.*, at January Term, 1949, of MOORE.

Criminal prosecution on indictment charging the defendant with the murder of one Mamie J. Wilkerson.

The record discloses that Mamie J. Wilkerson, a widow, and her four small children lived in a two-room house near the village of Vass in Moore County. The defendant lived alone in a house about "25 good steps away." Both houses were close to the home of Ed McKeithan.

On the night of 8 November, 1947, "somewhere after nine" the defendant was at the home of Ed McKeithan and said to him: "Had a little fight tonight . . . after everything got settled down I am going across the branch tonight. . . . If I don't be here tonight you can have what I leave in my house."

The defendant went to the home of Mamie J. Wilkerson about eleven o'clock. She was in the front room with her two small boys who were in bed. Her two daughters, eleven and thirteen years of age, were sleeping in the kitchen. The defendant had been in the house only a few minutes when he went into the kitchen, got an axe, returned to the room where Mamie Wilkerson was sitting in a chair, and proceeded to knock her in the head with the axe, causing her death.

The defendant had known the deceased for a year or two. He had been in her house on numerous occasions "in the day time and night time." He had carried her to Vass on the day of the homicide to buy groceries.

Annie Ruth Wilkerson, 13-year-old daughter of the deceased, was asked what was said between her mother and the defendant prior to the slaying. She answered: "Mama asked him where he was going and he wouldn't say nothing and mama said she was going after the sheriff and he didn't say nothing; he went in the kitchen and got the axe and hit her on the head three times with it. . . ."

Cross-examination: "Q. Now you testified that you heard your mother say she was going to get the law—where was she when she said that?

"A. She was in the front room where the bed was. Yes, sir. I could hear her say that from the room where I was sleeping.

"Q. Was it after she said that that he came into the kitchen and got the axe or before that?

"A. It was before that."

The defendant immediately left in his car, and was not apprehended until four or five months later when the sheriff was notified that he was being held by the Durham police.

While transporting the prisoner from Durham to Carthage, he confessed to the sheriff that he had killed Mamie J. Wilkerson.

The solicitor: "Q. State whether the defendant at that time, or in talking with you thereafter, told you anything about where he came from and whether he had been in any other trouble?" Objection; overruled; exception. "Ans. He stated, to my inquiry, that he was serving a life sentence at the South Carolina Penitentiary for the murder of a colored man down there." Motion to strike; denied; exception. "He said he had been an escapee about three years from that Penitentiary." Objection; motion to strike; denied; exception.

The defendant offered no testimony.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Moody, and Forrest Shuford, II, Member of Staff, for the State.

W. D. Sabiston, Jr., for defendant.

STACY, C. J. The question for decision is whether the defendant's statement to the sheriff that he had killed a man in South Carolina and was an escaped convict from that State was properly admitted in evidence against him on the present prosecution. The answer is to be evolved from the record.

We start with the general rule that evidence of one offense is inadmissible to prove another and independent crime, the two being wholly disconnected and in no way related to each other. *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Smith,* 204 N.C. 638, 169 S.E. 230; *S. v. Deadmon,* 195 N.C. 705, 143 S.E. 514; *S. v. Dail,* 191 N.C. 231, 131 S.E. 573; *S. v. Miller,* 189 N.C. 695, 128 S.E. 1; *S. v. Graham,* 121 N.C. 623, 28 S.E. 537. The reason for the rule is to preserve to the accused, unencumbered by suggestion of other crimes, the common-law presumption of innocence which attaches upon his plea of "not guilty," and to protect him from the disadvantage of extraneous and surprise charges; also to confine the investigation to the offense charged. *S. v. Lyle,* 125 S.C. 406, 118 S.E. 803.

To this general rule, however, there is the exception as well established as the rule itself, that proof of the commission of other like offenses is competent to show the *quo animo,* intent, design, guilty knowledge or *scienter,* or to make out the *res gestæ,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Stancill,* 178 N.C. 683, 100 S.E. 241; *S. v. Beam,* 184 N.C. 730, 115 S.E. 176; *S. v. Choate, supra; S. v. Morris,* 84 N.C. 757; *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Ferrell,* 205 N.C. 640, 172 S.E. 186; *S. v. Simons,* 178 N.C. 679, 100 S.E. 239; *S. v. Kent,* 5 N.D. 516, 69 N.W. 1052; Wigmore on Evidence (3rd), Vol. 2, Sec. 390; Note to *People v. Molineux,* 168 N.Y. 264, 61 N.E. 286, as reported in 62 L.R.A. 193-357 (q.v.).

It is important to bear in mind the principle upon which the exception rests, for unless the proffered evidence of other offenses legitimately fall within its scope, it should be excluded. *S. v. Adams,* 138 N.C. 688, 50 S.E. 765. And it may be that the line of demarcation which separates the rule from the exception has been blurred or rendered difficult of discernment by reason of its seemingly inconsistent application in some of the cases. *S. v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516; *S. v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *S. v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533; *S. v. Flowers,* 211 N.C. 721, 192 S.E. 110. If so, we must try again to plot its course. The statement of the difference is simple enough. Its application is the place of the pinch or the rub. The exception requires a more relevant base than the mere disposition of the accused to commit such crimes. *S. v. Beam, supra.* The touchstone is logical relevancy as distinguished from certain distraction. "Never run rabbits while pursuing the fox," is a rule of the sportsman, equally worthy of observance in the trial of causes as on the hunt. Good sportsmanship is after the manner of good morals as well as good law.

It is likewise to be borne in mind that the defendant offered no evidence in the case, and did not put his general reputation and character in issue. *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. Colson,* 193 N.C. 236, 136 S.E. 730.

In support of the ruling below, it is pointed out that the defendant confessed to both offenses at the same time, *i.e.,* he told the sheriff that he killed Mamie J. Wilkerson and in the same conversation he stated that he was an escaped convict from South Carolina. It is contended, therefore, that the whole of the confession was admissible. *S. v. Edwards,* 211 N.C. 555, 191 S.E. 1; *S. v. Swink,* 19 N.C. 9; Anno. 26 A.L.R. 542; 2 A.L.R. 1030. The general rule is that a confession, like a deposition, *Savings Club v. Bank,* 178 N.C. 403, 100 S.E. 607, should be offered in its entirety. *S. v. Patterson,* 63 N.C. 520. Whether any part of it should be excluded, or admitted under special instructions according to its relevancy, is a matter about which the courts are divided. Anno. 2 A.L.R. 1029; 22 C.J.S. 1439.

In reply to the State's position, the defendant says the record fails to make manifest the unity of the confession, or that the two statements were made or elicited in the same conversation. Moreover, the right of the confessor to have his confession considered as given, in its entirety, with whatever views or theories it affords, *S. v. Jones,* 79 N.C. 630, may not extend to the prosecution, for if the part pertaining to the crime charged can be separated from the part relating to other offenses, only the part material to the inquiry should be received in evidence under the rule. *People v. Loomis,* 178 N.Y. 400, 70 N.E. 919; *People v. Spencer,* 264 Ill. 124, 106 N.E. 219; 20 Am. Jur. 426; 22 C.J.S. 1440. On this point it would seem that the defendant's position is the sounder one. *People v. Rogers,* 192 N.Y. 331, 85 N.E. 135; 15 Ann. Cas. 177. At least, such accords with many of the well-considered cases. Anno. 2 A.L.R. 1029. Then, too, it should be observed that the evidence in respect of the defendant's past criminal record was stated by the sheriff, not in giving the defendant's confession in chief, nor as an integral part thereof, but in response to a direct and independent question by the solicitor. *People v. Loomis, supra.*

By and large, however, the chief reliance of the prosecution is that the proffered testimony comes within the exception to the general rule of exclusion. 22 C.J.S. 1272. It was *inferred* in its admission, under authority of *S. v. Swink, supra,* that the defendant wished to get rid of the deceased for fear she would disclose his past criminal record to the sheriff, thus affording a motive for the crime charged. *S. v. Morris,* 84 N.C. 757. Indeed, the court instructed the jury that "this evidence is for your consideration only as it may bear—it being for you to determine to what extent, if any, it does bear—upon the question of the motive or

intent of the defendant in relation of the alleged killing of Mamie J. Wilkerson."

The difficulty with this *inference* and its submission to the jury is that it rests only in surmise, and the competency of evidence is for the court, not the jury. *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603; *S. v. Dick,* 60 N.C. 440. At any rate, the record is barren of any evidence to connect the offense charged with the defendant's past criminal record. Whether the requisite degree of relevancy exists is a judicial question to be determined in light of the inevitable tendency of such evidence to raise a legally spurious presumption of guilt in the minds of the jurors. *S. v. Lule, supra.* It nowhere appears of record that the deceased knew anything about the defendant's past, or that such was in her mind when she threatened to call the sheriff. The defendant went to the kitchen and got the axe before the deceased made any threat to "get the law." The direct testimony of the little girl, Annie Ruth, was somewhat equivocal on this point, but on cross-examination she was perfectly clear about it. The more reasonable interpretation of the record would seem to be that the two had been quarreling or fighting, according to the testimony of Ed McKeithan, and that this was back of the deceased's threat "to call the law," as one of the witnesses expressed it. The evidence apparently comes squarely within the general rule of exclusion. *S. v. McCall,* 131 N.C. 798, 42 S.E. 894.

We do not have the question, posed in some of the cases, where the confession of the crime charged is so interwoven with the challenged statement that the two cannot be separated without twisting or distorting the pertinent part. Nor is it essential to consider this question or the authorities bearing thereon. Quite clearly if the challenged statement stood alone, its incompetency would be conceded. It is specious logic to reason from one crime to another, *e.g.,* the defendant committed a similar offense in days agone, *ergo* he committed this one. Obviously a *non sequitur,* and the cases so hold. *S. v. Shuford,* 69 N.C. 486. *Locus penitentiæ* and reformation are also known to the law. Evidence of other crimes, when offered in chief, violates both the rule which forbids the State initially to attack the character of the accused and the rule that bad character may not be proved by particular acts. *S. v. Choate, supra;* Wharton's Crim. Evi., Sec. 344. It is to be remembered that the defendant in the instant case did not go upon the witness stand or put his character in issue. *S. v. Nance,* 195 N.C. 47, 141 S.E. 468; *S. v. Colson,* 193 N.C. 236, 136 S.E. 730.

The case of *S. v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533, is cited as an authoritative decision in support of the admission of the challenged testimony. We think there are distinguishing differences between the two cases, but if not altogether so in their implications, to the extent that our

present decision clashes with the Kelly decision it must be understood as modified accordingly.

The prejudicial effect of the challenged testimony, if incompetent and erroneously admitted, is not debated or questioned. It undoubtedly forestalled due consideration of any "less degree" of the capital charge. G.S. 15-170.

The learned counsel appointed by the court to represent the prisoner has brought up his appeal to the end that the accused may not suffer death except as the law commands. Both Mr. Sabiston and Assistant Attorney-General Moody have argued the case with their accustomed zeal and earnestness, fortified by manifest research and exhaustive briefs. Nothing has been overlooked on either side.

A death sentence presupposes a trial free from error. The defendant is entitled to another hearing. So ordered.

New trial.

MARVIN E. HINSON AND FIRE ASSOCIATION OF PHILADELPHIA v. VIRGINIA-CAROLINA CHEMICAL CORPORATION.

(Filed 25 May, 1949.)

1. Automobiles § 23a—

Mere ownership does not impose liability for the negligence of the driver of an automobile, but liability of the owner rests upon the doctrine of *respondeat superior*, which applies only if the driver is the owner's employee and is at the time about the owner's business and acting in the course of his employment.

2. Same—

While not every deviation of the servant from the strict execution of his duty is sufficient to suspend the master's liability, if the servant, though originally bound upon a mission for his master, completely forsakes his employment and goes on an exclusively personal mission, the course of employment is interrupted and is not resumed until the servant returns to the path of duty where the deviation occurred, or to some place where in the performance of his duty he should be.

3. Automobiles § 24½c—

The evidence tended to show that defendant's driver was employed to transport certain workers to and from defendant's plant, that he was required to keep the car at defendant's plant during the night, that on the day in question, after discharging the last employee at his home, the driver went on an unauthorized personal mission of his own, and that the accident in suit occurred while the driver was returning to his work the next morning but before he had reached the place where the deviation from the course of his employment occurred. *Held:* The evidence is insufficient to be submitted to the jury on the issue of *respondeat superior*.

APPEAL by defendant from *Burney, J.*, at October Term, 1948, of NEW HANOVER.

Civil action to recover property damages resulting from alleged actionable negligence in which corporate plaintiff claims an interest by subrogation,—it having paid insurance on the property damaged.

This action grew out of a collision in North Carolina on Highway #76, between plaintiff's oil tanker and tractor, traveling west, and operated by one James N. Baker, and defendant's Chevrolet truck, traveling east, and operated by one S. C. Strickland. The collision occurred about 5 o'clock and "just before sun-up" on the morning of 21 July, 1945, at a point about a mile east of Hallsboro. Defendant denies that Strickland, at the time of the collision was its agent in the operation of the truck, and acting within the scope of his employment. And on the contrary, it avers that at the time of the collision Strickland was engaged in a private and personal enterprise.

Passing the evidence which tends to show that the collision in question was the proximate result of the negligence of Strickland, the operator of defendant's truck, the evidence as to the scope of his employment by defendant follows:

Strickland, as witness for plaintiff, among other things, testified: "My duties were to get up early every morning and go down to Delco or Malmo to pick up men and take them back to the plant, and in the afternoon to deliver them back home. I had been keeping the truck at night at different places where I boarded. I stayed at three different places while I worked for the V.C.C. Company, at Woodburn and at Leland and at the plant, where I was last staying . . . Mr. Owen . . . is the foreman of the Virginia-Carolina Chemical Corporation. His duties were to look after the plant and equipment . . . I asked Mr. Owen about keeping it (the truck) at the place I stayed on account of getting up early in the morning, and he give me permission to keep it . . . At the time of the accident I was living at Navassa . . . The three places I lived during my employment with the company were within a maximum of four or five miles of the plant. The men I was hauling were as far up as Delco . . . I was living in one of the Company's houses at the plant at the time of the accident . . . Mr. Owen knew that I was living at Bill Lewis' and he told me to keep the truck there every night to keep from walking so far in the morning. He told me to keep it there so I could go backwards and forwards to work and pick up the labor every morning."

And Strickland, as witness for plaintiff, also testified: "On the morning of July 21, 1945, I was operating a truck out on the highway near Hallsboro, N. C. . . . I had been to Hallsboro and had left the truck at the Cedar Inn Service Station . . . during the night with people I knew.

and had went several places with some more boys and girls. The next morning about time to go to work, about 5 o'clock, I come along and picked up the truck and was headed back to pick up labor and I got in the accident . . . I would say it was two miles below Delco where I would pick up some of the hands and this point is about the same distance from the plant at Navassa and the filling station where I had parked the car the night before the wreck . . . On the morning of July 21, 1945, I was headed to about two miles this side of Delco to pick up the first laborer and then go into Armour and Acme and get some more . . . The afternoon before the accident, after I had left the plant, I went to Hallsboro to see my girl friend and parked the truck at her house . . . After I got to Hallsboro I went with several of my friends to Chadbourn and we ate and drank and stayed up all night . . . Mr. Owen didn't know I had the truck at Hallsboro that night, and Mr. Robinson didn't either. I mentioned it to Wilkinson, the mechanic, that give me right smart orders. On Friday afternoon, July 20, 1945, between 4:30 and 5 o'clock he told me to drive the truck on up there; that it would be all right. He had promised to go up there with me, and we were supposed to drive his car up there and something happened . . . Mr. Shackelford was what I would call chief mechanic. He didn't tell me I could use the truck to go to Hallsboro . . . I made a statement about this shortly after this thing took place and signed one . . . I think I said I didn't get authority from any one except Wilkinson to take the truck up there. The Company didn't send me down there. I went on my own. Some nights I took the truck back to the plant and some nights I didn't. I had not been given permission to drive the truck to Hallsboro and go where I pleased. In the statement I said I went to different employee's houses and left them . . . Julius F. Duvall . . . was the last passenger I let out. At his home I pulled off the highway and got stuck in the mud . . . and after I got out I decided to go to Hallsboro. I reckon that's what I said. I ain't saying it is and I ain't saying it's not . . ." And again, "so far as I know this was a part of the statement I signed: 'On July 20th when I let my last passenger out at Delco I knew I was not supposed to go any further, and taking the truck to Hallsboro was absolutely against the rules laid down by my company. This trip I took was unauthorized and my company did not send me to Hallsboro.' It was the truth they didn't send me to Hallsboro. I had never taken the truck before for my own use, no more than getting something to eat . . . I do remember saying the trip was not authorized by anybody. I didn't put in the statement that Mr. Wilkinson authorized it because he had a family and I didn't want to get him mixed up in it. Mr. Robinson hired me and sent me to Mr. Shackelford; I took orders from him and Mr. Wilkinson as far as greasing the trucks and changing oil, or anything

that needed to be done to the truck when I was not driving. Mr. Wilkinson was a mechanic. If he had authority to hire and fire I didn't know it. Mr. Robinson is the general superintendent and has been there right many years."

And in connection with this evidence, these facts do not appear to be in dispute: Both Delco and Hallsboro are located on Highway #76 which runs about east and west, from Wilmington on the east to and beyond Whiteville on the west. From Wilmington to Whiteville it is about 48 miles. Navassa, where defendant's plant is located, is just north of the highway, and a short distance from Wilmington. From Navassa to the highway and in a western direction it is about nineteen miles to the point near Delco where the last laborer was put out of the truck on late afternoon of 20 July, that is, of the day before the collision. And in going west from this point it is about 20 miles to Hallsboro. Whiteville is still farther west, and Chadbourn is west of Whiteville.

Motions of defendant made in apt time for judgment as in case of nonsuit were denied, and it excepted. And the case was submitted to the jury,—and from judgment, on verdict in favor of plaintiffs, defendant appeals to the Supreme Court and assigns error.

Marsden Bellamy, Clayton Holmes, and David H. Scott for plaintiff, appellee.

Stevens, Burgwin & Mintz for defendant, appellant.

WINBORNE, J. Defendant, in brief filed in this Court, very frankly states that there is no serious dispute but that Strickland, who was one of its employees and who was operating its truck at the time of the accident, was guilty of negligence. And, assuming this to be true, defendant contends, and rightly so, that the real question presented is as to whether the doctrine of *respondeat superior* applies under the facts of this case. That is, the underlying and basic question presented by defendant's exception to the denial of its motions, aptly made, for judgment as in case of nonsuit, is this: Was Strickland acting within the scope of his employment by defendant at the time of and in respect to the collision resulting in damage to property, of which plaintiffs complain?

In the light of pertinent decisions of this Court, we are of opinion and hold that the answer to the question is "No." See *Martin v. Bus Line*, 197 N.C. 720, 150 S.E. 501; *Parrott v. Kantor*, 216 N.C. 584, 6 S.E. 2d 40; *McLamb v. Beasley*, 218 N.C. 308, 11 S.E. 2d 283; *Riddle v. Whisnant*, 220 N.C. 131, 16 S.E. 2d 698; *Rogers v. Town of Black Mountain*, 224 N.C. 119, 29 S.E. 2d 203; *Carter v. Motor Lines*, 227 N.C. 193, 41 S.E. 2d 586.

From these and numerous other decisions of this Court to like effect, these applicable principles are found: The owner of an automobile is not liable for damages caused by it merely because of its ownership. The liability, if any, of the owner of an automobile operated by another rests solely upon the doctrine of *respondeat superior.* And this doctrine applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time of, and in respect to the very transaction out of which the injury and damage arose. The rule is well settled that the master is responsible for the tort of his servant which results in injury to another when the servant is acting in the course of his employment, and is at the time about the master's business. And it is equally well settled that the master is not liable if the tort of the servant which causes the injury occurs while the servant is acting outside the legitimate scope of his authority, and is then engaged in some private matters of his own. *McLamb v. Beasley, supra.*

"A servant is acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment, if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility; but, if there is a total departure from the course of the master's business, the master is no longer answerable for the servant's conduct," Tiffany on Agency, p. 270. *Robertson v. Power Co.*, 204 N.C. 359, 168 S.E. 415.

And, with respect to departure from employment, without consent of owner, it is stated in 5 Blashfield's Cyc. of Automobile Law and Practice, Section 3029, that "the general rule is that a servant in charge of his master's automobile, who, though originally bound upon a mission for his master, completely forsakes his employment and goes on an errand exclusively his own, and while so engaged commits a tort, does not thereby render the master answerable for such tort under the rule of *respondeat superior.*" See *Parrott v. Kantor, supra.*

The trend of judicial decisions, as stated in *Parrott v. Kantor, supra,* is that the departure commences when the servant definitely deviates from the course or place where in the performance of his duty he should be. And while there is conflict of authority on the subject, better reason supports the view that after a servant has deviated from his employment, for purposes of his own, the relation of master and servant is not restored until he returns to the path of duty, where the deviation occurred, or to some place, where in the performance of his duty, he should be.

Applying these principles to the evidence in the case in hand, we hold that the moment when Strickland, the operator of defendant's truck,

after completing delivery of the employees to their homes, the last one to a point near Delco, in the course of his employment, turned aside from his duty to drive the truck back to the plant at Navassa, where he says he was ordered to keep it at night, and drove on to Hallsboro, 20 miles farther away from the plant, without permission of any authorized superior, and in pursuit of private purposes of his own, he departed from his employment and remained outside of it until he returned to the point of departure. Until he reached that point, he was only returning to his employment. See *Parrott v. Kantor, supra.* And, the collision having occurred before he reached there, the defendant, his master, is not liable for his tort in bringing about the collision, and the consequent damages of which plaintiffs complain.

For reasons stated, the motions of defendant for judgment as in case of nonsuit, should have been sustained. Hence the judgment below is Reversed.

W. W. PATTERSON v. LUCY BIVENS PATTERSON.

(Filed 25 May, 1949.)

1. Contempt § 2b—

In order for the willful disobedience of a court order to be punishable for contempt it is necessary that the order be lawfully issued, and the disobedience of an order void *ab initio* for want of jurisdiction may not be made the basis for contempt proceedings.

2. Judges § 2a: Divorce § 17—

In an action for divorce, the resident judge has concurrent jurisdiction with the judge holding the courts of the district to hear and determine an application for the custody of the children of the marriage. G.S. 7-65, G.S. 50-13.

3. Judgments § 19—

A judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside the district in which the action is pending, unless authorized to do so by statute or by consent of parties appearing of record.

4. Evidence § 2—

The courts will take judicial notice of the judicial district in which a specified county is located.

5. Judgments § 19: Divorce § 17—

Upon application for the custody of the children of the marriage after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the tempo-

rary order should not be made permanent. *Held:* The judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void *ab initio.*

APPEAL by Mrs. K. M. Cox from *Phillips, J.*, in Chambers, 22 January, 1949, of STANLY.

Civil action for divorce involving custody of children of the marriage, heard upon notice to defendant and her sister, Mrs. K. M. Cox, to show cause why they should not be held in contempt of court for violating an order pertaining to the custody of said children.

The record on this appeal discloses these procedural facts:

1. This action was instituted in Superior Court of Stanly County, 3 September, 1942, for absolute divorce from the bonds of matrimony existing between plaintiff and defendant on ground of two years separation, and, at November Term, 1942, judgment was rendered therein in accordance with the relief sought. But no reference to the two children of the marriage is made in the complaint filed in the action, and no provision for their custody is made in the judgment so rendered.

2. Thereafter on 18 August, 1947, plaintiff, by verified petition filed in this action, petitioned the court for an order committing to him the custody and tuition of the said children of the marriage. Plaintiff alleges in this petition that defendant secured possession of the children on 10 August, 1947, under pretense of keeping them for a few days visit, and then refused to return them to him, and is about to leave the State of North Carolina taking the children with her.

3. Thereupon, on same date, 18 August, 1947, in Rockingham, North Carolina, the Honorable W. G. Pittman, Judge of the 13th Judicial District of North Carolina, entered an order (1) awarding to plaintiff the immediate temporary custody of the children, and (2) requiring defendant to appear before him, the Judge aforesaid, at the courthouse in Asheboro, North Carolina, on Monday, September 2, 1947, at 2 o'clock p.m., to show cause, if any she has, why the temporary order of custody of said children should not be made permanent. And, on same date, this order was served on defendant by a deputy sheriff of Alamance County, North Carolina.

4. Pursuant thereto, and on 4 September, 1947, his Honor W. G. Pittman, in Chambers at Asheboro, North Carolina, entered an order in which, after finding as a fact that defendant was then a nonresident of the State of North Carolina, and a resident of the State of Georgia, the temporary custody of said children was granted to plaintiff until further orders of the court, and the permanent custody of the children be finally determined.

5. Thereafter plaintiff, by motion in the cause in this action, and for causes set forth, moved the court for an order adjudging defendant and

her sister, Mrs. K. M. Cox, of Burlington, North Carolina, guilty of contempt for willful violation of the said order of his Honor, W. G. Pittman, Resident Judge of the 13th Judicial District, dated 4 September, 1947. And, thereupon, on 10 December, 1948, his Honor, F. Donald Phillips, then Resident Judge of the said 13th Judicial District, in Chambers at Rockingham, North Carolina, entered an order (1) requiring defendant and Mrs. K. M. Cox to appear before him on 20 December, 1948, at 11 o'clock a.m., in Rockingham, North Carolina, and "show cause, if any there be, why they should not be punished for contempt," and (2) requiring that Mrs. Cox, "in order to purge herself of the alleged acts of contempt, notify" defendant "wheresoever she may now reside of the issuance of this order, and that she personally see that the said infants are before this court on the date of said hearing." This order was served on Mrs. Cox on 13 December, 1948, by a deputy sheriff of Alamance County, and she answered, denying in the main the allegations made against her.

6. Thereafter when the cause came on for hearing on the rule to show cause described in last preceding paragraph at time and place designated therefor, his Honor, Phillips, Judge as aforesaid, finding as facts in substance that Mrs. K. M. Cox, with knowledge of the said order of Pittman, J., dated 4 September, 1947, aided and abetted defendant in removing said children from the State of North Carolina, adjudged that "Mrs. K. M. Cox is guilty of contempt and as for contempt of this court" and continued prayer for judgment until 22 January, 1949,—she to appear before said Judge at that time and abide the further orders of the court.

7. And on 22 January, 1949, Phillips, Judge as aforesaid, made additional findings of fact in respect to the alleged violation of the order of Pittman, J., as aforesaid, and thereupon adjudged and declared Mrs. K. M. Cox "to be guilty of contempt and as for contempt of this court, and that she be committed to the common jail of Stanly County, North Carolina, for a period of 30 days, for such contempt," and that in accordance therewith, commitment issue.

Mrs. K. M. Cox appeals therefrom to Supreme Court, and assigns error.

S. H. McCall, Jr., and David H. Armstrong for plaintiff, appellee.

Thomas C. Carter and W. I. Ward, Jr., for respondent, appellant.

WINBORNE, J. In this State any person found guilty of willful disobedience of an order lawfully issued by any court of competent jurisdiction may be punished for contempt. G.S. 5-1 (4). *Nobles v. Roberson,* 212 N.C. 334, 193 S.E. 420; *Elder v. Barnes,* 219 N.C. 411, 14 S.E. 2d 249; *Mfg. Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577. But an order

of court not "lawfully issued" may not be the basis on which to found a proceeding for contempt. *In re Foreclosure,* 205 N.C. 488, 171 S.E. 788. Hence appellant on this appeal challenges, and we hold properly so, the validity of the judgment holding her for contempt on the ground that the order of 4 September, 1947, entered by Pittman, J., on which the contempt proceeding is based, is void for that Pittman, resident judge of the judicial district, had no authority to make the order, upon notice to show cause, on and at hearing out of the county and out of the district in which the action was and is pending.

In this connection it is provided by statute, G.S. 50-13, that "after the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best." See also *In re Blake,* 184 N.C. 278, 114 S.E. 300; *Robbins v. Robbins,* 229 N.C. 430, 50 S.E. 2d 183, and numerous other cases.

It is also provided by statute in this State, G.S. 7-65, as amended by Chapter 142 of Session Laws 1945, that "in all matters and proceedings not requiring intervention of a jury or in which trial by jury has been waived, the resident judge of the judicial district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge in the exercise of concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of term or in term time." Thus it appears that the resident judge of the judicial district has concurrent jurisdiction with the judge holding the courts of the district to make orders in divorce actions respecting the care, custody, tuition and maintenance of the minor children of the marriage as outlined in G.S. 50-13. But in this State a judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside of the county in which the action is pending, unless authorized so to do by statute, or by consent of the parties. *Cahoon v. Brinkley,* 176 N.C. 5, 96 S.E. 650; *Gaster v. Thomas,* 188 N.C. 346, 124 S.E. 609; *Brown v. Mitchell,* 207 N.C. 132, 176 S.E. 258; *Jeffreys v. Jeffreys,* 213 N.C. 531, 197 S.E. 8. And the consent must appear on face of record. *Jeffreys v. Jeffreys, supra.* Compare *Pate v. Pate,* 201 N.C. 402, 160 S.E. 450.

And in keeping with the well established principle that the courts will take judicial notice of the political subdivisions of their States, *S. v. R. R.,* 141 N.C. 846, 54 S.E. 294, this Court takes judicial notice (1) that Stanly County, in which the present action was instituted and is

pending, is in the Thirteenth Judicial District of North Carolina and (2) that Asheboro, where the order of 4 September, 1947, by Pittman, J., was made and entered in this action, is in Randolph County, in the Fifteen Judicial District of North Carolina. See *Laundry v. Underwood,* 220 N. C. 152, 16 S.E. 2d 703, and *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281.

Moreover, it appears in the record on this appeal that the hearing at Asheboro was on a notice issued to defendant to appear and show cause, if any she had, why the temporary order of custody of the children of the marriage should not be made permanent.

Therefore, it clearly appears on the face of this record that Pittman, Resident Judge of the Thirteenth Judicial District, was without authority to hear the cause and to make the order of 4 September, 1947, at Asheboro, which is both out of the County and out of the district wherein the divorce action was or had been pending. Thus the order then made was void *ab initio* for lack of jurisdiction in the judge to make it, and may not be the basis for a proceeding for contempt. *In re Foreclosure, supra.* Compare *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576, where the judgment in question was entered by consent of parties.

For reasons stated, the judgment from which appeal is taken is

Reversed.

SUSIE HARRIS v. MONTGOMERY WARD & COMPANY.

(Filed 25 May, 1949.)

1. Negligence § 4f (2)—

The mere fact that a patron slips and falls on a waxed or polished floor is insufficient to impose liability upon the proprietor, since *res ipsa loquitur* does not apply and the mere waxing or polishing of a floor is not *ipso facto* evidence of negligence, but in order to justify recovery it must be made to appear that the proprietor either placed or permitted a harmful substance to be on the floor, or that a harmful substance had been there for a sufficient length of time to constitute constructive notice to him of its presence.

2. Same—

Plaintiff's evidence tended to show that she slipped and fell on a small greasy place on the floor of defendant's store, that a few days theretofore a commercial preparation had been used on the floor which was slick if not properly applied, and that after its application on Saturdays the floor was always gone over each Monday morning in order to be sure there were no slick places left. *Held:* Considering the evidence in the light most favorable to plaintiff and giving her the benefit of every reasonable inference therefrom, it was sufficient to be submitted to the jury upon the issue of negligence.

3. Negligence §§ 5, 6—

Where there is evidence of concurring negligence, the negligence of a person sought to be charged need not be the sole proximate cause of the injury but is sufficient to support recovery if it be one of the proximate causes thereof; but in the absence of evidence of concurring negligence, the negligence of defendant must be the proximate cause of the injury, since if plaintiff is also guilty of negligence, plaintiff's contributory negligence would bar recovery.

4. Negligence § 20—

In this action against a single defendant there was no evidence of concurring negligence. *Held:* An instruction that defendant's negligence need not be the sole and only proximate cause of the injury but that the burden is on plaintiff to show by the greater weight of the evidence that negligence on the part of defendant was a proximate cause, or one of the proximate causes, of the injury, constitutes error prejudicial to defendant, since under the instruction contributory negligence of plaintiff would not bar recovery.

APPEAL by defendant from *Bobbitt, J.*, at November Term, 1948, of GUILFORD.

This is a civil action to recover damages for personal injuries.

The defendant is engaged in the mercantile business in the City of Greensboro. The plaintiff, with her husband, entered the store of the defendant in the afternoon on 7 May, 1947, a little before five o'clock. She testified: "I went upstairs and bought several things and came back downstairs and was just walking along across the floor and stepped in a little greasy place and my feet commenced to slip. My right foot slipped . . . I reached for the counter . . . and that made me fall back on my right side." The little greasy spot, according to the testimony of the plaintiff and her husband, was about half as large as one's hand and was located in the "walkway." The plaintiff suffered a broken leg.

C. V. Stack, a former employee of the defendant, was offered as a witness for the plaintiff, and testified: "I had observed the condition of the floors down there on this day, the floor where she fell, because they had just Myco-sheened it or whatever they call that they put on the floor. I presume the whole floor was like the condition of the floor at the point where she fell. . . . The floor had been Myco-sheened that evening; in fact I am not sure whether it was in the process or had been completed all over, but oughn't to have been in the process because it happened very late. Rufus Cornelius did the actual work. . . . I could not say the floor was any different in that particular place than it was in the rest of the building or what he had completed of the building. I know the Myco-sheen had been applied . . . Myco-sheen had been applied to the place where she fell."

The plaintiff also introduced in evidence the adverse examination of Rufus Cornelius, an employee of the defendant at the time of the accident, who testified he was the janitor; that no oil was used on the floor of the defendant's store, but a preparation called Myco-sheen; that Myco-sheen is slick if it is not put down right; that Myco-sheen was used to keep the floor moist, to keep the dust down; that the "floors are dirty and the oil keeps the dust off the merchandise"; that "I always put it down on Saturday night . . . so by Monday morning it was in good shape, and I checked it first thing. I would sweep to be sure there was no slick or dirty places I didn't miss. . . . We Myco-sheen the floor about once a month to clean the floor. I do not know how many weeks it had been before this that the Myco-sheen had been put on the floor. It has been done so long I am not sure when it had been done."

From a verdict and judgment for plaintiff, defendant appeals and assigns error.

A. Stacy Gifford and James E. Coltrane for plaintiff.
Frazier & Frazier for defendant.

DENNY, J. The appellant seriously contends its motion for judgment as of nonsuit, interposed at the close of plaintiff's evidence and renewed at the close of all the evidence, should have been sustained.

Ordinarily an action against an owner or lessee of a building cannot be sustained where it is 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. *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180, and the cases cited therein.

The fact that a floor is waxed or polished is not *ipso facto* evidence of negligence. *Res ipsa loquitur* does not apply to injuries resulting from slipping or falling on a waxed or oiled floor. *Barnes v. Hotel Corp., supra; Pratt v. Tea Co.*, 218 N.C. 732, 12 S.E. 2d 242; *Parker v. Tea Co.*, 201 N.C. 691, 161 S.E. 209; *Bowden v. Kress*, 198 N.C. 559, 152 S.E. 774. Moreover, the proprietor of a store is not an insurer of the safety of his customers; and when an action is brought against him to recover for an injury resulting from a fall, caused by some substance on the floor where customers may be expected to walk, "in order to justify recovery it must be made to appear that the proprietor either placed or permitted the harmful substance to be there, or that he knew or by the exercise of due care should have known of its presence in time to have removed the danger or given proper warning of its presence." *Brown v. Montgomery Ward & Co.*, 217 N.C. 368, 8 S.E. 2d 199; *Fox v. Tea Co.*, 209 N.C. 115, 182 S.E. 662; *Sams v. Hotel Raleigh*, 205 N.C. 758, 172

S.E. 371; *Cooke v. Tea Co.*, 204 N.C. 495, 168 S.E. 679; *Parker v. Tea Co., supra; Bohannan v. Stores Company, Inc.*, 197 N.C. 755, 150 S.E. 356.

We concede this is a border line case. However, the plaintiff offered evidence to the effect that an employee of the defendant applied Myco-sheen on the floor where the plaintiff fell only a short time before the accident, and that plaintiff's fall was caused by slipping on a little greasy, slick spot on the floor. The plaintiff also offered evidence to the effect that Myco-sheen is slick if not properly applied, and when it is applied on Saturday night the floor is always gone over on Monday morning in order to be sure there are no slick places.

In applying the law to the facts in this case, the question to be answered is simply this: Was plaintiff's evidence, when considered in the light most favorable to her and she is given the benefit of every reasonable inference to be drawn therefrom, sufficient to carry the case to the jury? We have concluded this question must be answered in the affirmative. *Brown v. Montgomery Ward & Co., supra; Anderson v. Amusement Co.*, 213 N.C. 130, 195 S.E. 386; *Parker v. Tea Co., supra; Bowden v. Kress, supra.*

The appellant excepts and assigns as error the following portions of his Honor's charge: "Now the burden of proof upon this issue rests upon the plaintiff to satisfy you from the evidence and by its greater weight that the defendant, Montgomery Ward & Company, was negligent in one of the respects alleged, one or more of the respects alleged, and that such negligence on its part constituted the proximate cause, or one of the proximate causes of the plaintiff's injuries. . . . There may be two or more proximate causes of an injury. The plaintiff, in order to establish actionable negligence, is not required to satisfy the jury from the evidence and by its greater weight that negligence on the part of the defendant constituted the sole or only proximate cause of the injury. It is required, however, that the plaintiff satisfy the jury from the evidence and by its greater weight that negligence on the part of the defendant was a proximate cause, or one of the proximate causes, of the injury."

It is sufficient on the issue of primary negligence for a plaintiff to satisfy the jury from the evidence and by its greater weight that the negligence on the part of the defendant was a proximate cause or one of the proximate causes of his injury, where the evidence also tends to show that the negligence of some other person or agency concurred with the negligence of the defendant in producing plaintiff's injury. *Rattley v. Powell*, 223 N.C. 134, 25 S.E. 2d 448; *Sample v. Spencer*, 222 N.C. 580, 24 S.E. 2d 241; *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876; *Gold v. Kiker*, 216 N.C. 511, 5 S.E. 2d 548; *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814; *Wachovia Bank & Trust Co. v. Southern Ry.*

Co., 209 N.C. 304, 183 S.E. 620; *Campbell v. R. R.*, 201 N.C. 102, 159 S.E. 327. But when there is no evidence of such concurring negligence, as in this case, then the negligence of the defendant must be the proximate cause of the injury, otherwise the plaintiff is not entitled to recover. *Wood v. Telephone Co.*, 228 N.C. 605, 46 S.E. 2d 717; *Montgomery v. Blades*, 222 N.C. 463, 23 S.E. 2d 844; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412; *Mitchell v. Melts*, 220 N.C. 793, 18 S.E. 2d 406; *Murray v. R. R.*, 218 N.C. 392, 11 S.E. 2d 326; *Little v. Martin Furniture Co.*, 200 N.C. 731, 177 S.E. 796. For the contributory negligence of a plaintiff would defeat a recovery in an action such as this, even though the plaintiff's negligence was but one of the proximate causes of the injury, and not the sole proximate cause. *Tyson v. Ford*, 228 N.C., 778, 47 S.E. 2d 251; *Riggs v. Gulf Oil Corp.*, 228 N.C. 774, 47 S.E. 2d 254; *Davis v. Jeffreys*, 197 N.C. 712, 150 S.E. 488.

For the reasons stated, we think the defendant is entitled to a new trial. Therefore, it becomes unnecessary to consider or discuss the remaining assignments of error.

New trial.

S. A. SCHLOSS, JR., MARY JANE SILVERMAN, AND FLOYD S. WILD, TRADING AS SCHLOSS POSTER ADVERTISING COMPANY; C. C. FOSTER, TRADING AS FOSTER POSTER ADVERTISING COMPANY OF STATESVILLE; N. C. FOSTER, TRADING AS FOSTER POSTER ADVERTISING COMPANY OF HENDERSONVILLE; ATLANTIC OUTDOOR ADVERTISING COMPANY, INC.; B. L. SIZEMORE, TRADING AS SIZEMORE POSTER ADVERTISING COMPANY; W. E. RUTLEDGE, TRADING AS RUTLEDGE POSTER ADVERTISING COMPANY; GENERAL OUTDOOR ADVERTISING COMPANY, INC.; J. C. HOGAN, BYNUM LAXTON, SALLY HOGAN, AND W. G. HOGAN, TRADING AS APPALACHIAN POSTER ADVERTISING COMPANY, v. STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 25 May, 1949.)

1. State § 3—

The State may not be sued in its own courts or elsewhere, in the absence of consent or waiver.

2. Same—

The State Highway and Public Works Commission is an agency of the State and as such is not subject to suit save in a manner expressly provided by statute. G.S. 136-19.

3. State § 5b—

An agency of the State is powerless to exceed the authority conferred upon it, and therefore cannot commit an actionable wrong.

4. Same: Injunctions § 1b—

Injunction will not lie against an agency of this State to restrain it from committing a tort.

5. Same—

If officers of the State commit or threaten to commit a tort in the purported performance of their official duties they are individually subject to be sued or enjoined, and if they seek to defend on the ground of sovereign immunity, they must show their authority.

6. Same: Highways § 8—

Plaintiffs sued the State Highway and Public Works Commission to enjoin it from enforcing its ordinance restricting the placing of advertising signs along the State highways, alleging that the ordinance is in excess of the authority vested in the commission and is unconstitutional. *Held:* Defendant's demurrer was properly sustained, since injunction will not lie against a State agency to prevent it from committing a wrong.

APPEAL by plaintiffs from *Stevens, J.*, January Term, 1949, WAKE. Affirmed.

Civil action for injunctive relief.

Plaintiffs are each engaged in the business of outdoor advertising, and, in the course of their business, construct and now maintain advertising signs on privately owned, leased lands adjacent to State highways throughout the State of North Carolina.

The defendant Commission has adopted the following ordinance:

"Section No. 41. THAT WHEREAS, in the opinion of the State Highway & Public Works Commission a multiplicity of signs in close proximity to the State highways tend to obscure and distract the attention of the motorist from the necessary warning and traffic signs;

"NOW, THEREFORE, IT IS ORDERED from and after the effective date of this ordinance, (November 1, 1941) no advertising signs shall be erected along any of the State highways of the State closer than 50 feet to the center of the paved section of the said highway; provided, this restriction shall not apply to signs beyond the limits of the State highway right-of-way erected at the place of business advertising such business, or signs erected on any premises advertising such premise for sale or advertising for sale the products produced thereon; and provided further, that where signs have been lawfully erected on any leased property, the owner of such signs shall have twelve months from the effective date of this ordinance to relocate or readjust the said sign in accordance with this ordinance."

It has also adopted an ordinance which prohibits the maintenance of structures carrying advertising signs closer than 300 feet to the intersection of any highway.

Plaintiffs have been advised through the chairman of the defendant Commission that on and after 1 January 1949 no structures bearing advertising signs will be permitted to stand which are closer than 50 feet to the center of the paved section of any highway, and instructions and directions have been issued to agents, servants, and employees of the defendant Commission to demolish and remove, on and after 1 January, 1949, all structures which are being maintained in violation of the terms of said ordinances, which instructions would apply to signs maintained by each of the plaintiffs.

The plaintiffs allege that (1) said ordinances are in excess of the authority vested in the defendant Commission and are invalid and void, (2) said ordinances are unreasonable, discriminatory, and not uniform in their application and in effect confiscate and destroy private rights, (3) said ordinances in effect amount to the taking of property without due process of law, (4) unless defendant is restrained and enjoined from so doing, it will, through its agents, servants and employees, demolish, remove and destroy the structures owned by plaintiffs containing advertising signs and which structures are standing on privately owned lands but within 50 feet of the center line of paved sections of the highways or closer than 300 feet to the intersection of highways, and (5) if said signs are destroyed, the plaintiffs and each of them will suffer irreparable damage. They pray that defendant be enjoined and restrained from demolishing and removing or in any wise interfering with said advertising structures.

A temporary restraining order was issued upon the return of the rule to show cause why said restraining order should not be made permanent, the defendant appeared and demurred for that (1) the court is without jurisdiction to entertain an action against the defendant Commission, an agency of the State, and (2) the court is without jurisdiction of the alleged cause of action set out in the complaint. The demurrer was sustained and plaintiffs appealed.

Brassfield & Maupin for plaintiff appellants.

R. Brookes Peters and Kenneth F. Wooten for defendant appellee.

BARNHILL, J. That the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established principle of jurisprudence in all civilized nations. *S. v. R. R.*, 145 N.C. 495; *Bennett v. R. R.*, 170 N.C. 389, 87 S.E. 133; *Carpenter v. R. R.*, 184 N.C. 400, 114 S.E. 693; *Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665; *Rotan v. State*, 195 N.C. 291, 141 S.E. 743; *Vinson v. O'Berry*, 209 N.C. 287, 183 S.E. 423; *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619; 49 A.J. 301, and citations in note; Anno. 42

A.L.R. 1465, 50 A.L.R. 1408. In the absence of consent or waiver, this immunity against suit is absolute and unqualified. *Dalton v. Highway Com.*, 223 N.C. 406, 27 S.E. 2d 1; 40 A.J. 304.

The State Highway & Public Works Commission is an agency of the State and as such is not subject to suit save in the manner expressly provided by statute. G.S. 136-19; *Carpenter v. R. R., supra; Dalton v. Highway Com., supra; McKinney v. Highway Commission,* 192 N.C. 670, 135 S.E. 772; *Latham v. Highway Commission,* 191 N.C. 141, 131 S.E. 385; *Milling Co. v. Highway Commission,* 190 N.C. 692, 130 S.E. 724; *Reed v. Highway Com.*, 209 N.C. 648, 184 S.E. 513; *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256.

It is an inanimate, artificial creature of statute. Its form, shape, and authority are defined by the Act by which it was created. It is as powerless to exceed its authority as is a robot to act beyond the limitations imposed by its own mechanism. It can commit no actionable wrong. Hence the owner of property cannot maintain an action against it in tort for damages to property. *McKinney v. Highway Commission, supra; Carpenter v. R. R., supra.* It follows, as of course, he cannot maintain an action against it to restrain the commission of a tort. As against the defendant, his remedy is that, and that only, provided by statute—a proceeding in condemnation for the assessment of compensation for property taken for a public use. *Yancey v. Highway Commission, supra.*

It must not be understood that we hold that plaintiffs are without a remedy. When public officers whose duty it is to supervise and direct a State agency attempt to enforce an invalid ordinance or regulation, or invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the immunity of the State from suit, even though they act or assume to act under the authority and pursuant to the directions of the State. *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896; *Carpenter v. R. R., supra; Vinson v. O'Berry, supra; S. v. Curtis,* 230 N.C. 169; 49 A.J. 310, 28 A.J. pp. 355, 450, 453; Anno. 43 A.L.R. 408. The courts are open to the injured party, and he may there obtain prompt and adequate relief. *Pue v. Hood, supra.* If the officers seek to defend on the ground of sovereign immunity, they must show their authority. *Vinson v. O'Berry, supra.*

But the members of the State Highway & Public Works Commission are not parties defendant. Summons was served only on the chairman as the process agent of the defendant. Hence, neither the validity of the pleaded ordinance nor the tortious nature of the alleged threatened act is presented for discussion or decision.

On this record the demurrer was well advised. Hence, the order sustaining the same must be

Affirmed.

DR. LANDIS G. BROWN v. W. B. & S. BUS LINES, INC.

(Filed 25 May, 1949.)

1. Negligence § 19c—

Nonsuit on the issue of contributory negligence is proper only when plaintiff's own evidence establishes this defense as the sole reasonable deduction that may be drawn therefrom.

2. Automobiles § 18h (3)—Plaintiff's evidence held to show contributory negligence as matter of law in hitting bus parked on highway without lights.

Plaintiff's own evidence tended to show that he was driving along a straight highway at nighttime at 50 miles per hour, that he first saw defendant's bus, which was standing stationary on the highway with only its clearance lights burning, when it was outlined by the lights of an approaching car, that at the time he could see only 100 to 125 feet in his direction of travel, and that he endeavored to stop as soon as he saw the bus but that it was then too late to avoid the collision. *Held:* The sole permissible conclusion from plaintiff's evidence is that he was driving at a speed at which he was unable to stop within the radius of his lights and that the collision and injury proximately resulted therefrom, and therefore defendant's motion for nonsuit should have been allowed.

3. Automobiles § 8d—

One who operates a motor vehicle at night must take notice of the existing darkness and must not exceed a speed which will enable him to stop within the radius of his lights.

APPEAL by defendant from *Burney, J.*, September Term, 1948, of BRUNSWICK. Reversed.

This was an action to recover damages for a personal injury sustained when an automobile driven by plaintiff collided with the rear of defendant's bus. The collision was alleged to have been caused by the negligence of the defendant in stopping its unlighted bus on the highway. The defendant denied negligence on its part, and further pleaded the contributory negligence of the plaintiff as a bar to his action.

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

Stevens, Burgwin & Mintz for plaintiff, appellee.

Harriss Newman and Rountree & Rountree for defendant, appellant.

DEVIN, J. The only question here presented is the propriety of the ruling of the trial court in denying defendant's motion for judgment of nonsuit. The motion was based upon the ground that contributory negligence on the part of the plaintiff was manifest from his own testimony, and that no other reasonable inference could be drawn therefrom than

that his negligence was a proximate contributing cause of his injury. The determination of this question necessitates examination of plaintiff's testimony, giving him the benefit of every reasonable inference in his favor to be drawn therefrom.

The plaintiff testified that on the evening of 19 October, 1947, about 6:40 p.m., he was driving his automobile in an easterly direction on highway 17, at a speed of 50 miles an hour. The road was straight and practically level. Plaintiff's automobile was in good condition and his driving lights in working order. Several miles east of Shallotte he noticed in front of him on his side of the road an unlighted object, 100 to 125 feet distant. This was outlined by the lights of an automobile approaching from the opposite direction, and the object proved to be defendant's bus. Plaintiff applied his brakes and skidded 37 steps, but was unable to stop before striking the rear of the bus. He said he had almost stopped, and that if he had had 5 more feet he could have avoided it. The only lights burning on the bus were two rear clearance lights, one on each side of the top. Plaintiff was not blinded by the lights of the oncoming automobile. He said with the bus in front and lights approaching on another car his lights would not shine down the road farther than 100 to 125 feet, the distance at which he first observed an object on the road. He testified: "When I first saw the bus outlined in the headlights of the oncoming car I did not know what it was. All I could tell was that there was something directly in front of me rather large. I detected no lights on the rear of this object. I continued on until just about the time it would take to recognize something in front of me and put on brakes. As soon as I found something in front of me, I began to stop—that proved to be too late to avoid the collision."

This case presents another instance of the difficulty of determining the line between cases where opposing inferences raise questions for the jury and those where the contributory negligence of the plaintiff appears from his own testimony so clearly that no other conclusion can reasonably be drawn therefrom. *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623. As *Chief Justice Stacy* observed in *Tyson v. Ford*, 228 N.C. 778, 28 S.E. 2d 771, "the line of demarcation may be difficult to plot." The general principles of law involved seem well settled, but their application to particular facts is not always easy. However, a careful consideration of the plaintiff's testimony as set out in the record leaves us with the impression that only the inference of negligence on his part can reasonably be deduced therefrom. Driving in the darkness at 50 miles an hour, he could see only 100 to 125 feet in the direction in which he was moving. With visibility thus limited in relation to his speed, as soon as he discovered the bus in front of him he endeavored to stop but was unable to do so before striking it. He testified if the bus had been five feet farther

away he could have stopped in time to have escaped injury. As he expressed it, "As soon as I found something in front of me, I began to stop—that proved to be too late to avoid the collision."

No other conclusion seems permissible but that plaintiff was driving his automobile at such speed that he was unable to stop within the radius of his lights, and that the collision and resultant injury proximately flowed therefrom. *Cox v. Lee, ante,* 155, 52 S.E. 2d 355; *Bus Co. v. Products Co.,* 229 N.C. 352, 49 S.E. 2d 623; *Riggs v. Oil Co.,* 228 N.C. 774, 47 S.E. 2d 254; *Tyson v. Ford,* 228 N.C. 778, 47 S.E. 2d 451; *Sibbitt v. Transit Co.,* 220 N.C. 702, 18 S.E. 2d 203; *Beck v. Hooks,* 218 N.C. 105, 10 S.E. 2d 608; *Stallings v. Transport Co.,* 210 N.C. 201, 185 S.E. 643; *Weston v. R. R.,* 194 N.C. 210, 139 S.E. 237. "One who operates a motor vehicle during the nighttime must take notice of the existing darkness which limits visibility to the distance his headlights throw their rays, and he must operate his motor vehicle in such manner and at such speed as will enable him to stop within the radius of his lights." *Cox v. Lee, ante,* 155, 52 S.E. 2d 355; *Barlow v. Bus Lines,* 229 N.C. 382, 49 S.E. 2d 793; *Dawson v. Transportation Co., ante,* 36, 51 S.E. 2d 921; *Thomas v. Motor Lines, ante,* 122, 52 S.E. 2d 377.

We think the negligence of the plaintiff on his own testimony in the respect pointed out, combining and concurring with defendant's negligence, was a proximate contributing cause of his injury, barring recovery therefor, and that the defendant was entitled to have its motion for nonsuit allowed. For this reason the judgment below must be

Reversed.

STATE v. JOHN MUSE.

(Filed 25 May, 1949.)

1. Criminal Law § 79—

Exceptions not brought forward in appellant's brief or in support of which no reason or argument is stated or authority cited, are deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

2. Criminal Law § 81c (3)—

Admission of evidence over objection becomes harmless when evidence of similar import is admitted without objection.

3. Same—

Where the answer negatives any harmful effect of an improper question the matter cannot be held prejudicial.

4. Criminal Law § 53d—

Objection to the charge on the ground that in stating the contentions the court in effect gave the State's evidence of bad character the weight of substantive proof, is untenable when it appears that the court specifically charged the jury that such evidence should be considered only upon the question of the credibility of the defendant as a witness in his own behalf.

5. Criminal Law § 78e (1)—

An exception for the failure of the court to comply with the provisions of G.S. 1-180 must be supported by a proper assignment of error on this ground.

6. Criminal Law § 53j—

The failure of the court to charge that the testimony of a witness, an alleged accomplice, should be scrutinized closely and accepted with care, will not be held for prejudicial error in the absence of a special request for instructions, since the matter relates to a subordinate rather than a substantial feature of the case.

APPEAL by defendant from *Burney, J.*, at January-February Term, 1949, of ROBESON.

Criminal prosecution upon a bill of indictment charging that on 31 December, 1948, defendant "did unlawfully and willfully have in his possession for the purpose of sale and did unlawfully and willfully . . . sell 2 one-half pints of tax-paid intoxicating whiskey against the form of the statute," etc.

Upon the trial in Superior Court the State offered evidence tending to support the charge,—the witness L. G. McGill testifying to an actual sale to him by defendant of two half pints of tax-paid intoxicating whiskey on the night of 31 December, 1948. The State also offered evidence tending to corroborate the testimony of McGill. On the other hand, defendant, testifying as a witness for himself, denied that he had sold any whiskey to L. G. McGill on 31 December, 1948, or at any other time, and offered testimony of others tending to corroborate his testimony and to contradict the evidence offered by the State.

Further recital of the evidence is unnecessary, since no question as to the sufficiency of the evidence to take the case to the jury is raised on this appeal.

Verdict: Guilty as charged in the bill of indictment.

Judgment: Imprisonment in the common jail of Robeson County and assigned to work under the supervision of the State Highway and Public Works Commission for a term of 12 months.

Defendant appeals therefrom to Supreme Court, and assigns error.

Attorney-General McMullan and Assistant Attorney-General Moody and John R. Jordan, Jr., Member of Staff, for the State.

McLean & Stacy and Nance & Barrington for defendant, appellant.

WINBORNE, J. While in the record on this appeal defendant sets out thirty-nine assignments of error covering forty-five exceptions, he adverts in his brief to only seven of them. Those exceptions in the record not brought forward in his brief or in support of which no reason or argument is stated or authorities cited, are taken to be abandoned by him. Rule 28 of the Rules of Practice in the Supreme Court of North Carolina, 221 N.C. 544.

But as to the exceptions which are not so deemed abandoned on this appeal, prejudicial error is not made to appear. We treat them *seriatim.*

I. Exception No. 21 has this setting: On the cross-examination of defendant he was asked these questions, to which he gave answers indicated: "Q. You have any initials? A. You all put it Cadillac, that is not my name. Q. Do you have an initial? A. J. W. Muse. Q. Do you have a Cadillac? A. Yes, 1948. Q. Paid $4,000 for it?" Objection by defendant—overruled. Defendant excepts. "A. I wouldn't say it is paid for even." In this connection the record discloses that one witness for the State and two for defendant had referred previously to defendant's Cadillac automobile. The first State's witness, L. G. McGill, in describing the defendant's place of business and its surroundings at the time he says he went there for the alleged purchase of whiskey, testified: "His Cadillac automobile was sitting out in front,—his place doesn't have any gas at it." And one of defendant's witnesses testified: "I was there when the Cadillac was out at the side of the building,—it sits there a big part of the time." And the other, referring to defendant, testified, "John and I go fishing in that Cadillac." These statements having been admitted in evidence without objection, it would seem that the reference to the Cadillac in the questions and answers quoted above would be harmless. And defendant's answer to the question as to what he paid for the Cadillac negatives any harmful effect of the question.

II. Exceptions 31 and 32 are directed to portions of the charge of the jury in which the court was stating contentions of the State upon the evidence offered. Defendant complains that in stating these contentions the court so emphasized the State's contention that defendant had been previously convicted of selling intoxicating liquors as to give it, in the minds of the jury, the weight of substantive evidence when defendant had not put his character in issue.

In this connection it is noted that defendant testified on direct examination, "I used to sell whiskey; the last whiskey I sold I pulled time for it; it has been 20 years or over. It was in 1927 or '28." And on cross-examination, he stated further: "I served time in 1927 or '28 for selling liquor; I served nine months." And the State in rebuttal offered evidence tending to show that the general reputation of defendant is bad for selling whiskey.

In reference to this evidence the court instructed the jury that while defendant had gone upon the witness stand, he had not put his character in issue, and that, hence, evidence of his bad character was to be considered by the jury only as affecting his credibility as a witness in the case and not as substantive evidence, that is, evidence bearing upon his guilt or innocence. In the light of this instruction taken in connection with the statement of the contention to which exceptions Nos. 31 and 32 relate, it seems clear that the jury could not have misunderstood the recitation of the State's contentions based on the evidence. Indeed, no undue emphasis is made to appear.

III. Exceptions Nos. 28 and 40 relate to portions of the charge as given. The vice assigned is (1) failure of the court to charge the jury that the testimony of the witness McGill, an alleged accomplice, should be scrutinized closely and accepted with care and caution, and (2) presentation of evidence by the court to the jury in a way to strongly fortify same.

It is argued that in these respects the court failed to comply with provisions of G.S. 1-180 which require that the judge in his charge to the jury "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." But it is noted that the record contains no assignment of error based on exception to the failure of the court to charge. Hence the question of failure to comply with provisions of G.S. 1-180 is not presented.

However, it is contended by defendant that it was the duty of the court to instruct the jury on substantive features of the case arising on the evidence, even in the absence of a request for special instruction. This is a correct statement of the rule in cases to which it is applicable. *Spencer v. Brown,* 214 N.C. 114, 198 S.E. 630. But it is not applicable to the matter here under consideration.

It is well settled in decisions of this Court that an instruction to the jury to scrutinize the testimony of a witness, an alleged accomplice, is a subordinate rather than a substantial feature of the charge, and, hence, in absence of special request therefor, the failure of the trial judge to so instruct "will not generally be held for reversible error." *S. v. Wallace,* 203 N.C. 284, 165 S.E. 716, and cases cited.

IV. Exceptions 43 and 44 relate to the refusal of the court to set aside the verdict, and to grant to defendant a new trial. These are formal and require no special treatment.

As here indicated error is not made to appear on this appeal.

No error.

GRUBB OIL COMPANY v. RALPH GARNER ET AL.

(Filed 25 May, 1949.)

1. Monopolies § 2—

Lessee alleged that lessor covenanted not to sell any petroleum products other than those of lessee within a radius of 2,000 feet of the demised premises or from the demised premises. *Held:* There being no allegation that lessor agreed to purchase petroleum products from anyone, the provisions of G.S. 75-5 (2) are not applicable, and, upon the pleadings, lessee is entitled to the continuance to the hearing of the temporary order restraining lessor or its successor from selling competing products in the prescribed territory, and demurrer was improvidently sustained.

2. Pleadings § 15—

A demurrer admits the truth of factual averments and relevant inferences for the purpose of testing the sufficiency of a pleading, taking the allegations as written.

APPEAL by plaintiff from *Gwyn, J.,* in Chambers at Greensboro, 10 February, 1949, from DAVIDSON.

Civil action to restrain sale of petroleum products, other than "Atlantic," from demised premises as per covenant in lease.

The complaint alleges:

1. That on 6 December, 1941, the plaintiff leased from Wade and Pearl Tysinger a filling station on Highway 64 in Davidson County for a period of seven years and thereafter from year to year for a period not exceeding seven years at a rental of one cent per gallon of lessee's gasoline or motor fuel sold from said premises. Among other things, the lease provides:

"10. Lessor covenants and agrees that he will not, at any time during the continuance hereof, engage directly or indirectly in the business of handling and/or selling from the demised premises, or any other premises within a radius of 2,000 feet therefrom, any petroleum products other than the products of Lessee, . . ."

2. That two days later, on 8 December, 1941, Wade Tysinger agreed with the plaintiff, "In order not to complicate in any way the rental, since the service station has been sublet to me, it is agreeable and I prefer that 1c per gallon on all gasoline purchased by me not be added to the purchase price," this in full satisfaction of the stipulated rent.

3. That on 27 March, 1945, Wade and Pearl Tysinger sold and conveyed the filling station to Ralph and Margie Garner, and shortly thereafter, Ralph Garner executed the following endorsement on the bottom of agreement of 8 December, 1941, set out in paragraph next above: "I purchased the above described property from Wade Tysinger and agreed to a payment of rent as set out in above letter. I agree to assume the

lease between Grubb Oil Co. and Wade and Pearl Tysinger and to comply with all its terms and conditions as if I had executed it."

4. That on 20 December, 1948, Ralph and Margie Garner entered into an agreement with B. C. and Isobel Young, t/a Buck Young Oil Company, purporting to lease to them the premises in question, from year to year for a term of ten years, and agreeing that only petroleum products of "Sinclair" should be sold on said premises. That notwithstanding notice from the plaintiff, the defendants have entered upon the premises, taken possession of plaintiff's equipment, and are undertaking to sell "Sinclair" products through plaintiff's pumps, etc., in violation of their agreement.

Wherefore plaintiff asks for injunctive relief.

A temporary restraining order was issued in the cause, and upon the return thereof, the same was dissolved and demurrer interposed by the defendant sustained on the ground that the covenant set out in paragraph 10 of the lease violates G.S. 75-5, subsec. 2, being in restraint of trade.

From judgment dissolving the injunction and sustaining the demurrer, the plaintiff appeals, assigning error. The defendants have renewed their demurrer here.

D. L. Pickard and Charles W. Mauze for plaintiff, appellant.

Don A. Walser for defendants, appellees.

STACY, C. J. The question for decision is whether the covenant in suit runs counter to the anti-monopoly or anti-trust laws.

It is not surprising that the parties are in disagreement as to their rights under the instruments in suit. A *lessor* who has nothing but a filling station to lease covenants, *in medias res,* with his lessee not to handle or sell from the demised premises, or other premises within a radius of 2,000 feet, any petroleum products other than those of the lessee. It is quite understandable that the lessee might not want the lessor to handle competing products within a radius of 2,000 feet, and such a covenant seems legally permissible, *Sea Food Co. v. Way,* 169 N.C. 679, 86 S.E. 603, but why the lessor should be asked to stipulate and agree in his lease not to handle competing products "from the demised premises," is not so readily perceived. He apparently has no right to handle anything from the premises while under demise.

However this may be, there is no allegation that the lessor has agreed to purchase petroleum products from anyone—a necessary averment to attract the provisions of G.S. 75-5, subsec. 2. This statute makes it unlawful, *inter alia,* to sell any goods, wares, merchandise, or things of value upon condition that the purchaser will not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in busi-

ness. *Shoe Co. v. Dept. Store,* 212 N.C. 75, 193 S.E. 9; *Fashion Co. v. Grant,* 165 N.C. 453, 81 S.E. 606; *Standard Oil Co. v. United States,* ..... U.S. ....., 69 S. Ct. 1051, denied 13 June, 1949.

It is true there is here in a letter written by the lessor to the lessee, two days after the lease was signed, the statement, "since the service station has been sublet to me," but this is all that appears on the subject of a sublease. It falls short of an allegation that the lessor agreed to purchase petroleum products from the lessee on the condition denounced by the statute. *Lewis v. Archbell,* 199 N.C. 205, 154 S.E. 11; *Wooten v. Harris,* 153 N.C. 43, 68 S.E. 898. The only challenged agreement appearing on the face of the complaint is the lessor's covenant not to handle or sell from the demised premises, or other premises within a radius of 2,000 feet, any petroleum products other than the products of the lessee. This agreement apparently runs afoul of no statute, *Hill v. Davenport,* 195 N.C. 271, 141 S.E. 752, and hence it is not subject to successful challenge in the manner and form here presented. A demurrer admits the truth of factual averments and relevant inferences for the purpose of testing the sufficiency of a pleading. *Leonard v. Maxwell, Comr.,* 216 N.C. 89, 3 S.E. 2d 316.

It would seem, therefore, that as presently presented, the plaintiff is seeking to enforce a permissible restriction in a lease, rather than a forbidden condition in a sales contract. Anno. 83 A.L.R. 1416; 126 A.L.R. 1375; 24 Am. Jur. 716.

Of course, if it should appear on the hearing that the demise of the premises to the lessee and its immediate subletting to the lessor, for purposes of operation, were but parts of a single transaction, though separately stated, a different situation might arise from what is presently alleged. Nevertheless, on demurrer, we must take the pleading at its face value. Anno. 83 A.L.R. 1418.

The demurrer was improvidently sustained. In the present state of the record, the injunction should have been continued to the hearing.

Error and reversed.

STATE v. THURMAN BLANKS.

(Filed 25 May, 1949.)

1. Criminal Law §§ 53f, 53k—

Objection that in stating the contentions, the court unduly emphasized the testimony of certain of the State's witnesses *held* untenable, it appearing that the court stated the testimony of these and other witnesses fully and fairly.

2. Criminal Law § 78e (2)—

Exception to an immaterial misstatement of the evidence will not be considered when the matter was not called to the trial court's attention at the time.

3. Homicide § 27h—

Defendant pleaded not guilty and did not testify personally or make any admission. Defendant's counsel did not admit that the gun with which deceased was shot was in the hands of defendant, but did offer to plead guilty of murder in the second degree. The court charged that defendant contended he was not guilty of any of the degrees of homicide, *seriatim*, and that he contended that the jury should have a reasonable doubt of his guilt and acquit him of any offense. *Held:* The charge was not prejudicial to defendant.

4. Homicide § 25—

Evidence tending to show that defendant had animosity toward deceased, that he approached him armed with a gun and ordered him to "Stick em up" several times, and shot his unarmed victim when he had raised his hands as high as his head, *is held* sufficient to sustain conviction of murder in the first degree, and objection that there was no sufficient evidence of premeditation and deliberation is untenable.

5. Criminal Law § 53d: Homicide § 27a—

The court merely recited testimony that after the offense, defendant went to the city and surrendered to the officers. The failure of the court to charge upon the law of flight is not error, since in no place in the charge did the court instruct the jury that it should consider flight as evidence of guilt, much less that it might be considered as evidence of guilt of first degree murder.

6. Criminal Law § 34d: Homicide § 19—

Flight of a defendant may be considered with other circumstances as an implied admission of guilt, but it is not evidence of premeditation or deliberation in a homicide prosecution.

APPEAL by defendant from *Burney, J.*, January Term, 1949, of BLADEN. No error.

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

Robert R. Bond, David Sinclair, and Robert J. Hester for defendant, appellant.

DEVIN, J. The State's evidence tended to show that the homicide occurred on the afternoon of Sunday, 7 November, 1948, at the home of Owen Graham, in the presence of a number of witnesses who had gathered there. Graham and another were seated in an automobile in front of the house, and the deceased had walked up near by when the defendant

came from behind the house with a shotgun. He approached within 10 or 11 feet of the deceased and said to him, "Stick em up." This he repeated three times. The deceased raised his hands as high as his head, and the defendant then shot him, killing him instantly. After shooting the deceased the defendant said, "You took a gun off my brother one time six months ago. It's too late now, I done killed him," or "I have done done it." The deceased had no weapon or anything in his hand. It was in evidence that defendant had told a witness that deceased had accused him and Graham of making liquor. After shooting deceased, the defendant left and went to Wilmington, where he surrendered to the officers.

The defendant did not testify and offered no evidence. At the close of the State's evidence the defendant through his counsel moved for judgment of nonsuit as to murder in the first degree, offering to tender plea of guilty of murder in the second degree. The motion was denied.

The defendant assigns error in the court's charge to the jury in the several respects pointed out by his counsel in their brief and stressed in the oral argument.

The first two exceptions brought forward are based on the ground that the court in reciting the evidence stated the State's contentions as to the testimony of certain witnesses more in detail than was accorded defendant's contentions. However, from an examination of the charge, we think the trial judge stated the testimony of these and other witnesses fully and fairly, and we perceive no hurtful effect to the defendant on that score. Defendant also noted exception to the fact that in one instance the court in stating the State's contentions quoted the remark made by the defendant after the shooting as "You took my brother's gun six months ago and I have gotten you now," instead of stating the last clause in the language of the witness as "I done killed him." We do not find here any material misstatement of the evidence, nor was this called to the court's attention at the time. *S. v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234; *S. v. Edwards,* 228 N.C. 153, 44 S.E. 2d 725.

The defendant also noted exception for that the court in stating defendant's contentions said the defendant contended he was not guilty of any offense, and that the jury ought not to believe him guilty of murder in first degree or in second degree, or manslaughter; that the jury should have a reasonable doubt as to his guilt and give him the benefit of such doubt and acquit him. The defendant suggests that as he had offered to plead guilty of murder in the second degree and his counsel had so stated, this had the effect of prejudicing him in the eyes of the jury. But the defendant had pleaded not guilty. He had not testified or personally made any admission. His counsel admitted the deceased died as result of gunshot wound but declined to admit the gun was in the hands of defendant. The burden was on the State throughout to satisfy the

jury beyond a reasonable doubt of his guilt. The credibility of the witnesses was for the jury. There was no error, of which the defendant can complain, in instructing the jury as to the different degrees of homicide, or in charging them that they should not return verdict of guilty of murder in the first degree if they entertaine a reasonable doubt about it, or find the defendant guilty of any lesser offense unless so satisfied from the evidence beyond a reasonable doubt, and that unless they so found they should acquit him. *S. v. Maxwell,* 215 N.C. 32, 1 S.E. 2d 125; *S. v. Ellison,* 226 N.C. 628, 39 S.E. 2d 842. Nor was there error in giving the defendant the benefit of these principles of law in stating contentions based thereon.

It was argued that the State's evidence was insufficient to make out a case of first degree murder for that it showed the homicide was committed upon a sudden impulse, prompted by the circumstance of the moment, rather than as the result of premeditation and deliberation, and that the court should have so instructed the jury. But we think that was a matter for the jury, and that there was evidence to support the charge of murder in the first degree. *S. v. Walker,* 173 N.C. 780, 92 S.E. 327; *S. v. Benson,* 183 N.C. 795, 111 S.E. 869; *S. v. Buffkin,* 209 N.C. 117, 183 S.E. 543; *S. v. Wise,* 225 N.C. 746, 36 S.E. 2d 230.

The defendant excepted to the court's action in reciting the testimony of the witnesses that after the shooting the defendant left and went to Wilmington without explaining to the jury the law relating to flight. An examination of the judge's charge shows that in quoting this testimony he did not refer to it specifically as evidence of guilt, or include it in his statement of the State's contentions as constituting evidence of guilt. The court merely stated the testimony of witness that "he went to Wilmington and surrendered to the officers." Nor does it appear that this testimony was permitted to be considered by the jury as evidence of first degree murder. It is well settled that flight of a defendant is not evidence of premeditation or deliberation, but may be considered with other circumstances on the question of guilt, or as a circumstance from which an inference of conscious guilt might be drawn, unless explained. *S. v. Foster,* 130 N.C. 666, 41 S.E. 284; *S. v. Malonee,* 154 N.C. 200, 69 S.E. 786; *S. v. Payne,* 213 N.C. 719, 197 S.E. 573; *S. v. Peterson,* 228 N.C. 736, 46 S.E. 2d 852.

After a careful consideration of the exceptions brought forward in defendant's appeal as well as the entire record, including the charge of the trial judge, we reach the conclusion that there was no error in the trial of which the defendant can justly complain, and that the judgment below must be affirmed.

No error.

G. F. BRANCH, JOHN W. OXENDINE, N. C. STUBBS, L. G. SINGLETARY, J. B. POWELL AND J. M. POWELL, INDIVIDUALLY AND AS TAXPAYERS OF ROBESON COUNTY, NORTH CAROLINA, AND ON BEHALF OF SAID COUNTY, v. BOARD OF EDUCATION OF ROBESON COUNTY, BOARD OF COUNTY COMMISSIONERS OF ROBESON COUNTY, D. L. GREENE, COUNTY SUPERINTENDENT OF COUNTY SCHOOLS; W. D. REYNOLDS, ROBESON COUNTY MANAGER; LUMBERTON ADMINISTRATIVE SCHOOL UNIT, FAIRMONT ADMINISTRATIVE UNIT, L. McK. PARKER, ROBESON COUNTY TAX COLLECTOR, AND HONORABLE HARRY McMULLAN, ATTORNEY-GENERAL OF NORTH CAROLINA.

(Filed 25 May, 1949.)

1. Appeal and Error § 2—

An appeal will lie from the dissolution of a temporary restraining order.

2. Injunctions § 9—

The findings of fact made upon the hearing of an order to show cause why a temporary restraining order should not be continued are not binding upon the hearing of the cause upon its merits.

3. Appeal and Error §§ 38, 40c—

An order dissolving a temporary restraining order will be presumed correct, and when appellants fail to overcome the presumption of correctness the order will not be disturbed.

4. Injunctions § 1a—

Injunction will not lie to restrain an act which has already been done at the time of the institution of the action.

PLAINTIFFS' appeal from *Nimocks, J.*, at Chambers, September Criminal Term, 1948, ROBESON Superior Court.

The plaintiffs brought this action to secure a mandatory injunction against the defendants with respect to moneys alleged to be in the hands of the defendant Commissioners from collection of delinquent taxes, including those levied for educational purposes, alleging that they are in danger of misapplication.

At the same time they secured a temporary restraining order against all the agencies joined as defendants from expending funds out of certain accounts as explained *infra*, and an order to show cause why the temporary injunction should not be continued to the hearing. The appeal is from dissolution of the restraining order.

They attack as unconstitutional Chapters 486 and 487 of the Session Laws of 1945, both concededly public-local laws applying only to Robeson County. They are alleged to be in contravention of Article IX, Section 5, of the North Carolina Constitution, and other provisions of the State and the Federal Constitutions contended to have a bearing upon their validity.

Both cited Session Acts relate to the proceeds of belated collections of delinquent taxes, purport to alter the method of interfund accounting theretofore in use in the county, so that surplus funds over budgetary requirements, with respect to these taxes, should be passed into the general fund (Chapter 487) or the revolving fund account (Chapter 486) without distinguishment of character or source. Custodial status remained unchanged.

The gravamen of plaintiffs' objection is that the proceeds of the delinquent tax collections, including substantial sums in the aggregate, which, as general funds, were thus made subject to expenditure, at discretion of the board, for nonschool purposes; and when put in the revolving fund from which other funds might be supplemented, the same result would follow.

At the hearing the several boards and agencies were represented and proceeded with evidence.

The Board of County Commissioners introduced evidence tending to show that all the current budget requirements with respect to the schools had been currently met, and that the unexpected result of delinquent tax collections had created a surplus not needed in that respect. The evidence tended to show that while the revised system of bookkeeping did not distinguish the sources and amounts of the inter-fund collections, this could be accomplished by analysis of the levy and collection for the several years involved; and that such analysis showed that the total expenditures actually made from these funds for educational purposes were approximately equal to the aggregate collections of taxes chargeable to educational purposes, and that no invasion of those collections had been made for other purposes. The evidence tended to show that an emergency with respect to school buildings existed; the existing buildings and facilities which it was their duty under the statute to maintain, had become inadequate, unsanitary, dangerous, and wholly unfit to house the growing student population, especially those in use by the Negro race; and that the funds had been used in the erection of school buildings and the furnishing of facilities without which the conduct of the schools could not be carried on. The evidence tended to show that the "funds" with which plaintiffs' action is concerned were thereby practically exhausted,—with the exception of a still pending item between the City of Lumberton and the County of Robeson, when plaintiffs began their action.

The evidence, consisting of affidavits and voluminous accounts exhibited by respondents—the plaintiff offered no evidence—was heard by Judge Nimocks, who, on consideration thereof and of the pertinent statutes, and the argument of counsel, found facts consistent with the foregoing summary, concluded that the acts cited did not contravene any constitutional provisions, and dissolved the temporary restraining order.

Plaintiffs appealed.

Malcolm McQueen, F. D. Hackett, Frank McNeill, and Hector McLean for plaintiffs, appellants.

McKinnon & Seawell and McLean & Stacy for defendant Board of Commissioners of Robeson County; W. D. Reynolds, Robeson County Manager; and L. McK. Parker, Robeson County Tax Collector, appellees.

E. J. Johnson for defendant Board of Education of Robeson County, appellee.

Ozmer L. Henry for defendants Lumberton Administrative School Unit and Red Springs Administrative School Unit, appellees.

F. Wayland Floyd for Fairmont Administrative School Unit, appellee.

SEAWELL, J. Although the plaintiffs have appealed from an interlocutory order, it has been considered, in the practice, as one involving a substantial right and subject to appeal. McIntosh, N. C. Practice and Procedure, Sec. 876, p. 993; *Jones v. Thorne,* 80 N.C. 72.

However, it must be borne in mind that the proceedings on the show cause order, including the findings of fact, are significant only with respect to the immediate issue—whether the order should be continued to the hearing or dissolved; and the findings of fact are not binding on the court upon the final hearing. *Grantham v. Nunn,* 188 N.C. 239, 124 S.E. 309; *Owen v. Board of Education,* 184 N.C. 267, 114 S.E. 390; *Sutton v. Sutton,* 183 N.C. 128, 110 S.E. 777.

The evidence is summarized here only for the purpose of the present review, in passing upon the validity and propriety of the order assailed.

Detailed consideration of the questions fundamentally involved might embarrass, instead of aid, the hearing on the merits and will not be attempted.

The decision of the court below rested largely on its sound judgment, subject, of course, to the legally applicable principles. We cannot say that these latter have been invaded. The presumption of correctness of the judgment entered below applies to cases of this kind, *Plott v. Comsioners,* 187 N.C. 125, 121 S.E. 190; *Hyatt v. DeHart,* 140 N.C. 270, 52 S.E. 781, and the plaintiffs have not overcome it. Indeed, upon the evidence, the court had before it the question whether by exhaustion of the funds intended to be protected, the acts sought to be restrained had already become a *fait accompli* when the action began. *Yates v. Dixie Fire Ins. Co.,* 166 N.C. 134, 81 S.E. 1062.

Affirmed.

STATE v. KENNETH MATHIS AND JOHN DRYMAN.

(Filed 25 May, 1949.)

1. Burglary § 11—

Evidence of each defendant's guilt of first degree burglary *held* sufficient to be submitted to the jury and overrule defendants' motions for nonsuit on this charge.

2. Burglary § 13a—

Even where the jury finds facts constituting burglary in the first degree in a prosecution for this offense, it may return a verdict of guilty of burglary in the first degree, or guilty of burglary in the first degree with recommendation for imprisonment for life, or, if the jury deems it proper, guilty of burglary in the second degree. G.S. 14-52, G.S. 15-171.

3. Burglary § 12a—

In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. G.S. 14-52, G.S. 1-180.

APPEAL by defendants from *Clement, J.*, at January Term, 1949, of BUNCOMBE.

Criminal prosecution upon an indictment found as a true bill at January Term, 1949, of Buncombe and containing five counts charging,

First: "That John Dryman and Kenneth Mathis, late of the county of Buncombe, on 22 October, 1948, about the hour of seven o'clock in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Clyde Bennett there situate, and then and there actually occupied by one Clyde Bennett, feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Clyde Bennett in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Second: The same as the first, adding: "and then and there in such dwelling house, John Dryman and Kenneth Mathis of the value of three thousand ($3,000.00) dollars of the money, goods, chattels of the said Clyde Bennett in the said dwelling house, then and there being found, then and there feloniously and burglariously did steal, take and carry away, contrary to the form of the statute . . ., etc."

Third: Charges John Dryman and Kenneth Mathis with the criminal offense of robbery of Clyde Bennett with firearms—at the same time and place specified in the first and second counts.

Fourth: Charges that John Dryman and Kenneth Mathis at same time and place feloniously and secretly assaulted Clyde Bennett with

deadly weapons, with intent to kill and murder him, inflicting serious and permanent injuries upon him not resulting in death, etc.

Fifth: Charges that John Dryman and Kenneth Mathis, at same time and place, did unlawfully and feloniously take, steal and carry away $3,000.00 in money owned by and in possession of Clyde Bennett.

Upon arraignment at the January Term, 1949, of Superior Court of Buncombe County on the bill of indictment just described, defendants John Dryman and Kenneth Mathis pleaded not guilty.

And on the trial in Superior Court the State offered evidence tending to support as against defendants the charge so preferred against them. Defendants offered no evidence.

Verdict: As to defendant John Dryman: "Guilty of burglary in the first degree." As to defendant Kenneth Mathis: "Guilty of burglary in the first degree charged in the bill of indictment."

Judgment: As to each, John Dryman and Kenneth Mathis, separately, death by the administration of lethal gas.

Each defendant, John Dryman and Kenneth Mathis, separately, appeals from the judgment so rendered against him to the Supreme Court and assigns error.

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

F. Piercy Carter and Shelby E. Horton, Jr., for defendant Mathis.

Henry C. Fisher for defendant Dryman.

WINBORNE, J. The evidence offered by the State on the trial in Superior Court, as shown in the record of the case on appeal, taken in the light most favorable to the State, is sufficient to take the case to the jury as to each defendant on each of the essential elements of the crime of burglary in the first degree as defined by the laws of the State, and to support as to each defendant a verdict of guilty of burglary in the first degree. Hence, there is no error in the denial of defendants' motions for judgment as of nonsuit on the charge of burglary in the first degree. See *S. v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708, and cases cited, and *S. v. Bell*, 205 N.C. 225, 171 S.E. 50, and cases cited. But since error in another phase of the trial, necessitating a new trial, is made to appear, no useful purpose will be served by a narrative of the evidence adduced by the State.

However, assignment of error #82, based upon defendant Mathis' exception No. 65 and defendant Dryman's exception No. 75, to the failure of the trial judge to charge in respect to the right of the jury under G.S. 14-52 to return a verdict of guilty of burglary in the first degree and to recommend in connection therewith that punishment therefor shall be imprisonment for life in the State's prison, is well founded.

The Attorney-General, in the State's brief, says, "We do not find that the court did charge the jury on this statute."

In this connection it may be noted that the General Assembly of North Carolina has enacted several statutes pertaining to burglary and the punishment therefor, among which are G.S. 14-51, G.S. 14-52, and G.S. 15-171. G.S. 14-51 declares that there shall be two degrees in the crime of burglary as defined at the common law. It defines what shall constitute burglary in the first degree, and what shall constitute burglary in the second degree. And G.S. 14-52, as to punishment for burglary, prescribes that "any person convicted according to the due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison. Any one so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court." The proviso in the statute was added by the General Assembly of 1941 (P.L. 1941, Ch. 215). Before the enactment of it, a verdict of guilty of burglary in the first degree made death sentence mandatory. But since the enactment of it, when a jury in returning a verdict of guilty of burglary in the first degree recommends imprisonment for life, the death penalty is thereby eliminated, and sentence of life imprisonment is mandatory. Thus a substantial right is created by the proviso in G.S. 14-52 in favor of one charged with burglary in the first degree. And in such case, it is the duty of the trial judge under the provisions of G.S. 1-180 "to declare and explain the law arising thereon."

Moreover, G.S. 15-171 provides that "where the crime charged in the bill of indictment is burglary in the first degree the jury, upon the finding of facts sufficient to constitute burglary in the first degree as defined by statute, may elect to render a verdict of guilty of burglary in the second degree if they deem it proper so to do," and "the judge in his charge shall so instruct the jury." See *S. v. Surles, ante,* 272.

Therefore, taking the two statutes together, G.S. 14-52 and G.S. 15-171, when in a case in which the charge is burglary in the first degree the jury finds from the evidence and beyond a reasonable doubt facts constituting burglary in the first degree, one of three verdicts may be returned: (1) Guilty of burglary in the first degree, which carries a mandatory death sentence; (2) Guilty of burglary in the first degree, with recommendation of imprisonment for life, which calls for a sentence to life imprisonment; and (3) if the jury "deem it proper so to do," Guilty of burglary in the second degree, for which the sentence may be life imprisonment, or imprisonment for a term of years in the discretion of the judge, all in accordance with the statutes.

In the present case the trial judge failed to declare and explain the law in respect to the provisions of the proviso in G.S. 14-52, as required by G.S. 1-180, and in so doing deprived defendants of the benefit of a substantial right, which entitles them to a new trial.

Hence, other exceptions have not been considered, as the matters to which they relate may not recur on another trial.

New trial.

LESS MARTIN, ADMINISTRATOR OF DAVID MARTIN, JR., DECEASED, v. H. R. CURRIE.

(Filed 25 May, 1949.)

1. Appeal and Error § 39e—

The exclusion of testimony cannot be held prejudicial when it does not appear what the witness would have testified if permitted to do so.

2. Negligence § 18—

Where there is evidence warranting the inference that marks on the ground at the scene where defendant's tractor overturned, causing the death of the driver, plaintiff's intestate, existed at the time of the accident, testimony as to such marks is competent.

3. Death § 8—

Since exemplary or punitive damages are not recoverable in an action for wrongful death, evidence of the pecuniary state of defendant is irrelevant, and objection is properly sustained to a question asked defendant as to the amount of land he owned. G.S. 28-174.

4. Master and Servant § 14a—

The charge of the court as to the duties of an employer to his employee and the liability of the employer for negligent injury to the employee, *held* without error.

APPEAL by plaintiff from *Armstrong, J.*, and a jury, at November Term, 1948, of RICHMOND.

The plaintiff's intestate, David Martin, Jr., suffered death from the overturning of a tractor which he was using in rendering agricultural services for his employer, H. R. Currie, the defendant. The plaintiff thereupon sued the defendant for damages under G.S. 28-173 upon a complaint alleging that the death proximately resulted from the negligence of the defendant in furnishing the intestate a defective tractor. The defendant answered, denying negligence on his part and pleading assumption of risk and contributory negligence on the part of the intestate.

The evidence at the trial was conflicting, and the court submitted these four issues to the jury: (1) Was the death of plaintiff's intestate, David Martin, Jr., caused by the negligence of the defendant, as alleged in the complaint? (2) If so, did the plaintiff's intestate, David Martin, Jr., assume the risk incident to his employment? (3) Did plaintiff's intestate, David Martin, Jr., by his own negligence, contribute to his injury and death? (4) What amount, if any, is plaintiff entitled to receive of the defendant?

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

H. F. Seawell, Jr., for plaintiff, appellant.
Jones & Jones for defendant, appellee.

ERVIN, J. The plaintiff's first exception is addressed to the ruling of the court sustaining an objection of the defendant to a question propounded to the plaintiff's witness, Elcoe Covington, by plaintiff's counsel calling for a description of the condition of the tractor in controversy "about a month after the accident." This exception cannot be considered on this appeal for the record does not show what evidence this witness would have given if he had been permitted to answer the question. *Francis v. Francis,* 223 N.C. 401, 26 S.E. 2d 907; *Gibson v. Insurance Society,* 217 N.C. 564, 9 S.E. 2d 15; *In re Will of Redding,* 216 N.C. 497, 5 S.E. 2d 544; *Hammond v. Williams,* 215 N.C. 657, 3 S.E. 2d 437.

The defendant reached the scene of the fatal accident immediately after the tractor overturned, and was permitted to testify as to marks then appearing on the ground at that place. Since the record warrants an inference that these marks existed at the time of the accident, this evidence was properly received. *Shaw v. Handle Co.,* 188 N.C. 222, 124 S.E. 325; *Norris v. Mills,* 154 N.C. 474, 70 S.E. 912; *Blevins v. Cotton Mills,* 150 N.C. 493, 64 S.E. 428.

The court rightly sustained the defendant's objection to the following question put to defendant on cross-examination by plaintiff's counsel: "How much farm land do you have?" Evidence of the pecuniary state of the defendant is irrelevant and inadmissible in an action for damages for death by wrongful act because the controlling statute does not allow recovery of exemplary or punitive damages in such cases. G.S. 28-174; *Collier v. Arrington,* 61 N.C. 356; *Gray v. Little,* 127 N.C. 304, 37 S.E. 270.

The exception to the charge is untenable. The excerpt assigned as error conforms to the law of master and servant as laid down in repeated decisions of this Court. *Murray v. R. R.,* 218 N.C. 392, 11 S.E. 2d 326;

Craver v. Cotton Mills, 196 N.C. 330, 145 S.E. 570; *Watson v. Tanning Co.,* 192 N.C. 790, 136 S.E. 117; *Lindsey v. Lumber Co.,* 190 N.C. 844, 130 S.E. 713; *Riggs v. Mfg. Co.,* 190 N.C. 256, 129 S.E. 595; *Cable v. Lumber Co.,* 189 N.C. 840, 128 S.E. 329; *Murphy v. Lumber Co.,* 186 N.C. 746, 120 S.E. 342; *Owen v. Lumber Co.,* 185 N.C. 612, 117 S.E. 705; *Tritt v. Lumber Co.,* 183 N.C. 830, 111 S.E. 872.

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 issue relating to the actionable negligence of the defendant adverse to plaintiff under a charge free from error. Hence, the trial and judgment must be upheld.

No error.

STATE v. Y. S. WHITE.

(Filed 25 May, 1949.)

1. Criminal Law § 62f—

Where defendant appeals to the Superior Court from a suspended sentence entered in a municipal court, he may not complain that upon his plea of guilty in the Superior Court, sentence is entered without conditional or elective suspension.

2. Bills and Notes § 37—

The offense proscribed by G.S. 14-107 is not the attempted payment of a debt, but the giving of a worthless check with its resulting injury to society in undermining confidence in negotiable paper.

3. Criminal Law § 62a—

A sentence of 18 months on the roads entered upon defendant's plea of guilty to a misdemeanor is within that permitted by law, and therefore cannot be "cruel and unusual" in a constitutional sense. Constitution of N. C., Art. I, Sec. 14.

APPEAL by defendant from *Bobbitt, J.,* at December Term, 1948, of GUILFORD (High Point Division).

Criminal prosecution on warrant charging the defendant with drawing and uttering a worthless check in violation of G.S. 14-107.

On 17 August, 1948, the defendant gave the Powell Motor Company of High Point a check drawn on a Charlotte bank for $1,535.00 in payment of an automobile. The check was returned marked "Insufficient Funds." The defendant requested that it be redeposited, which was done, and it was again dishonored.

Warrant was issued for the defendant on 30 August, 1948. From a conviction in the Municipal Court of the City of High Point and sentence of 18 months on the roads, suspended on condition the defendant pay the

holder the amount of the check and the costs of the action, the defendant appealed to the Superior Court of Guilford County.

In the Superior Court, the defendant, through counsel, entered a plea of guilty and was sentenced to 18 months on the roads.

The defendant appeals, alleging that the sentence imposed is excessive and violative of Art. I, Sec. 14, North Carolina Constitution.

Attorney-General McMullan, Assistant Attorney-General Moody, and John R. Jordan, Jr., Member of Staff, for the State.

York, Morgan & York for defendant.

STACY, C. J. The question for decision is the reasonableness of the punishment inflicted. The defendant was given an opportunity in the Municipal Court to escape the road sentence there imposed by paying his check and the costs of the action. This he elected not to do.

He was given the same sentence upon a plea of guilty in the Superior Court without any conditional or elective suspension. He would now like to go back and accept the conditions attached to the sentence in the Municipal Court. These conditions, however, are no longer available to him.

His appeal here is to test the alleged cruelty and unusuality of the punishment inflicted in the Superior Court where he entered a plea of guilty to the offense charged.

The defendant was given two chances by the holder of the check, and two by the Municipal Court. The Superior Court evidently thought the best way to take his bad checks out of circulation was to take him out of circulation for awhile. A check is a negotiable instrument and passes readily through the channels of commerce because of the faith and confidence which those in the marketplaces are willing to repose in negotiable paper, and it is an injury to society to undermine this confidence. It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. *S. v. Yarboro,* 194 N.C. 498, 140 S.E. 216.

The sentence imposed is less than the punishment heretofore approved in a number of misdemeanor cases. It cannot be said to be "cruel and unusual" in a constitutional sense. The judgment will be affirmed on authority of *S. v. Levy,* 220 N.C. 812, 18 S.E. 2d 355; *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Wilson,* 218 N.C. 769, 12 S.E. 2d 654.

Affirmed.

WINIFRED L. PERRY v. LONNIE WARREN PERRY.

(Filed 25 May, 1949.)

1. Appeal and Error § 12—

Appeals *in forma pauperis* are not to be allowed as a subterfuge to permit appellant to escape payment of costs which might be taxed against him, and the trial court should ascertain if the affidavit is made in good faith and whether the facts therein stated are true. G.S. 1-288.

2. Same—

On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant is earning $300.00 per month, and permitted defendant to appeal from the order *in forma pauperis*. The cause is remanded to the end that the court may determine whether defendant is in fact entitled to appeal *in forma pauperis*.

APPEAL by defendant from *Nimocks, J.*, in Chambers at Fayetteville, 25 February 1949, CUMBERLAND.

Action for subsistence without divorce, heard on rule to show cause why defendant should not be adjudged in contempt.

An order requiring the defendant to make certain monthly payments to plaintiff "so long as the plaintiff shall remain married to the defendant and so long thereafter as the plaintiff shall remain a single person" was duly entered in this action by Bone, J., 30 May 1947.

On 22 January 1949, Nimocks, J., on the unverified petition of counsel for plaintiff, issued his rule to the defendant to appear and show cause why he should not be attached for contempt for a willful failure to make the required subsistence payments. On the return of the rule to show cause, the court below entered its order requiring the defendant to "pay in the Office of the Clerk of the Superior Court of Cumberland County, for the use and benefit of plaintiff herein the sum of $100 per month" beginning 10 March 1949. The defendant appealed and filed his motion to be allowed to perfect his appeal *in forma pauperis*. The motion was allowed.

Nance & Barrington for plaintiff appellee.

Seavy A. Carroll for defendant appellant.

PER CURIAM. The statutory provision for appeals *in forma pauperis* is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal to this Court. It is not to be used as a subter-

fuge to escape payment of costs which otherwise might be taxed against the appellant.

The court below found as a fact, on admissions made in open court, that defendant is now earning $300 per month. Even so, the defendant made a motion to be allowed to appeal *in forma pauperis,* supported by the statutory affidavit. The court, in allowing the motion, at least impliedly found that the affidavit was made in good faith and that the facts as therein stated are true.

If defendant is earning $300 per month, he is able to make a reasonable deposit to secure the payment of the costs of his appeal. On the question of his ability to make such deposit, the findings of the court on the one hand, and the defendant's affidavit and the order based thereon on the other, are contradictory. This raises a serious question as to whether the affidavit was made in good faith.

In view of this situation, the trial judge should be afforded an opportunity to review the motion and reconsider his order based thereon, to the end that he may determine whether the defendant is in fact entitled to appeal *in forma pauperis.* For that purpose only the cause is

Remanded.

BAKAMI CONSTRUCTION & ENGINEERING COMPANY v. JAMES THOMAS AND BOB JONES, INDIVIDUALLY AND TRADING AS SOUTHERN QUEEN HOT SHOPPE.

(Filed 25 May, 1949.)

Appeal and Error § 2—

An appeal from the overruling of exceptions to the report of the referee and to the overruling of the motion that the entire evidence reported by the referee be stricken because not signed by the witnesses, G.S. 1-193, will be dismissed as premature.

APPEAL by plaintiff from *Bobbitt, J.,* November Term, 1948, of GUILFORD. Appeal dismissed.

Harry Ganderson and Welch Jordan for plaintiff, appellant.

Falk, Carruthers & Roth for defendants, appellees.

PER CURIAM. This was a suit on a building contract, instituted by the plaintiff contractor, to which the defendants filed answer and counterclaim. Over objection of plaintiff the cause was referred. Upon the coming in of the report of the referee, plaintiff filed exceptions, and also moved to set aside the report on the ground that this was not a case for

reference, and further moved that the entire evidence reported by the referee be stricken out because of failure of the referee to have the testimony signed by the witnesses as required by G.S. 1-193. These motions were overruled, and plaintiff excepted and appealed.

The plaintiff's appeal at this stage of the action is premature and must be dismissed. In the event of an adverse final judgment the exceptions which plaintiff has noted to the rulings of the court may be preserved for reviewing the questions thereby raised. *Cole v. Trust Co.*, 221 N.C. 249, 20 S.E. 2d 54, and cases there cited; McIntosh 773; G.S. 1-277.

Appeal dismissed.

LEROY LEE v. D. A. McDONALD, JR., AND HELEN STREET McDONALD, HIS WIFE; ANNA LEE McDONALD; ALICE GLENN ROBERTS, SARAH HAYES HEADEN AND HUSBAND, WILLIAM J. HEADEN; P. J. HAYES, JR., AND WIFE, MRS. P. J. HAYES; WILLIAM ALLEN HAYES AND WIFE, MRS. WILLIAM ALLEN HAYES; DANIEL O'CONNOR HAYES AND WIFE, RUTH HINES HAYES, AND PEGGY ANN HAYES.

(Filed 2 June, 1949.)

1. Boundaries § 1—

What are the boundaries of a deed is to be determined in accordance with the intent of the grantor as gathered from the four corners of the instrument, and is a question of law for the court; and it is for the jury to determine where the boundaries are actually located.

2. Boundaries § 2—

Where a deed states in the description that it includes certain lots, designated by number, but the prior description by metes and bounds does not include such lots in their entirety, the particular description by metes and bounds controls unless it is clear that the grantor intended to convey the additional land not embraced in the particular description.

3. Same—

It is only when the specific description is ambiguous, or insufficient, or there is reference to a fuller or more accurate description, that the general description is allowed to control.

4. Quieting Title § 2—

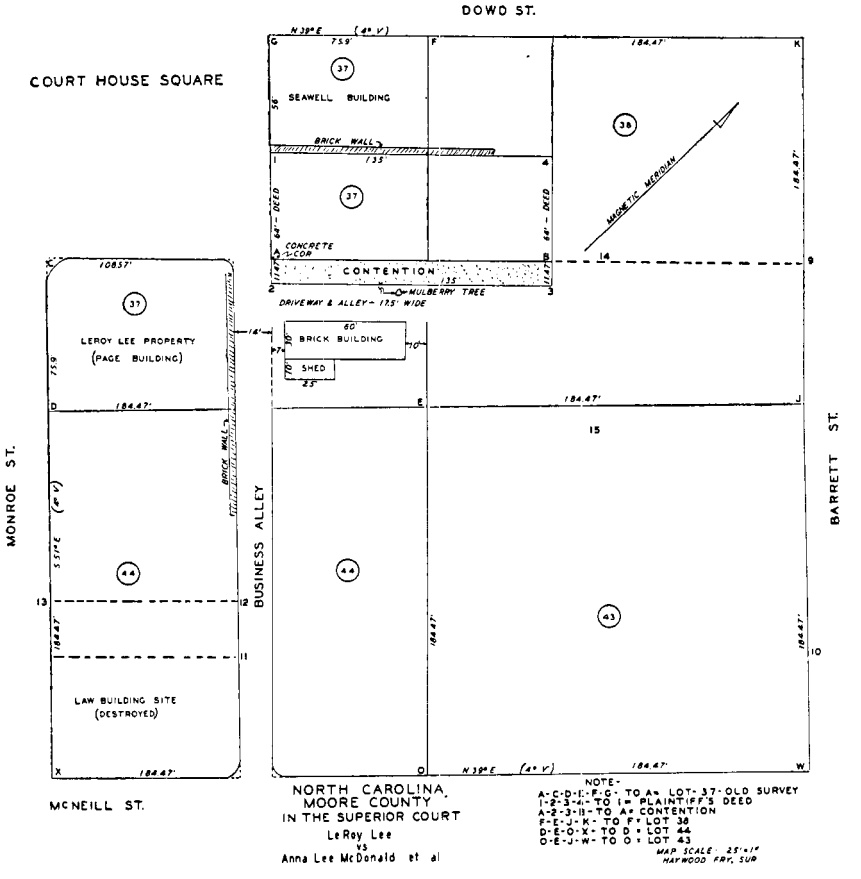
Where, in an action to remove cloud from title, defendants have established superior record title to the land in dispute, the court should give defendants' requested instruction that plaintiff is not entitled to recover unless he establishes title by adverse possession by the greater weight of the evidence.

APPEAL by defendants from *Armstrong, J.*, at September Term, 1948, of MOORE.

This was an action to remove a cloud from the title of plaintiff to the land described in the complaint.

The land in controversy fronts 11.43 feet on Business Alley in the Town of Carthage and has a depth of 135 feet, the frontage lying between a concrete marker of the Court House Square in the eastern edge of said alley and a driveway and alley to the South thereof, parallel with Dowd Street, as shown by a map of the Town of Carthage, and on the Court map, Exhibit A, by letters and figures A, 2, 3, B and back to A.

EXHIBIT A



The plaintiff and the defendants claim the true title to the land in dispute.

The plaintiff relies upon certain deeds to show superior title in himself and his predecessors in title under whom he claims. The first deed in point of time was from William H. McCormick, assignee of the estate of Samuel Barrett, bankrupt, to L. Grimm, dated 24 September, 1882, and duly recorded in the office of the Register of Deeds in Moore County, on 24 September, 1886, and again recorded in said office after all records were destroyed by fire when the Courthouse burned in 1889, on 8 January, 1891, which deed contains the following description: "All that piece or parcel of land situate and lying in the County of Moore and State of North Carolina, and described as follows, to wit: The Barrett Hotel Lots with all the improvements thereon, situate in the Town of Carthage, adjoining the public square and the property of J. M. Monger, together with all the improvements and appurtenances thereunto belonging, or in any way appertaining."

The second deed was from W. B. Richardson to L. Grimm, dated 15 August, 1885, and duly recorded on 31 December, 1885, and re-recorded 26 January, 1891; this deed conveys: "A tract of land in Moore County, State of North Carolina, adjoining the lands of J. M. Monger and the Courthouse Square, in the Town of Carthage, and known as the Barrett Hotel lot and bounded as follows: Beginning at a stake, the corner of the public square, runs thence N. 39 E. 101 links to Barretts' line (William Barretts) formerly Nalls; thence N. 51 W. 149 links to William Barretts' (formerly Nalls') corner on Dowd Street; thence with said street S. 39 W. 101 Links to the public square; thence with the line of the public square S. 51 E. 149 links to the beginning, including Lot No. 37 deeded to A. C. Currie by Neal Morrison, attorney, etc., registered in Book A.C., page 95. Also one other Lot No. 38 formerly possessed and owned by Martin and adjoining the lot whereon Murdoc Bethune formerly lived hereinbefore described deeded by J. Worth, Clerk and Master of the County of Randolph, to A. C. Currie and registered in Register's office of Moore County in Book A.E., page 85. The foregoing description includes the Barrett Hotel, outhouses, garden, yards and all appurtenances and belongings thereto, the same being in the Town of Carthage."

The land in dispute is not embraced within the metes and bounds set forth in the above deed. The southern line of the property conveyed by the metes and bounds description is represented on the Court map, Exhibit A, by the line from A to B. However, the plaintiff claims all of Lots 37 and 38, by reason of the reference thereto as set out in the above deed. Lot 37 is shown on Exhibit A, as containing all the area from A to C, thence to D, to E, to F, to G, and back to A. Likewise, Lot 38 is shown as containing the area from F to E, thence to J, to K, and back

to F. The Barrett Hotel stood on the lot now occupied by the Seawell Building, as shown on Exhibit A, and being a part of Lot No. 37.

The first deed in plaintiff's chain of title, in which the description by metes and bounds contains the disputed area is a deed of partition of the Hotel lot, dated 22 July, 1912, which deed was duly recorded 30 July, 1912. The description in this deed is represented on the Court map Exhibit A, by the figures 1, 2, 3 and 4.

The defendants offered in evidence a deed from J. M. Monger and wife to Ida A. McDonald, dated 4 November, 1891, and duly recorded 14 November, 1896. The description in this deed by metes and bounds does embrace the disputed area, beginning at C, on the Court map, Exhibit A, running thence through A and B to 9, on Barrett Street, thence to W, on Barrett Street; thence from W through 0 to a corner of Law Building site, shown on Court Map, thence N. 51 W. 24 feet, thence S. 39 W. 40 feet to Monroe Street, thence along Monroe Street, to the beginning, being parts of Lots 37, 38, 44 and all of lot 43, according to the evidence and as shown by the Court Map, Exhibit A.

The defendants also offered in evidence a tax deed dated 6 October, 1890, and recorded 7 September, 1895, to D. A. McDonald, conveying the same property described in the above conveyance to his wife Ida A. McDonald. The tax deed was executed by the Sheriff of Moore County and recites that the premises were levied upon and sold to satisfy the unpaid taxes thereon for the years 1884, 1885 and 1886.

The defendants also offered in evidence a quitclaim deed from A. H. McNeill, one of plaintiff's predecessors in title, dated 23 May, 1904, to D. A. McDonald and recorded 1 September, 1909, in which he releases all his right, title and interest in the land formerly owned by J. M. Monger in the Town of Carthage, Moore County, and assigned to the said J. M. Monger as his homestead, from the lien of certain judgments held by party of the first part, the land released "being the whole of the lots in said Town of Carthage numbered in the plan of said Town as Lots Nos. 43 and 44 and a portion of Lots 37 and 38."

The defendants are the heirs of D. A. McDonald and his wife, Ida M. McDonald, together with the spouses of those who are married.

The jury found upon issues agreed upon by the parties, that the plaintiff is the owner of the land in dispute and that the defendants' claim constitutes a cloud upon his title. Judgment was entered to the effect that the plaintiff is the owner of the land in dispute and that the claim of title thereto asserted by the defendants or any of them, is invalid and void, and the same is removed from the described land as a cloud upon the title of the plaintiff.

Defendants appeal and assign error.

Spence & Boyette for plaintiff.

W. A. Leland McKeithan and W. Clement Barrett for defendants.

DENNY, J. The defendants except and assign as error the refusal of the court to charge the jury in substance as follows: That a particular description in a deed by metes and bounds which is unambiguous, will control over a reference to lots when there is a discrepancy or ambiguity between the two descriptions.

The intent of a grantor in a deed, like that of a testator in a will, must be gathered from its four corners, and it is the duty of the court to decide as a matter of law, what the boundaries are in a deed, and for the jury to determine where they are actually located. *Gudger v. White,* 141 N.C. 507, 54 S.E. 386; *Von Herff v. Richardson,* 192 N.C. 595, 135 S.E. 533; *Greer v. Hayes,* 216 N.C. 396, 5 S.E. 2d 169; 26 C.J.S. 357.

Ordinarily if a description by metes and bounds does not embrace the *locus in quo,* but such description is followed by the statement "including" lot or lots thus and so, when such lot or lots in their entirety are not embraced in the description, such reference should not be allowed to control and thereby enlarge the boundaries unless it is clear the grantor intended to convey the additional land not embraced in the description by metes and bounds. *Hudson v. Underwood,* 229 N.C. 273, 49 S.E. 2d 508; *Bailey v. Hayman,* 218 N.C. 175, 10 S.E. 2d 667; *Von Herff v. Richardson, supra; Ferguson v. Fibre Co.,* 182 N.C. 731, 110 S.E. 220; *Williams v. Bailey,* 178 N.C. 630, 101 S.E. 105; *Potter v. Bonner,* 174 N.C. 20, 93 S.E. 370; *Lumber Co. v. McGowan,* 168 N.C. 86, 83 S.E. 16; *Midgett v. Twiford,* 120 N.C. 4, 26 S.E. 626; *Cox v. McGowan,* 116 N.C. 131, 21 S.E. 108; *Carter v. White,* 101 N.C. 30, 7 S.E. 473.

In *Cox v. McGowan, supra, Avery, J.,* said: "The parties are presumed to have intended to be governed by the description which they made specific, when it is in conflict with another."

It is only when the specific description is ambiguous, or insufficient, or there is a reference to a fuller or more accurate description, that the general description is allowed to control. *Lewis v. Furr,* 228 N. C. 89, 44 S.E. 2d 604; *Crews v. Crews,* 210 N.C. 217, 186 S.E. 156; *Quelch v. Futch,* 172 N.C. 316, 90 S.E. 259; *Ritter v. Barrett,* 20 N.C. 266 (133); *Campbell v. McArthur,* 9 N.C. 33, 18 C.J. 284.

We think an examination of the original deeds in plaintiff's chain of title reveals that the grantors therein only intended to convey the Barrett Hotel property. The deed from William McCormick, assignee of the estate of Samuel Barrett, to L. Grimm expressly so states and contains no description by metes and bounds, neither does it refer to any lot number; and in the deed from Richardson to Grimm hereinabove set forth, it will be noted that the grantor describes the property as adjoining the

lands of J. M. Monger and the Courthouse Square, in the Town of Carthage, and *known as the Barrett Hotel lot,* and bounded as follows. Then follows a description by metes and bounds, which description according to the plaintiff's evidence includes no part of the land in controversy. Then after the reference to Lots 37 and 38, this significant statement is added: "The foregoing description includes the Barrett Hotel, outhouses, garden, yards and all appurtenances and belongings thereto, the same being in the Town of Carthage."

Moreover, it appears from the plaintiff's evidence that J. M. Monger lived in a residence located on that part of Lot No. 37, shown on Exhibit A, as "LeRoy Lee property (Page Building)." It further appeared in the quitclaim deed executed by A. H. McNeill, a predecessor in title to plaintiff, to D. A. McDonald, that J. M. Monger had allotted to him as a homestead all of Lots 43 and 44 and a portion of Lots 37 and 38.

It is clear that A. H. McNeill's record title must have been superior to all of Lots 37 and 38 to the record title of J. M. Monger, from whom the defendants claim title, if the plaintiff's record title is superior to that of the defendants. If A. H. McNeill claimed title to all of Lots 37 and 38 at that time, it is difficult to understand why he released all of Lots 43 and 44 and a portion of Lots 37 and 38 to D. A. McDonald, from liens he held against McDonald's predecessor in title, J. M. Monger. Certainly if A. H. McNeill owned all of Lots 37 and 38, as contended by the plaintiff, his liens against Monger would not have been a lien against his own property. Furthermore, if all of these lots belonged to McNeill, or his predecessor in title, why was a portion of them allotted to J. M. Monger as a part of his homestead?

We think on this record, the defendants have shown a superior record title to the property in dispute.

The defendants also except to the refusal of his Honor to charge the jury that since they hold the superior record title to the land in dispute, the plaintiff cannot recover unless he shows by the greater weight of the evidence that he has obtained title thereto by adverse possession or that his predecessors in title have done so. The exception is well taken, and must be upheld.

Whether the plaintiff and those under whom he claims have obtained title to the land in dispute by the adverse possession thereof for twenty years, or by adverse possession under color of title for seven years, is a question about which we express no opinion. That is a question for the jury on appropriate issues and under proper instructions. But for the reasons herein pointed out, the defendants are entitled to a new trial, and it is so ordered.

New trial.

STATE v. RALPH COCHRAN.

(Filed 2 June, 1949.)

1. Indictment § 13—

A motion to quash will lie only for fatal defect appearing on the face of the warrant or indictment and matter *aliunde* the record may not be considered in determining the motion.

2. Criminal Law § 56—

A motion in arrest of judgment will lie only for some fatal defect appearing upon the face of the record proper, which does not include the case on appeal, and the court, in considering the motion, is confined to the record and may not consider extraneous facts or circumstances.

3. Appeal and Error § 1: Criminal Law § 67c—

It is the province of the Supreme Court to decide questions of law and procedure presented by exceptions duly entered in the court below and brought forward in the briefs, and ordinarily it will not decide nonjurisdictional questions which are not thus presented.

4. Constitutional Law § 10d—

The Supreme Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. N. C. Const., Art. IV, sec. 8.

5. Same: Appeal and Error § 1: Criminal Law § 67c: Intoxicating Liquor § 6—

Defendant was convicted of the unlawful sale of a bottle of tax-paid beer in a trial free from error, G.S. 18-126. The solicitor formally admitted that at the time of the sale, defendant possessed and displayed licenses for the sale of beer from the city, county and State, which "were then in full force and effect," and the officer-witness for the State testified that the licenses were owned and displayed at defendant's place of business. *Held:* Notwithstanding that the trial was free from error, the Supreme Court will stay the judgment, since, upon the record, it would be a manifest injustice to permit the imposition of sentence on the verdict rendered.

APPEAL by defendant from *McSwain, Special Judge,* April Term, 1949, CABARRUS. Reversed.

Criminal prosecution on warrant charging the unlawful sale of beer.

Defendant was tried in the county recorder's court of Cabarrus County on a warrant which charges that he "did unlawfully and willfully possess for the purpose of sale and sell one bottle of tax-paid beer of more than one-half of one per cent of alcohol by volume but not more than five per cent of alcohol by weight in violation of North Carolina General Statutes 18-126, contrary to the form of the statute . . ." There was a verdict of guilty and he appealed from the judgment pronounced thereon. When the cause came on for hearing in the Superior Court, he moved to quash

the warrant for that it fails to state a criminal offense. The court, after hearing the motion, found certain facts in respect to an election held under the provisions of G.S. 18-124, including a finding that said election was held within sixty days next preceding a municipal primary in the City of Concord, and overruled the motion. Defendant excepted.

In the trial proper, it was made to appear that defendant, on 28 April 1949, had in his possession for the purpose of sale and did sell one bottle of beer on which the tax had been paid. The solicitor formally admitted that on said date the defendant "owned, possessed and displayed in his place of business where said beer was possessed and sold, Privilege Licenses of the City of Concord, of the County of Cabarrus, and of the State of North Carolina, for the possession and sale of beer, which said licenses were in full force and effect."

The defendant offered no evidence and there was no demurrer to the evidence or motion for a directed verdict. Nor was any evidence respecting the alleged election offered for the consideration of the jury under proper instructions from the court.

There was a verdict of guilty. Thereupon, the defendant moved in arrest of judgment. On this motion the court found the same facts as those found on the motion to quash, and, on the facts found, denied the motion. Defendant excepted. Judgment was pronounced and defendant excepted and appealed to this Court.

Attorney-General McMullan, Assistant Attorney-General Rhodes, and Forrest H. Shuford, II, Member of Staff, for the State.

John Hugh Williams for defendant appellant.

BARNHILL, J. As an averment negativing the possession of a license is not essential, the warrant charges a criminal offense. The defendant was convicted on evidence unchallenged by exception or by motion to dismiss as in case of nonsuit. There was no prayer for a directed verdict. The cause was submitted to the jury under a charge admittedly free from error and the verdict is in proper form. So then, there is no exception in the record which challenges the validity of the trial or verdict.

The only exceptions and assignments of error in the record are directed to the alleged error of the court in (1) overruling the motion to quash, (2) overruling the motion in arrest of judgment, and (3) pronouncing judgment on the verdict.

A motion to quash lies only for a defect on the face of the warrant or indictment. *S. v. Turner,* 170 N.C. 701, 86 S.E. 1019. The defect must appear on the face of the record. *S. v. Choate,* 228 N.C. 491, 46 S.E. 2d 476; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Callett,* 211 N.C. 563, 191 S.E. 27.

It must appear from an inspection of the record that no crime is charged, *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166; *S. v. Gardner,* 219 N.C. 331, 13 S.E. 2d 529, or that the warrant or indictment is otherwise so defective that it will not support a judgment. *S. v. Francis,* 157 N.C. 612, 72 S.E. 1041; *S. v. Taylor,* 172 N.C. 892, 90 S.E. 294; *S. v. Gregory,* 223 N.C. 415, 27 S.E. 2d 140.

The court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied. *S. v. Brewer,* 180 N.C. 716, 104 S.E. 655.

A motion in arrest of judgment, though somewhat broader in scope, serves the same purpose as a motion to quash. The motion to quash is directed to patent defects in the pleading while the motion in arrest of judgment is directed to such defect in the pleading, verdict, or other part of the record.

To afford ground for a motion in arrest of judgment, it must appear that the court is without jurisdiction or that the record is in some respect fatally defective and insufficient to support a judgment. *S. v. Walker,* 87 N.C. 541; *S. v. Phillips,* 228 N.C. 446, 45 S.E. 2d 535; *S. v. Vanderlip,* 225 N.C. 610, 35 S.E. 2d 885; *S. v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250; *S. v. Foster,* 228 N.C. 72, 44 S.E. 2d 447; *S. v. Gregory, supra; S. v. Morgan, supra,* and cases cited; *S. v. Lewis,* 194 N.C. 620, 140 S.E. 434; *S. v. Turner, supra; S. v. McKeon,* 223 N.C. 404, 26 S.E. 2d 914.

Here too, in considering the motion, the Court is confined to the record and may not consider extraneous facts or circumstances; and "record," as here used, means the record proper. It does not include the case on appeal. *S. v. Efird,* 186 N.C. 482, 119 S.E. 881.

The facts found by the court below were found on the preliminary hearing on the motion to quash. As it is not permissible to consider them on the motion to quash or on the motion in arrest of judgment, and the evidence in respect thereto was not offered on the trial, they constitute mere surplusage and have no proper place in the record. *S. v. Efird, supra.*

Both the defendant and the Attorney-General debate at some length the validity of the election held 21 February. It is apparent they desire us to decide whether that election was and is invalid by reason of the fact it was held less than sixty days prior to a municipal nonstatutory primary within the county. G.S. 18-124 (f). But that question is not presented by any exception or assignment of error appearing of record. Thus they furnish us no peg on which to hang decision.

It is the province of this Court to decide questions of law and procedure presented by exceptions duly entered in the court below and brought forward in the briefs filed in this Court. It is contrary to the

course and practice of appellate courts to consider and decide nonjurisdictional questions which are not thus presented. *S. v. Bittings,* 206 N.C. 798, 175 S.E. 299, and cited cases. The question here debated is not of such public interest as to require us to ignore or set at nought long-established rules of procedure which are essential to the orderly administration of justice. Indeed, the admission of the solicitor concedes the invalidity of the election. G.S. 18-126.

Even so, this Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of the inferior courts. N. C. Const., Art. IV, sec. 8. In deciding whether this is an occasion to invoke that jurisdiction, we must consider the situation presented by the record, which is this: Generally speaking, it is unlawful to sell beer in North Carolina. But the sale thereof is not unlawful, provided the seller is duly licensed under, and makes sale in accord with, the provisions of G.S. Chap. 18, art. 4.

The sale here charged was made by defendant in his place of business. At that time he held licenses to sell beer which were duly displayed therein. The officer-witness for the State so testified and the solicitor formally admitted that these licenses—city, county, and State—were possessed by defendant and were then in full force and effect. This judicial admission of the solicitor brings the sale made by the defendant squarely within the protective provisions of the statute and affirmatively discloses that no criminal offense has been committed.

When this is made to appear by judicial admission of the solicitor, and the admission is fully supported by the testimony offered, it would be a manifest injustice to permit the imposition of sentence on the verdict rendered, or to require the defendant to resort to other remedy for relief. Under such circumstances, this Court will stay judgment. It is so ordered.

Reversed.

THE SHAW UNIVERSITY, A CORPORATION, v. DURHAM LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 2 June, 1949.)

1. Trusts § 20—

Ordinarily the power given a trustee to sell does not confer authority to mortgage the property, but where the trustees themselves purchase the property for a valuable consideration and have deed made to them in fee for use of an educational institution, with authority to rent or sell and use the proceeds for the purposes of the trust, the authority to mortgage for the purpose expressed in the writing will be inferred, there being nothing in the instrument to indicate an intention to the contrary.

2. Deeds § 14b—

A mere statement of the purpose for which the property conveyed is to be used is not sufficient to constitute a condition subsequent, there being no clause of re-entry, nor limitation over, nor other provision to become effective upon condition broken, and nothing in the instrument to indicate that the grantor intended to convey a conditional estate.

3. Trusts § 20—

The land was conveyed to grantees for use of an educational institution with mandatory requirement that the grantees apply for charter incorporating the educational institution, and upon its incorporation to convey the property to such institution upon the same uses. The corporation was created with charter authority to execute mortgages and deeds of trust on its property in order to carry out the purposes of its creation. *Held:* There being nothing in the deeds or in the charter of the corporation to the contrary, such corporation has the power to mortgage the property to further the purposes of its creation.

APPEAL by the defendant from *Harris, J.,* at Chambers, in Raleigh, N. C., 19 May, 1949. From WAKE.

This is a controversy without action, submitted on an agreed statement of facts.

The pertinent facts are as follows:

1. The Shaw University has applied to the Durham Life Insurance Company for a loan of $200,000.00, offering as security therefor its bond, secured by a deed of trust on property located in Raleigh, and being the block on which certain buildings of the University are located.

2. The Durham Life Insurance Company is willing to make the loan and has committed itself to do so, provided the University has the authority to execute a valid deed of trust on its property as security therefor.

3. The defendant challenges the authority of the plaintiff to execute a valid deed of trust on its property, by reason of the wording contained in two deeds which form the basis of title to the property offered as security for the proposed loan.

4. The deed from Daniel Barringer to Elijah Shaw and others, trustees, dated 3 May, 1870, and duly recorded in the office of the Register of Deeds of Wake County, reciting a consideration of $13,000.00, conveyed the property to the Trustees in *fee simple* for the following purposes: "Under this deed they shall hold, use and apply said lands and premises to the following uses and trusts and none other: (1) The said parties of the second part shall hold and apply the property herein conveyed to them for the uses and purposes of an educational institution and the *proceeds of the rental or sale thereof* shall be perpetually devoted to *educational purposes,* and no pupil or pupils shall ever be excluded from the benefits arising therefrom or from the benefits arising *from the rental or sale thereof* on account of race, color or previous condition of servi-

tude; (2) the parties of the second part shall apply to the General Assembly of the State of North Carolina as early as it may conveniently be done for a Charter or Act of Incorporation, creating and incorporating a literary institution . . . and as soon as such Charter or Act of Corporation is obtained, said parties of the second part or their successors shall convey the property herein conveyed to the said Corporation to be held by it in all respects upon the same uses and trusts as those herein declared."

5. A charter was granted, creating a corporation as contemplated, by an Act of the General Assembly of North Carolina, being Chapter 153, Private Laws of N. C., Session 1874-75, as amended by *House Bill 1244* of the 1949 Session of the General Assembly of N. C., and The Shaw University is a corporation, duly created and existing under and by virtue of the aforesaid Acts.

6. The surviving Trustees executed a deed to The Shaw University, dated 14 October, 1875, which was duly recorded in Wake County. The essential provisions in the *habendum* of this deed read as follows: "To Have and To Hold the said lands and premises . . ., rights and privileges thereunto in any way appertaining or belonging to the said party of the second part and to their successors and assigns on the trusts herein declared in *fee simple*. In special trust and confidence nevertheless, that the said party of the second part and its successors shall hold, use, and apply the said lands and premises to the uses and trusts hereinbefore specified, and more particularly mentioned in said deed of conveyance to the said parties of the first part."

7. The charter of Shaw University authorizes the corporation to take and hold property by gift, grant, bequest, devise, purchase or otherwise, and to use and dispose of the same for the benefit of the corporation unless the Will of the donor prohibits the corporation from disposing of the devised property; it is also given the power to construct new buildings, remodel, renovate and make additions to old buildings now owned by the corporation or which may be hereafter acquired by it, when such acts are necessary or expedient; and the corporation is also given the power to equip such buildings with suitable furniture and furnishings; "and to this end and for these purposes and for the purpose also of the general upkeep of the present buildings and for the general operation of the present plants and those which may hereafter be acquired or constructed, said corporation shall have power and authority to borrow money and pledge the credit of the corporation therefor, and power to execute mortgages, deeds of trust, and other pledge agreements, both on personal and real property, as security for money so borrowed."

8. It is stipulated that the proposed loan is being sought "for the purpose of building necessary buildings and repairing other buildings,

and to expand facilities of the Institution and the general enlargement of its plant and schools, all of which is for the furtherance of educational purposes."

Upon the stipulated facts, his Honor held that The Shaw University has a good fee simple title to the property referred to herein, and the right to mortgage the same is not restricted by any provisions in the two deeds referred to above, and entered judgment accordingly. The court further directed the defendant to conclude its agreement with the plaintiff by making the loan in accord with said agreement.

Defendant appeals, assigns error and submits the case on appeal to this Court, under Rule 10.

Mordecai & Mills for plaintiff.

Ray B. Brady for defendant.

DENNY, J. The sole question presented on this appeal is simply this: Does the plaintiff have the power to execute a valid deed of trust on the premises conveyed by the above deeds?

Ordinarily the power to sell given an agent, attorney or trustee, does not include the power to execute a mortgage. *Shannonhouse v. Wolfe,* 191 N.C. 769, 133 S.E. 93. "The weight of authority is to the effect that a mere power of sale expressly conferred in an instrument does not, by implication, confer authority to mortgage, in the absence of anything in the instrument, read in the light of the surrounding circumstances, to indicate a contrary intent." 41 Amer. Jur. 813.

Even so, a different rule applies when the trust is not created for the benefit or profit of the donor or grantor, but for the benefit of the donee. *Shannonhouse v. Wolfe, supra. Brogden, J.,* in discussing this question in the above case, quoted with approval from the opinion in *Hamilton v. Hamilton,* 149 Iowa 329, where it is said: "The language creating such a power (that is for the benefit of the donee) is to be liberally construed to promote the purpose or intent of its creation, and, if the power to sell is amplified by other words of general meaning, and the circumstances under which the gift is made be not such as to forbid that construction, the authority to mortgage for the purpose expressed in the writing may be inferred."

The property involved herein was not a gift but a purchase by the Trustees from Daniel Barringer, for a consideration of $13,000.00. The property was not conveyed in trust for the benefit of the grantor, but was conveyed to Trustees, the grantees therein, "for the uses and purposes of an educational institution and the proceeds of the rental or sale thereof" were to be "perpetually devoted to educational purposes."

There is nothing in the Barringer deed to indicate the grantor intended to convey a conditional estate, or that the Trustees intended to purchase or create such an estate. There is no clause of re-entry, no limitation over or other provision which was to become effective upon condition broken. The property was conveyed in fee simple for certain expressed purposes, and authority was given to use, rent or sell it. And the only limitation as to its use or disposition, is to the effect that the property or the proceeds derived from the rental or sale thereof, "shall be perpetually devoted to educational purposes."

It is said in *Hall v. Quinn,* 190 N.C. 326, 130 S.E. 18, "A clause in a deed will not be construed as a condition subsequent unless it expresses in apt and appropriate language the intention of the parties to this effect (*Braddy v. Elliott,* 146 N.C. 578) and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. *Hunter v. Murfee,* 126 Ala. 123; *Fitzgerald v. Modoc County,* 44 L.R.A. (N.S.), (Cal.), 1229; *Wright v. Board of Education,* 152 S.W. 543; *Forman v. Safe & Trust Co.,* 80 At. (Md.) 298; *Brown v. Caldwell,* 48 A.R. (W.V.) 376; *Highbee v. Rodeman,* 28 N.E. (Ind.) 442; *Raley v. Umatilla County,* 3 A.S.R. 142."

The Barringer deed made it mandatory that the grantees therein apply to the General Assembly of North Carolina for a Charter or Act, incorporating the educational institution now known as The Shaw University. And when such corporation was created, the grantees in the Barringer deed were required, under the terms thereof, to convey the property to the corporation. The corporation was created as contemplated and the property conveyed to it as required. Moreover, the plaintiff has the express power granted in its charter to execute mortgages and deeds of trust on its property, in order to carry out the purposes for which it was created; and we find nothing in the deeds under consideration, or in the charter of the corporation or the amendment thereto, that we deem a restriction on the power of the plaintiff to execute a deed of trust on the premises conveyed in the aforesaid deeds, as security for the loan which it seeks. *Hall v. Quinn, supra; Raleigh v. Trustees,* 206 N.C. 485, 174 S.E. 278; *Ferrell v. Ins. Co.,* 211 N.C. 423, 190 S.E. 746; *Trust Co. v. Heymann,* 220 N.C. 526, 17 S.E. 2d 665.

The judgment of the court below is

Affirmed.

NATHAN CURRY AND WIFE, MAE CURRY, v. D. W. ANDREWS AND WIFE, JESSIE ANDREWS.

(Filed 2 June, 1949.)

1. Mortgages § 2c—

Evidence tending to show that trustor, threatened with foreclosure, made an agreement with a third person under which such third person was to loan trustor an amount sufficient to discharge the deed of trust, and take a mortgage to secure the loan, that trustor signed an instrument upon representations by such third person that it embodied this agreement, but that in fact the instrument was a deed, *is held* sufficient to be submitted to the jury in a suit to have equity declare the instrument a mortgage.

2. Mortgages § 24—

There is no fiduciary relationship between trustor and the *cestui qui trust* so that a conveyance of the property by trustor to the *cestui* would be presumed fraudulent in law, and therefore a conveyance by trustor to a third person who has purchased the note secured by the deed of trust will not be presumed fraudulent, and an instruction that the burden rested upon such third person to prove the *bona fides* of the transaction is error.

APPEAL by defendants from *Phillips, J.*, January Term, 1949, of FORSYTH. New trial.

This was a suit to have a deed executed by plaintiffs to defendants declared to be a mortgage.

It was alleged that the instrument was intended to be a mortgage to secure a loan to discharge an outstanding deed of trust and notes, and that plaintiffs were induced to execute the deed by the fraudulent representations of the defendants that it was a mortgage, plaintiffs being ignorant and unable to read. Plaintiffs' evidence tended to support these allegations. Defendants offered evidence *contra*.

Issues were submitted to the jury and answered in favor of plaintiffs. Two issues pertinent to the appeal were as follows:

"1. Did the defendant, D. W. Andrews, purchase and have transferred and assigned to himself the deed of trust and note executed and delivered by the plaintiffs to Carolina Mortgage Company upon the land described in the complaint, as alleged in the complaint?

"2. If so, did the defendants, by fraud, undue influence, coercion and oppression cause the plaintiffs to execute and deliver a deed absolute on its face to the defendants, intending the same to be a mortgage, as alleged in the complaint?"

From judgment on the verdict, defendants appealed.

Elledge & Browder, Joe W. Johnson, and Eugene H. Phillips for plaintiffs, appellees.

Hastings & Booe, William S. Mitchell, and Charles F. Vance, Jr., for defendants, appellants.

DEVIN, J. The evidence offered by plaintiffs was sufficient to carry the case to the jury, and the motion for judgment of involuntary nonsuit was properly overruled. However, there was error in the court's instructions to the jury on the second issue, prejudicial to the defendants, for which a new trial must be awarded.

Plaintiffs' evidence tended to show that about 1933, plaintiffs being indebted to Carolina Mortgage Company for money borrowed, executed notes therefor secured by deed of trust on their home to a trustee, afterwards referred to as Keswick Corporation, Substituted Trustee. The notes and deed of trust do not appear in the record, but it was admitted that this was the form of the original transaction, though at times the deed of trust was loosely referred to in the evidence as a mortgage. In 1937 plaintiffs, threatened with foreclosure by the trustee, instituted suit against Keswick Corporation, Substituted Trustee, and the Carolina Mortgage Company to restrain the sale. Pending this suit plaintiffs applied to the defendants for a loan to take up and cancel this deed of trust. Defendants agreed to do so upon plaintiffs' executing a mortgage on the property to them in the sum of $1,425, which would include the amount outstanding on the debt secured by the deed of trust, plus interest on the new loan, taxes and street assessments. According to plaintiffs' testimony they signed a paper which they were induced by defendants' representations to believe embodied this agreement, and made payments thereon aggregating $1,808. In 1944, learning that defendants claimed $2,000 still due, plaintiffs employed counsel, and upon investigation discovered that the paper they had signed was not a mortgage but on its face an absolute deed. Plaintiffs, unable to read, relied upon the false representations of defendants. This suit was instituted in August, 1944.

Defendants' evidence was in sharp contradiction as to the *bona fides* of the transaction, and tended to show that plaintiffs executed the deed for a valuable consideration and with full knowledge of its effect, and that plaintiffs thereafter remained in possession as tenants of defendants.

The court charged the jury on the second issue as follows:

"If you have answered the first issue yes, that is, that the defendant, D. W. Andrews, purchased and had transferred and assigned to himself the deed of trust and note executed and delivered by the plaintiffs to Carolina Mortgage Company upon the land described in the complaint, the law at once creates the fiduciary relation of mortgagor and mortgagee between the plaintiff and defendant; and this being so, the deed from

plaintiff could only be a purchase of plaintiff's reversionary interest in the land, which the law presumes to be fraudulent, and the burden then rests upon the mortgagee, that is, the defendant(s), to show the *bona fides* of the transaction."

It is apparent that the court applied to the facts of this case the principle stated in *McLeod v. Bullard,* 84 N.C. 515. *Massengill v. Oliver,* 221 N.C. 132, 19 S.E. 2d 253; *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615. This rule applies where the relationship of mortgagor and mortgagee exists and in respect to transactions affecting the mortgaged property. But here the plaintiffs had executed a deed of trust on the property to a trustee—Keswick Corporation, Substituted Trustee, or its predecessor—to secure notes evidencing a debt due Carolina Mortgage Company, and in 1937 these notes and deed of trust were acquired by the defendants. The relation between the plaintiffs and defendants was not that of mortgagor and mortgagee. The defendants were or became the holders of the evidence of plaintiffs' indebtedness which had been secured by a conveyance of the legal title to the property to a third party trustee. Hence, as pointed out in *Simpson v. Fry,* 194 N.C. 623, 140 S.E. 295; *Murphy v. Taylor,* 214 N.C. 393, 199 S.E. 382; *Ferguson v. Blanchard,* 220 N.C. 1, 16 S.E. 2d 414; and *Stell v. Trust Co.,* 223 N.C. 550 (554), 27 S.E. 2d 524, there was not such a relationship as would be sufficient to raise a presumption of fraud as a matter of law and to cast upon the defendants the burden of exculpating themselves therefrom. In *Simpson v. Fry, supra, Justice Connor* states the reasons why the rule in *McLeod v. Bullard, supra,* was inapplicable to the relation of trustor and secured creditor. In *Ferguson v. Blanchard, supra,* it was said: "It seems to be well settled that where land has been conveyed to a trustee to secure the debt of a third person, the relationship between the trustor and the secured creditor is not such as to characterize a subsequent conveyance of the land by the trustor to the creditor as in law presumptively fraudulent."

We think the court placed upon the defendants a greater burden than they were in law required to carry, and that they are entitled to another hearing. As there must be a new trial, we have found it unnecessary to decide other matters brought forward in defendants' appeal as they may not again arise.

New trial.

JESSE R. NANCE v. GILMORE CLINIC, INC., DR. J. FRED MERRITT, DR. CHARLES W. REAVIS, AND HENRY C. KIRKGARD.

(Filed 2 June, 1949.)

Bill of Discovery § 7b—

Under G.S. 8-89 a plaintiff is entitled to an order requiring defendant to produce specified papers and documents to afford information necessary to the filing of the complaint. *Flanner v. St. Joseph's Home*, 227 N.C. 342, distinguished in that the matter sought to be discovered in that case was not necessary as a basis for filing complaint but to the contrary related to matter which it would have been improper to allege or which was not necessary to the statement of the cause of action.

PLAINTIFF'S appeal from *Edmundson, Special Judge,* February 21, 1949, Civil Term, GUILFORD Superior Court.

Plaintiff brought this action against the defendants to recover damages for alleged tortious defamation and disclosures of confidential information acquired professionally while making a checkup on plaintiff's physical condition and health in a clinic allegedly operated by them. At the same time notice of the nature of the action was given the defendants and an order obtained extending the time for filing the complaint. Simultaneously the plaintiff filed an affidavit setting forth the nature of the case, the facts upon which it was founded, the character of the relief sought, and the necessity of examining the defendants and the production by them of certain specified papers and documents, as information necessary to the filing of the complaint. The order and notice was duly served on defendants; the order requiring them to appear on a fixed day for such examination.

The examination was begun on the 22nd of September, having been continued from the original date, and at that time the clerk, on objection by the defendants, entered his order denying the motion of plaintiff to require the production of documents, but continued the hearing, apparently for examination of parties, to October 7. Defendants and plaintiff appealed.

Meantime plaintiff, on October 5, filed with the Clerk a separate petition and affidavit relating to the production and examination of certain specific documents and records, mostly relating to the clinical examination made by defendants, and concerning the relation the several defendants have to each other and to the corporate defendant. The petition was allowed and in pursuance thereof a notice, and the order of the Clerk, was served on the defendants, requiring them to appear on a certain day and produce the documents for examination. On the day preceding the appearance date the defendants filed with the clerk and served upon the plaintiff notice of appeal to the Superior Court from the order so made.

On the hearing in the Superior Court, Judge Edmundson, without finding any facts, but basing his action, as a matter of law, on *Flanner v. St. Joseph's Home,* 227 N.C. 342, 42 S.E. 2d 225, reversed and set aside the order of the Clerk; and extended the time for filing complaint.

The plaintiff appealed.

Hines & Boren and Welch Jordan for plaintiff, appellant.

Smith, Wharton, Sapp & Moore for defendants, Gilmore Clinic, Inc., Dr. J. Fred Merritt, and Dr. Charles W. Reavis, appellees.

SEAWELL, J. The case at bar is distinguishable from the cited case when the latter is considered in its own frame of factual setting. The *Flanner case* does not hold that the statute invoked, G.S. 8-89, is not available at all, under any circumstances, in seeking information to enable plaintiff to draft his complaint. To construe it that way would, by redefinition, put the Court in opposition to prior precedent and recognized practice. *Holt v. Warehouse Co.,* 116 N.C. 480, 21 S.E. 919; *Abbitt v. Gregory,* 196 N.C. 9, 144 S.E. 297, (cited in *Fox v. Yarborough,* 225 N.C. 606, 35 S.E. 2d 885). Relief in that case was denied because the declared purpose of the inspection was (1) to discover whether defendant had liability insurance, which would have been an improper allegation in the complaint, and (2) to obtain in advance of an expected plea in defense, evidence that defendant was a commercial rather than an eleemosynary corporation, not necessary to allege. Only in respect to discovery of evidence does the opinion hold that pleadings must first be filed and an issue raised to which the evidence sought must be pertinent.

The court below based its order denying inspection on a matter of law, the inapplicability of the statute invoked, and the judgment is subject to review. On examination of the record we are constrained to hold that the plaintiff is entitled to the inspection of the documents listed, and the judgment to the contrary is reversed. The plaintiff will be given reasonable time to file complaint.

Reversed.

E. M. LONG v. FRANK R. LOVE.

(Filed 2 June, 1949.)

1. Pleadings § 3a—

The function of the complaint is to state the ultimate and decisive facts which constitute the cause of action but not the evidence necessary to prove such issuable facts.

2. Arrest and Bail § 9—

A defendant may be arrested and held to bail in a civil action in tort to recover for a willful, wanton or malicious injury to the person. G.S. 1-410 (1).

3. Arrest and Bail § 10—

In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy.

4. Pleadings § 31—

In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, motion to strike allegations that the injury was willful, wanton or malicious, is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. G.S. 1-153.

APPEAL by defendant from *Patton, Special Judge,* at November Civil Term, 1948, of ALAMANCE.

Civil action to recover damages for alleged personal injuries resulting from assault and battery in which the provisional remedy of arrest and bail is invoked.

Defendant in apt time filed motion to strike certain portions of the complaint as being "redundant, tautological and evidential," to his prejudice. The court, being of opinion that the motion should not be granted, denied it in the entirety.

Defendant appeals to Supreme Court and assigns error.

Cooper, Sanders & Holt for plaintiff, appellee.

Thos. C. Carter and Long & Ross for defendant, appellant.

WINBORNE, J. Upon motion of any party aggrieved, aptly made, the court may strike out irrelevant and redundant matter appearing in a complaint. G.S. 1-153, formerly C.S. 537. Defendant proceeds under this authority, and challenges the decision of the court below in denying his motion. This brings into focus the portions of the complaint to which objection is made.

In this connection it is provided by statute that the complaint must contain, among other things, "a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition." G.S. 1-122. Moreover, it is pertinent to note what is the function of a complaint. In *Winders v. Hill,* 141 N.C. 694, 54 S.E. 440, in opinion by *Walker, J.,* this Court has this to say: "The function of a complaint is not the narration of the evidence, but a statement of the substantive and

constituent facts upon which plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy, but are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. Those from which a legal conclusion may be drawn and upon which the right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' *Wooden v. Strew,* 10 How. Pr. 48; 4 Enc. of Pl. & Pr., p. 612." See also *Revis v. Asheville,* 207 N.C. 237, 176 S.E. 738; *Hawkins v. Moss,* 222 N.C. 95, 21 S.E. 2d 873; *Truelove v. R. R.,* 222 N.C. 704, 24 S.E. 2d 537; *Brown v. Hall,* 226 N.C. 732, 40 S.E. 2d 412.

Applying the provisions of the statute, G.S. 1-173, and the principle above stated to the complaint in hand, and bearing in mind that plaintiff bases his cause of action upon an alleged willful, wanton and malicious assault and battery committed upon his person by defendant, and invokes the provisional remedy of arrest and bail, G.S. 1-410 (1), we are in accord with the ruling of the court brought into question on this appeal.

A defendant may be arrested and held to bail in a civil action, in this State, for the recovery of damages on a cause of action not arising out of contract where the action is for willful, wanton or malicious injury to person. G.S. 1-410 (1).

Thus it appears that the portions of the complaint to which objection is made relate directly to the ultimate facts, and are within the pale of proper pleading in the statement of a cause of action for recovery of damages for an alleged willful, wanton and malicious injury to person,—on which the aid of arrest and bail is invoked.

And while the record discloses that the arrest and bail was predicated upon affidavits filed, it is appropriate for plaintiff to allege in his complaint facts upon which such remedy may be sustained. Hence the judgment below is

Affirmed.

PAUL M. BASON AND WIFE, RUBY G. BASON, v. W. E. SMITH.

(Filed 2 June, 1949.)

Landlord and Tenant §§ 1, 24—

Evidence tending to show that plaintiffs purchased the premises and took possession of the residence some 100 yards from the barn, but as a

part of the consideration, permitted defendant grantor to retain possession to the end of the year of the land on which there were growing crops, and to store crops in the barn, but that plaintiffs also used the barn, *is held* insufficient to establish the relationship of landlord and tenant in respect to the barn, and nonsuit was properly granted in plaintiffs' action to recover on an implied warranty in the supposed lease.

PLAINTIFFS' appeal from *Patton, Special Judge,* November Term, 1948, ALAMANCE Superior Court.

Cooper, Sanders & Holt for plaintiffs, appellants.

Paul H. Ridge and Long & Long (By: George A. Long) for defendant, appellee.

PER CURIAM. Plaintiffs' cause of action is predicated upon loss occasioned by the burning of a barn alleged to have been destroyed while in the possession of defendant as tenant of plaintiffs.

The evidence of plaintiffs tended to show that the land on which the barn was situated had been purchased by plaintiffs from defendant, and that at the time of purchase it was agreed that defendant should retain possession of the land on which growing crops were situated. There was a granary and large barn on the premises in which it was agreed that defendant might store crops and farm products until the end of the current crop year, on December 31, 1946, as part consideration of the purchase price. The defendant did retain possession of the barn under this agreement, and had a quantity of hay stored therein. The plaintiffs likewise kept a cow in the barn and a quantity of hay. The barn was wired for electricity. Plaintiffs had been living in the residence, approximately 100 yards from the barn, from September until December 18; and plaintiffs and a Mr. Jobe, who was renting part of the place, were using the barn some every day.

On or about December 18, some parties came to bale defendant's hay, to remove it from the premises and on that day the barn was burned.

At the conclusion of the evidence, the defendant, offering none, demurred and moved for judgment of nonsuit. It was allowed and plaintiffs appealed.

On examination of the evidence the Court is of the opinion that it is not sufficient to go to the jury on the relation of landlord and tenant, upon which the action is based. The judgment of nonsuit is, therefore,

Affirmed.

STATE v. JAMES EDWARD LEWIS.

(Filed 2 June, 1949.)

Criminal Law § 80b (4)—

Where defendant does not file case on appeal within the time allowed, the appeal will be dismissed upon motion of the Attorney-General, but when defendant has been convicted of a capital felony this will be done only after an examination of the record proper fails to disclose error or irregularity.

APPEAL by defendant from *Grady, Emergency Judge,* Second September Term, 1948, ROBESON.

Motion by State to docket and dismiss defendant's appeal.

Indictment: murder.

Verdict: guilty of murder in the first degree.

Sentence: death by asphyxiation.

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

No counsel for defendant.

PER CURIAM. Although the time for serving the same has long since expired, the Clerk of the Superior Court of Robeson County certifies that no case on appeal has been filed in his office and that counsel for defendant have notified him that the appeal herein will not be perfected. The Attorney-General moves to docket and dismiss the appeal under Rule 17.

Before ruling on a motion to docket and dismiss in a case where the death penalty was imposed, it is our custom to examine the record proper to ascertain whether the proceeding below was in all respects regular. We find no error or irregularity therein. Therefore, upon the facts now made to appear, the motion to docket and dismiss the appeal must be allowed. It is so ordered.

Judgment affirmed.

Appeal dismissed.

VALLIE BUMGARNER McINTYRE v. MONARCH ELEVATOR AND MACHINE COMPANY (ORIGINAL DEFENDANT), AND GILMORE CLINIC, INC. (ADDITIONAL DEFENDANT).

(Filed 16 June, 1949.)

1. Negligence § 4d—

A person taking over possession of an elevator in a building for the purpose of repair is chargeable with the duty of exercising due care for the safety of those who rightfully use or attempt to use it.

2. Negligence § 5—

Proximate cause is that cause which produces the injury in continuous sequence without any new or intervening cause, and without which the injury would not have occurred, under circumstances from which injury is reasonably foreseeable.

3. Same—

While foreseeability is an essential element of proximate cause, it is not necessary that the particular injury should have been foreseen, but it is sufficient if in the exercise of ordinary care the wrongdoer could have foreseen in the light of attendant circumstances as they were known or ought to have been known by him, that some injury was likely to result from his negligence.

4. Negligence § 19a—

Foreseeability and proximate cause are ordinarily for the determination of the jury, and it is only when all the facts are admitted and only one inference may be drawn therefrom that the court will declare whether an act was the proximate cause of the injury.

5. Negligence § 19b (1)—Evidence held for jury on questions of negligence and proximate cause in action for injuries in fall down elevator shaft.

The evidence considered in the light most favorable to plaintiff tended to show that defendant elevator company was employed to repair an elevator in a medical clinic, which elevator was for the use of the public, particularly for the use of ill persons and persons with defective vision seeking medical attention, that in the course of the work the elevator was moved between the first and second floors, and the doors at the first floor left open and unguarded, that a typewritten slip with the words "elevator out of order, use stairway" was pasted over the push button at the elevator door, and that plaintiff, a pregnant woman with defective vision, entered the building and was walking down the well-lighted corridor to the elevator when she fainted, and fell through the partially opened doors into the elevator well, suffering the injuries in suit. *Held:* The evidence was sufficient to be submitted to the jury on the questions of negligence of the elevator company and proximate cause.

6. Negligence § 19c—

Nonsuit on the ground of contributory negligence should not be granted unless plaintiff's evidence, taken in the light most favorable to her, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom.

7. Same—

In repairing an elevator in a medical clinic, defendant elevator company left the doors at the ground floor open about 18 inches while the elevator was moved between the first and second floors. Plaintiff, a pregnant woman with defective vision, fainted and fell through the doors to her injury while attempting to visit the doctor. *Held:* Plaintiff cannot be held contributorily negligent as a matter of law even though the corridor to the elevator was well lighted and a typewritten slip stating that the elevator was out of order had been pasted over the elevator call button.

8. Torts § 6—

Judgment of nonsuit was entered against plaintiff upon motion of the original defendant, and the original defendant's cross-action against a party joined on the original defendant's motion as a joint tort-feasor was thereupon dismissed. *Held:* Upon the reversal of the judgment of nonsuit, the cross-action for contribution is reinstated, the original defendant being entitled to a day in court to establish its cross-action if it can. G.S. 1-240.

BARNHILL, J., dissenting.

WINBORNE, J., concurs in dissent.

APPEAL by plaintiff from *Edmundson, Special Judge,* February Term, 1949, of GUILFORD. Reversed.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of defendant Monarch Elevator and Machine Company, hereinafter called the Elevator Company.

It was alleged that the Elevator Company while installing certain equipment for use in a passenger elevator in the building of Gilmore Clinic, Inc., had moved the elevator to the second floor and negligently left open and unguarded the door of the elevator shaft on the first floor, and that plaintiff who had entered the building for the purpose of receiving medical attention fell into the opening and was injured. The defendant Elevator Company denied negligence on its part, pleaded contributory negligence on the part of plaintiff, and further on its motion had Glimore Clinic, Inc., made party defendant and filed cross-action against the latter for contribution in the event plaintiff should recover against the Elevator Company. Gilmore Clinic, Inc., answered denying liability to its codefendant or the plaintiff.

At the close of plaintiff's evidence the motion of defendant Elevator Company for judgment of nonsuit was allowed, and judgment was entered dismissing plaintiff's action, and also dismissing the Elevator Company's cross-action against Gilmore Clinic, Inc.

Plaintiff excepted and appealed.

Defendant Elevator Company appealed from so much of the judgment as dismissed its cross-action against its codefendant.

King & King for plaintiff, appellant.

Smith, Wharton, Sapp & Moore for defendant Gilmore Clinic, Inc.

R. M. Robinson for defendant Monarch Elevator and Machine Co., Inc.

PLAINTIFF'S APPEAL.

DEVIN, J. The judgment of involuntary nonsuit entered by the court below raises the question of the sufficiency of the plaintiff's evidence to carry the case to the jury.

The evidence offered tended to show that the circumstances of the plaintiff's injury were substantially these: The defendant Elevator Company was engaged in installing certain electrical equipment for automatic operation of the elevator in the building of defendant Gilmore Clinic, Inc., in Greensboro. The elevator had previously been installed for manual operation and had been so operated for several months. The work of adding the additional wiring was being done by the Elevator Company under contract with Gilmore Clinic, Inc., for the use of the members of the medical profession associated with Gilmore Clinic and having offices in the building and for the convenience of their patients who came there for medical attention and service. On the first floor the doors to the elevator shaft were arranged to slide back on each side leaving a space 4 feet wide and measuring 7 feet from top to bottom, affording entrance to the elevator cage when in use. The elevator was located at the rear end of a corridor 6 feet wide and was 28 feet from the front door. On the occasion alleged, 25 November, 1947, about 4 p.m., the plaintiff, 24 years old, an expectant mother, entered the building for the purpose of being treated by Dr. Wood whose office was on the second floor. She had by direction of the physician visited this office twelve times. On those occasions the elevator had been operated by an employee of Gilmore Clinic, Inc. Plaintiff's vision was impaired but she could see large objects at some distance. Plaintiff testified she entered the front door and was walking down the lighted corridor toward the elevator when "without any warning whatsoever I completely blacked out and knew nothing until after being transferred to Wesley Long Hospital . . . I came to." She was picked up unconscious on the bottom of the elevator shaft, 4½ feet down. There was evidence tending to show that the employees of the Elevator Company, in order to install the equipment had opened the outer doors of the shaft on the first floor and raised the cage nearly to the second floor, so that the workman in charge could walk up the stairs and get on top of the cage to do the work on which he was engaged. This placed the bottom of the cage about 18 inches below the top of the opening, leaving 5½ feet clearance. The sliding or hatchway doors of the shaft were left open. One of defendant's employees had gone through this opening down into the pit, which was 6 feet square and unlighted, and was on a stepladder at the time plaintiff fell. The defendant Elevator Company's employee in charge of the work was on top of the cage when his assistant called him and he immediately came down and found plaintiff lying on the floor of the pit unconscious. There was no barrier or protection for the open elevator shaft. The manager of Gilmore Clinic, Inc., had pasted a narrow typewritten slip over the push button at the elevator door "elevator out of order, use stairway." All the work done before by defendant had been done with shaft door closed. At times the

Elevator Company's employees at request of the manager of Gilmore Clinic, Inc., had operated the elevator for the convenience of patrons.

The doors of the elevator shaft were left open by defendant Elevator Company's employer, but the width of the open space does not clearly appear. The only witness as to this was W. W. Dance, defendant Elevator Company's employee in charge of this work. He was offered by plaintiff. He testified, "The elevator doors were open. The hatchway doors were open. The elevator doors were open when I started up" to the second floor. On cross-examination he said, "the hatchway doors were partially open. I would say there was about 18 inches space between them. The elevator doors were open wide enough for Mr. Dillenbeck (his assistant in the pit) to come through . . . If he was to ease through he could possibly get through without disturbing the door. If he was to brush through there was a possibility he could push them wherever he wanted to." The man in the pit had only been down there a "couple of minutes" when the plaintiff fell. This man was not available as a witness at the trial.

There was no evidence as to the manner or cause of plaintiff's fall other than her statement that as she walked down the corridor she blacked out or fainted and the testimony of Mr. Dance that she was found unconscious at the bottom of the open shaft.

The plaintiff sustained serious injury from her fall, but the baby arrived in due time unharmed.

The evidence offered by plaintiff, considered in the light most favorable for her, tended to show that the defendant Elevator Company's employees, while working on the elevator cage in a building in which the elevator was in use by occupants and their invitees, left the door to the elevator shaft open without barrier or guard, and with only a narrow typewritten slip over the push button "elevator out of order." Whether under the circumstances this was a sufficient warning, and whether the defendant failed to exercise due care in the performance of a duty incumbent upon it, present questions, we think, for the determination of the jury. *Drumwright v. Theatres, Inc.*, 228 N.C. 325, 45 S.E. 2d 379; *Ross v. Drug Store*, 225 N.C. 226, 34 S.E. 2d 64; *Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496; *Hunt v. Meyers*, 201 N.C. 636, 161 S.E. 74.

In *Jones v. Bland*, 182 N.C. 70, 108 S.E. 344, 16 A.L.R. 1383, the plaintiff in a hotel lobby approached the elevator for the purpose of using it. The elevator door was open but the carriage had been moved to an upper story. Plaintiff fell in the open shaft and was injured. There was also the fact that due to the darkness of the afternoon and color of the paint ordinary observation did not disclose the opening. This Court held that if these facts were accepted a primary case of negligence was made out carrying the case to the jury. *Stewart v. Carpet Co.*, 138 N.C.

60, 50 S.E. 562; *Womble v. Grocery Co.*, 135 N.C. 474, 47 S.E. 493; 18 Am. Jur. 546; 45 C.J. 867, 870. In *Rosenbaum v. Shoffner*, 98 Tenn. 624, recovery for injury sustained by one who stumbled and fell into an open elevator shaft was affirmed. One who has taken over control of an elevator, in use in a building, for the purpose of repair is chargeable with the duty of exercising reasonable care for the safety of those who rightfully use or attempt to use it. *Otis Elevator Co. v. Wilson*, 147 Ky. 676; *Fox v. Dallas Hotel Co.*, 240 S.W. 517.

Did the Elevator Company's conduct in this respect constitute negligence, and, if so, did plaintiff's injury proximately result therefrom? Proximate cause of an injury is generally defined as the cause which produced the injurious result complained of in continuous sequence from the original wrongful act, without any new or intervening cause, and without which it would not have occurred, and one from which one of ordinary prudence would have foreseen that some such result was likely under the circumstances as they were known or ought to have been known at the time. *Ramsbottom v. R. R.*, 138 N.C. 38, 50 S.E. 448; *Paul v. R. R.*, 170 N.C. 230, 87 S.E. 66; *Whitt v. Rand*, 187 N.C. 805, 123 S.E. 84; *Mills v. Moore*, 219 N.C. 25, 12 S.E. 2d 661; *Luttrell v. Mineral Co.*, 220 N.C. 782, 18 S.E. 2d 412; *Lee v. Upholstery Co.*, 227 N.C. 88, 40 S.E. 2d 688. One of the elements of proximate cause essential in the establishment of actionable negligence is foreseeability. *Lee v. Upholstery Co., supra; Shaw v. Barnard*, 229 N.C. 713, 51 S.E. 2d 295; *Peoples v. Fulk*, 220 N.C. 635, 18 S.E. 2d 147; *Beach v. Patton*, 208 N.C. 134, 179 S.E. 446; *Gant v. Gant*, 197 N.C. 164, 148 S.E. 34; *Harton v. Tel. Co.*, 141 N.C. 455, 54 S.E. 299. Liability in law for a negligent act is dependent upon whether the injurious consequences flowing therefrom were such as could and should have been foreseen and by reasonable care and prudence guarded against. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796. It must be made to appear that the injury was the natural and probable consequence of the negligent act and ought to have been foreseen in the light of attendant circumstances. *Fore v. Geary*, 191 N.C. 90, 131 S.E. 387; *R. R. v. Kellogg*, 94 U.S. 467. But it is not necessary that the wrongdoer should have foreseen the particular injury which resulted "provided that in the exercise of ordinary care he might have foreseen that some injury would likely follow from his negligence." *Hudson v. R. R.*, 142 N.C. 198, 55 S.E. 103; *Hall v. Rinehart*, 192 N.C. 706, 135 S.E. 790; *Cole v. R. R.*, 211 N.C. 591 (598), 191 S.E. 353; *Bechtler v. Bracken*, 218 N.C. 515 (524), 11 S.E. 2d 721. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his act of omission or that consequences of a generally injurious nature might have been expected. *Sawyer v. R. R.*, 145 N.C. 24, 58 S.E. 598. In *Lee v.*

Upholstery Co., 227 N.C. 88, 40 S.E. 2d 688, cited by the defendant, the elevator was located in a manufacturing plant, for the use of employees in handling goods going out, to be loaded on trucks. It was not for the use of the public or truckers in gaining entrance into the building. 45 C.J. 867. In the instant case the elevator was a passenger elevator for the use of the public, and particularly for the use of ill persons seeking medical assistance, some with defective vision, like the plaintiff, who would be expected to approach the elevator for the purpose of entrance to the upper story. In the *Lee case* the truck on which plaintiff was working had been loaded from the elevator and then the truck was moved away "a convenient distance." The elevator was moved up, presumably to bring down other goods. While the plaintiff was tying down the load with a rope, the rope slipped out of his hand and he staggered back four or five steps, and fell in the opening. It was there held it could not have been foreseen that plaintiff, an experienced workman, familiar with the premises, in full possession of his faculties, would lose his balance and step backward five steps into the pit. We think this case in essential features is distinguishable and is not controlled by the holding in the *Lee case*.

The defendant Elevator Company contends that the evidence that the aperture between the sections of the door of the elevator shaft was only about 18 inches wide should be regarded as showing that it could not reasonably have been foreseen that an adult person would or could fall through. But on the other hand it appears that defendant's workman had a few moments before passed through the same opening and was at work on a stepladder 4½ feet below the first floor level. Whether he took the stepladder with him at this time does not appear. In any event, according to plaintiff's evidence, the opening was sufficiently wide for her to pass through. Like Mercutio's wound, " 'Tis not so deep as a well, nor so wide as a church door; but 'tis enough." Romeo and Juliet, Act III.

What is the proximate cause of an injury is ordinarily a question for the jury. Rarely is the court justified in deciding this question as a matter of law. *Nichols v. Goldston*, 228 N.C. 514, 46 S.E. 2d 320. In the language of *Justice Barnhill* in *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740, "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But this is rarely the case." Likewise, as stated by *Justice Seawell* in *Montgomery v. Blades*, 218 N.C. 680, 12 S.E. 2d 217, "Usually the question of foreseeability is one for the jury."

Both the building and the elevator were for the use of those needing medical service who might be expected to pass down the corridor and attempt to use the elevator which was known to be there for their con-

venience. These were circumstances within the knowledge of the defendant when it left the doors of the elevator shaft open. Whether the defendant was negligent, and, if so, whether such negligence was the proximate cause of plaintiff's injury, and whether the injury was one which in the exercise of due care defendant could and should have foreseen and by reasonable diligence guarded against, were questions for decision by the jury under appropriate instructions from the court.

Can the nonsuit be sustained on the ground of contributory negligence on the part of the plaintiff? We think not. On this point we have the plaintiff's testimony that as she walked down the corridor she suddenly and without warning fainted. Whether this was due to her condition or some inherent weakness does not appear. She fell through the open door of the elevator shaft and was injured. The burden of proof as to contributory negligence was upon the defendant Elevator Company. The rule is that nonsuit on this ground should not be granted "unless the plaintiff's evidence, taken in the light most favorable for him so clearly establishes such negligence that no other reasonable inference or conclusion can be drawn therefrom." *Dawson v. Transportation Co., ante,* 36, 51 S.E. 2d 921; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. "It is the settled rule in this jurisdiction that judgment of nonsuit on this ground can be rendered only when a single inference, leading to that conclusion, can be drawn from the evidence." *Hampton v. Hawkins,* 219 N.C. 205, 13 S.E. 2d 227; *Atkins v. Transportation Co.,* 224 N.C. 688, 32 S.E. 2d 209; *Winfield v. Smith, ante,* 392, 53 S.E. 2d 251. We think the evidence sufficient to entitle the plaintiff to have her case submitted to the jury, and that there was error in granting the motion for judgment of nonsuit.

APPEAL OF DEFENDANT MONARCH ELEVATOR AND MACHINE CO.

The defendant Elevator Company appealed from so much of the judgment as dismissed its cross-action against Gilmore Clinic, Inc. In the judgment it was set out that the court was "of opinion that as a matter of law the motion of nonsuit by Monarch Elevator and Machine Co. having been allowed, the cross-action against Gilmore Clinic, Inc., should be dismissed," and accordingly judgment was entered dismissing this appellant's cross-action.

Without undertaking to determine on this record whether or not the defendant Elevator Company would be entitled to contribution under G.S. 1-240 from its codefendant, in the event of recovery by the plaintiff, we think the court was in error in dismissing the cross-action at this stage of the litigation. The judgment of nonsuit having now been held to have been improperly allowed, the judgment below should not be held to prevent defendant Elevator Company from having its day in court

on its cross-action to establish liability of Gilmore Clinic, Inc., as joint tort-feasor, if it can. Whether appellant can succeed in its cross-action in the event of ultimate recovery by the plaintiff is another matter.

The parties are entitled to proceed in the cause as if the motion for nonsuit by defendant Elevator Company had been originally denied. See *Pascal v. Transit Co.*, 229 N.C. 435 (442), 50 S.E. 2d 534; *Smith v. Kappas*, 218 N.C. 758, 12 S.E. 2d 693. *Bourne v. R. R.*, 224 N.C. 444, 31 S.E. 2d 382, related to the effect of a nonsuit on defendant's counterclaim.

On plaintiff's appeal: Reversed.

On defendant Elevator Company's appeal: Reversed.

BARNHILL, J., dissenting: Plaintiff does not sue or pray relief against Gilmore Clinic, Inc. Strictly speaking, it is not a defendant but a respondent, brought in to answer the claim of the defendant for contribution in the event plaintiff shall recover on her cause of action. The Machine Company is the one and only defendant and will be so treated.

Defendant installed a manually operated elevator in the Gilmore Clinic Building and agreed to return later and convert it into an automatic or push button type. At the time of the accident described in the complaint, its employees were engaged in making the conversion.

The elevator well extended about four and one-half feet below the level of the first or ground floor. The work required one of the employees to get into this well to adjust or attach some wiring. It was necessary for him to provide a means of exit. This was done by leaving the doors ajar, furnishing an open space of about eighteen inches. The elevator was between the first and second floors, leaving about five and one-half feet clearance on the first floor. A sign was placed on or near the elevator car push button, giving warning that the elevator was not in use. The hall or passageway was well lighted. Plaintiff, apparently in perfectly normal condition, except that she was pregnant and her eyesight was impaired, entered the well-lighted first floor hallway, "blacked out," and, while in that condition, walked some distance to the back of the hall where the elevator was located, and in some unexplained manner fell in the elevator shaft. She seeks now to hold the defendant liable for the resulting injuries.

The defendant's employees were engaged in doing lawful work in a lawful manner. That the doors of the elevator shaft were left partly open to provide an exit for the workmen, being a necessary incident of the work, could not constitute negligence. However, the work was being done where people were accustomed to come and go. Therefore, it was the duty of the defendant to give such warning as would put a reasonably prudent person, exercising ordinary care for his own safety, on notice

of the danger, even though it was necessary to leave the elevator shaft doors partly open to furnish an exit for the workman in the elevator pit. This I concede. But it is not the province of the Court to prescribe the type of warning which should have been provided. We do not prescribe the size of the danger flag. *Murray v. R. R.,* 218 N.C. 392. We merely determine whether the method of warning adopted by defendant evidences a want of due care sufficient to require the submission of the question to the jury. The court below answered in the negative. The ruling is presumed to be correct. The plaintiff must show error.

Here the partly lowered elevator, the partially closed doors, and the notice on the elevator bell each gave notice that the elevator was not at the first floor elevator entrance to receive passengers. In combination they were amply sufficient to give notice to any person of ordinary prudence. This was the kind or type of notice defendant was required to give. Had it draped the elevator in red warning flags, these would not have served to give plaintiff notice. Had it placed a sawhorse or similar barrier in front of the opening, this, in all probability, would have increased the danger to plaintiff by causing her to pitch head foremost into the pit.

Indeed, we have said there is no duty to warn when the danger is obvious. *Deaton v. Elon College,* 226 N.C. 433. When the lighting is such that the condition can be discovered in the exercise of ordinary care, the failure to warn imposes no liability. *Benton v. Building Co.,* 223 N.C. 809.

In this connection we must remember that plaintiff was not the defendant's invitee. The Gilmore Clinic, Inc., had invited her to enter, but the only invitation defendant had extended was an invitation to stay away from the elevator.

To entitle one to rely upon an implied invitation to enter, his purpose must be of interest or advantage to the invitor. *Pafford v. Construction Co.,* 217 N.C. 730, and cases cited. In the *Pafford case* we draw the distinction between the owner of the building who extends the invitation to enter therein and the construction company working thereon.

The fact alone that the plaintiff, on account of her temporary mental deficiency or incapacity, was unable to exercise ordinary care for her own safety did not charge defendant with the duty to exercise increased care. *Worthington v. Mencer,* 11 So. 70, 17 L.R.A. 407. In the absence of knowledge thereof, defendant was not bound to take notice of plaintiff's infirmity. *Daily v. R. R.,* 106 N.C. 301; *Doggett v. Chicago, B. & Q. Ry. Co.,* 112 N.W. 171; *Carter v. Nunda,* 66 N.Y.S. 1059; *Yeager v. Spirit Lake,* 88 N.W. 1095; *Hill v. Glenwood,* 100 N.W. 522.

The law does not impose upon one the duty of giving to another the care due only to the deaf, blind, and unconscious until he has notice that such person is suffering from one of those disabilities. One is not charge-

able with the negligence for not guarding against a danger of which he has no knowledge. Anno., 69 L.R.A. 536; Anno., Ann. Cas. 1912 C 1072.

"When the mere negligence of another causes or contributes to the injury of a person who is mentally incompetent to such a degree, if the conduct of the injured person would have amounted to such contributory negligence as would have avoided his claim to relief if he had been capable of exercising care in his own behalf, the person inflicting the injury is not to be held to a liability which would not have been incurred under the same circumstances in favor of a person of ordinary capacity, unless he had notice of the injured person's mental deficiency, and of his consequent helplessness and peril in the circumstances in which he was placed. The duty of observing special precautions for the safety of another, because the latter, by reason of mental imbecility, cannot be influenced by the dictates of ordinary prudence, is not cast upon one who is not charged with notice of the other's peril, and of his lack of sufficient intelligence to avoid it. When it is sought, in behalf of an adult, to avoid the consequences of his own conduct, and to charge another with liability for a result to which such conduct contributed, the burden is upon him to show that he was not responsible for his own acts, and that the person sought to be charged was under the duty of dealing with him as one incompetent to care for himself." *Worthington v. Mencer, supra.*

Applying these principles of law to the facts appearing of record, I am led to the conclusion that the plaintiff has failed to make out a case of negligence. But concede negligence. This alone is not sufficient to impose liability.

Proof that an accident is a natural consequence of negligence is not enough to establish the negligence as the proximate cause of the accident. *Smith v. Whitley,* 223 N.C. 534; 38 A.J. 708. Negligence does not create liability unless it is the proximate cause of the injury, and foreseeability is an essential element of proximate cause. *Wood v. Telephone Co.,* 228 N.C. 605; *Lee v. Upholstery Co.,* 227 N.C. 88; *Boyette v. R. R.,* 227 N.C. 406; *Shaw v. Barnard,* 229 N.C. 713; *Watkins v. Furnishing Co.,* 224 N.C. 674; *Tyson v. Ford,* 228 N.C. 778; *Murray v. R. R., supra; Mills v. Moore,* 219 N.C. 25; *Luttrell v. Mineral Co.,* 220 N.C. 782; *Bechtler v. Bracken,* 218 N.C. 515; *Ellis v. Refining Co.,* 214 N.C. 388; *Fore v. Geary,* 191 N.C. 90; *Harton v. Tel. Co.,* 141 N.C. 455.

A defendant is not required to foresee or anticipate "whatsoever shall come to pass," *Beach v. Patton,* 208 N.C. 134, or to stretch foresight into omniscience. *Wood v. Telephone Co., supra; Gant v. Gant,* 197 N.C. 164; *Montgomery v. Blades,* 222 N.C. 463. A person is bound to foresee only those consequences that may naturally and proximately flow from his negligence. If the injury complained of was not reasonably foreseeable in the exercise of due care, no liability is created. *Wood v. Tele-*

phone Co., supra; Gant v. Gant, supra; Lee v. Upholstery Co., supra; Rattley v. Powell, 223 N.C. 134; *Osborne v. Coal Co.,* 207 N.C. 545; *Watkins v. Furnishing Co., supra; Butner v. Spease,* 217 N.C. 82; *Brady v. R. R.,* 222 N.C. 367.

As stated by *Stacy, C. J.,* in *Tyson v. Ford, supra:* "The test of liability for negligence . . . is the departure from the normal conduct of the reasonably prudent man, or the care and prevision which a reasonably prudent person would employ in the circumstances."

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable . . . One is not charged with foreseeing that which could not be expected to happen." *Brady v. R. R., supra; Hiatt v. Ritter,* 223 N.C. 262; *Fore v. Geary, supra.* The injury must be one which the author of the primary negligence could have reasonably foreseen and expected. *Shaw v. Barnard, supra; Harton v. Tel. Co., supra.* The law holds men liable only for the consequences of their actions which they can and should foresee and by reasonable care or prudence provide against. When the negligent condition created by the defendant is merely a circumstance of the accident and not its proximate cause, no liability is imposed. *Lee v. Upholstery Co., supra.*

In my opinion the conclusion that the fact plaintiff "blacked out" and wandered down a well-lighted hall, into the elevator well was reasonably foreseeable in the exercise of due care, is not sustained by the record. To hold the defendant liable for the resulting injury is to eliminate foreseeability as an element of proximate cause, require omniscience on the part of the defendant, and make it liable "for casualties which, though possible, were wholly improbable." *Brady v. R. R., supra.*

Defendant knew doctors maintained offices in the Gilmore Building, and that their patients entered the building and used the elevator. There is no evidence that it knew or had reason to know that the lame, the halt, and the blind entered alone and unattended. To hold that it should have guarded against plaintiff's "black out" and the resulting danger to her safety is to say that it should have foreseen a condition plaintiff herself did not anticipate or guard against.

Jones v. Bland, 182 N.C. 70, cited and relied on in the majority opinion, is in my opinion clearly distinguishable. The defendant there was clearly negligent. He was the proprietor of the hotel. His employee removed the elevator and left the elevator shaft open and unprotected. Sufficient light to enable plaintiff, his invitee, to observe the absence of the elevator was not provided. None of these circumstances exist here.

In principle, *Lee v. Upholstery Co., supra,* is more nearly in point. There the plaintiff was an invitee; the defendant was the invitor. It removed the elevator and left the elevator shaft open while its invitee was nearby, working within a few feet thereof. It gave no notice whatever of the dangerous condition thus created, although it was under the duty to keep its premises in a reasonably safe condition for the use of its invitees. The rope plaintiff was using to tie furniture on his truck slipped and he stumbled backward into the elevator well. The factual distinctions between that case and this certainly are not favorable to this plaintiff. Yet the type of injury there disclosed was not reasonably foreseeable. So we held. Here, however, the defendant ought to have foreseen plaintiff would "black out" and while unconscious squeeze through the narrow opening between the elevator doors and fall into the elevator pit. So the majority concludes. I am unable to follow the logic of that conclusion.

Plaintiff's accident was most unfortunate. On this record the resulting injuries were due to no fault of her own. But this is no cause for shifting the burden to the defendant. It but emphasizes the soundness of the truism "hard cases make bad law" which we should ever keep in mind.

In *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 166, we said: "The Court is reluctant to advance the standard of due care to such an unreasonable length as would practically put every accident in the category of actionable negligence." I fear that the majority have now overcome the reluctance there expressed. In any event, I cannot concur in the majority opinion. Instead I vote to affirm.

WINBORNE, J., concurs in dissent.

H. G. WILSON v. CENTRAL MOTOR LINES, INC., AND E. E. POOLE,
and
SUSAN ANN WILSON v. CENTRAL MOTOR LINES, INC., AND E. E. POOLE,
and
GLENN A. WILSON v. CENTRAL MOTOR LINES, INC., AND E. E. POOLE.

(Filed 16 June, 1949.)

1. Negligence § 1—

Actionable negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes plaintiff under the circumstances in which they are placed, which is the proximate cause or one of the proximate causes of injury.

2. Negligence § 5—

Proximate cause is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

3. Automobiles §§ 8d, 18h (2)—

Evidence that a disabled truck was left standing on the hard-surface of a highway at night without warning flares or lanterns as required by statute, G.S. 20-161 (a), and that a car, approaching from the rear, collided with the back of the truck, resulting in injuries to the driver and passengers in the car, *is held* sufficient to be submitted to the jury on the issue of negligence in each of the actions instituted by the driver and occupants of the car against the driver and owner of the truck.

4. Automobiles § 8d—

The driver of a car is not required to anticipate that vehicles will be parked on the highway at night without the warning signals required by statute, but this does not relieve him of the duty to keep a proper lookout and not to exceed a speed at which he can stop within the radius of his lights, taking into consideration the darkness and atmospheric conditions.

5. Same, Automobiles § 18h (3)—

Where plaintiff's own evidence discloses that his lights and brakes were in good condition, that he was driving with his lights full on at thirty-five miles per hour, that he could see 150 feet ahead despite the darkness and heavy fog, and that he failed to see any obstruction, and hit the rear of a truck parked on the highway in his lane of traffic without lights or warning flares, *is held* to disclose contributory negligence on his part as a matter of law.

6. Negligence § 11—

It is not required that plaintiff's negligence be the sole proximate cause of his injury in order to bar his recovery, but it is sufficient to bar recovery if it be one of the proximate causes of the injury.

7. Automobiles § 21—

In this action by passengers in an automobile against the driver and owner of a truck to recover for injuries sustained when the car collided with the truck parked on the highway at night without the statutory warning signals, an instruction that plaintiffs would not be entitled to recover if the negligence of the driver of the car was the sole proximate cause of the accident, *is held* sufficient on the question of insulated negligence.

ERVIN, J., dissenting in part.

SEAWELL, J., concurs in dissent.

APPEAL by defendants from *Carr, J.*, at August Civil Term, 1948, of ORANGE.

Three civil actions to recover for personal injuries sustained in motor vehicle collision allegedly caused by actionable negligence of defendants.

The several plaintiffs allege in their respective complaints as acts of negligence proximately causing the collision between the automobile in which they were riding and the said tractor and trailer, that defendants (1) "left said truck and trailer standing upon the paved portion of the highway when it was practical to park or leave said truck or trailer off the main traveled portion of the highway, while unattended and when there was not a clear and unobstructed width of 15 feet upon said highway opposite said truck for the free passage of the other vehicles thereon and when a clear view of said truck and trailer could have been had from a distance of 200 feet in both directions," and (2) failed "to display a lantern or flares at 200 feet in the front and rear of said truck and trailer" in violation of the duty which they owed to the public generally and plaintiffs in particular, and of the laws of the State of North Carolina governing the operation of said vehicles.

On the other hand, the defendants, answering, deny the allegations of negligence set out in the several complaints, and, for further defense, aver, in substance, that the tractor-trailer became disabled, through no fault of theirs, and could not be rolled off the pavement, and that defendant Poole took precautionary measure to safeguard the public in manner set out.

And, also for further defense, defendants aver that Glenn A. Wilson was contributorily negligent in manner set forth, and as against him plead same in bar of his right to recover in his action, and as against plaintiffs H. G. Wilson and Susan Ann Wilson, passengers in Glenn A. Wilson's automobile, they aver that the conduct of the driver, Glenn A. Wilson, as alleged, contributed to and was a proximate cause of the injuries complained of by the plaintiff, and that such negligence on the part of the driver insulated the negligence of defendants, if there were any, and same is pleaded in bar of any recovery by either H. G. Wilson or Susan Ann Wilson.

Upon the trial in Superior Court each of the plaintiffs testified as witnesses for all plaintiffs. Their testimony tends to be in agreement in these matters: That on the date of the collision in question, H. G. Wilson, plaintiff, was living in Efland, North Carolina, and his son, Glenn A. Wilson, and his daughter, Susan Ann Wilson, also plaintiffs, lived with him, and they all worked in Burlington,—he and his son at Fairchild plant, and his daughter at Graber Silk Mill; that on the morning of 15 February, 1946, they left their home for work at ten minutes past six o'clock in Glenn's automobile,—he driving, and Susan Ann, his sister, on the front seat beside him, and H. G., his father, in the back seat; that it was dark when they left home, and the lights of the automobile were turned on; and that as they were proceeding west on Highway No. 70 the automobile ran into a parked truck, also headed west, on the highway

at a point about two miles from their home, where the highway was straight for a quarter of a mile.

The plaintiff H. G. Wilson also testified in pertinent part: That they had traveled between their home and the point of collision at the rate of speed between 35 and 40 miles per hour; that he was looking straight up the road; that he did not see the truck, nor did he see any flares along the road on or near it,—no lanterns or pots burning, and there were no lights on the truck; that the only lights he saw in front of the car in which he was riding were the lights of a car meeting them; that just about the time the car in which he was riding was about to pass the oncoming car, the collision happened, "and I went out"; that he did not know what took place about the time he was meeting the oncoming car; and that he lost consciousness just as they were in the act of passing.

And, on cross-examination, the witness continued: That he had been working at Fairchild something like a month or two before the collision and had gone up and down the road every day except Saturday and Sunday, and was thoroughly familiar with the road; that the road was paved; that it had rained through the night; that the brakes were all right on his son's car and if he had applied them he could have stopped the car; that the lights were good and bright; that you could see down the road a long way; that he would say you could see 100 feet; that his son had his car under control and had his full headlights on; that he could not say whether his son dimmed when the other car approached, but that the other car did not dim; that his son did not apply his brakes but just kept on driving.

The plaintiff Susan Ann Wilson further testified in pertinent part: That they were traveling in the direction of Burlington at a speed of 35 or 40 miles an hour when they were involved in the collision with the truck; that she did not see the truck prior to the collision although she was looking straight ahead; that she did not see any lights on the truck nor any flares or lanterns or smudge pots on the highway; that she was knocked unconscious at the time of the collision and regained consciousness at the hospital; that at the time of the collision the car in which she was riding was meeting another car coming east; that when the collision took place they were meeting an approaching car which had not passed them; and that she does not know how far apart they were. And in response to question, "Were they close together?", this witness replied, "No." In response to a question from the court, she said the lights were burning on the car that was meeting them. Then, on cross-examination, the witness testified that at the place of the accident the road was level and straight for a quarter of a mile.

The plaintiff, Glenn A. Wilson, further testified in pertinent part: That at time he left home it was very dark and foggy; that the lights

were burning on his automobile and he was driving around 35 miles an hour and proceeding directly from his home to point of collision; that he, prior to the time of the collision, had not seen any obstruction on the highway, nor did he see any lights or flares or smudge pots; that the car he was driving ran into a truck which was standing still on the highway; that he was knocked unconscious but regained consciousness for a short time at the scene of the accident; that he had been driving an automobile for about 18 years. Then, on cross-examination, the witness continued: That he had been driving along the section of the road where the wreck occurred and was familiar with the place; that he had good lights on his car and they shone ahead about 150 feet. And, on being asked by the court, "You mean shone well enough for you to see an object ahead of you?", he answered "Yes." That the lights were on full; that his brakes were very good; that he was keeping a lookout and was going about 35 miles an hour; and that there was a heavy fog but he could see 150 feet ahead.

And, being recalled, plaintiff Glenn A. Wilson, under examination by the court, was asked these questions, and gave the answers indicated as follows:

Q. "Do you remember whether the man meeting you just about the time this wreck occurred dimmed his lights?"

A. "No, I don't know whether he did or not."

Q. "Do you recall whether or not you dimmed yours?"

A. "No, I don't know."

Q. "You would not say you did and you would not say you didn't?"

A. "No."

Q. "And you would not say he did and you would not say he didn't?"

A. "No, I would not."

Q. "Do you have any recollection or any way of knowing how close that car was to you when you were rendered unconscious?"

A. "No, I don't."

Q. "Do you recall that you were meeting a car?"

A. "Yes, I do. His lights were very bright and I don't think I dimmed mine, but looking more or less straight at the lights he looked like he was hogging the road like some trucks do. I don't remember when I hit the truck whether he had passed me or whether he was just getting by me. I don't remember the lick but I do remember leaning over from the lights, pulling to the right side of the road to make sure I would get by him."

Q. "You say you can't now recall whether he had passed you or whether he had got to you?"

A. "It was close to the center at the time I went out. You could see the car coming down meeting me."

Q. "Do you recall whether you made any effort to slacken your speed before you were rendered unconscious?"

A. "I don't think I did, sir."

Plaintiff offered testimony of others, who came to the scene after the accident, tending to show: That the road was straight for about 800 feet; that the shoulder of the road to the right of the truck was approximately 6 or 7 feet; that the truck was on the pavement at the bottom of a small dip, and on the right-hand side going west; that the chassis of the truck was approximately 4½ to 5 feet above the highway, and the left front of the automobile had run under the right rear corner of the trailer to the point where the windshield goes into the top,—part of the top being mashed down, the left door crushed and the windshield broken out; that there were no flares, smudge pots, or lights of any kind; but there were red glass reflectors,—three of them, placed about the truck, one in front, one on the side and one at the rear; that these reflectors were four inches in diameter and six inches high, according to one witness, and about twelve inches high in the estimate of another, and reflected lights of approaching cars; and that defendant Poole, who was present, stated that his lights were not on, and that the truck had broken down and he was unable to move it.

The defendant Poole, as witness for defendant, testified that the truck stopped about 9 o'clock on the night of 14 February, 1946; that he was unable to get it any further, or off the pavement; that he undertook to obtain assistance to move it; that failing to get assistance he took measures, described by him, to warn of the presence of the truck upon the highway; that all his lights were burning; that he stayed with the truck the remainder of the night; that he would get out and run around and try to keep warm from time to time, and checked his lights each time and found them to be on and burning; that the last time it was 6:30; that he got back in his cab at 6:30 and had gotten settled in the seat when a market truck came along the highway traveling west to east, the opposite direction from that in which the truck was headed; that just as this market truck was even with his tractor and trailer he heard some tires skid in the back of his trailer and looked in his rear view mirror to see what was taking place; that just as he looked in the mirror his truck jarred and he looked in the rear view mirror and saw an automobile up under the extreme right corner of the trailer; that after he saw what had happened he ran back to the automobile; that the truck which had been passing him was over on the right-hand side of the road headed east; that there were three people in the automobile, the plaintiffs in these actions, and that he talked to the driver of the car and said: "Fellow, can't you see a thing as big as a trailer," and the driver said, "I could not

stop." And defendants offered other evidence not necessary to be set forth.

The cases of H. G. Wilson and Susan Ann Wilson were submitted to the jury on three issues,—separate issues of negligence as to each defendant, and the third as to damages,—all of which were answered by the jury in favor of the said plaintiffs respectively.

The case of Glenn A. Wilson was submitted to the jury on like issues to those in the other two cases, with a fourth issue as to his contributory negligence. The jury answered all these issues in favor of the plaintiff.

From judgments on the several verdicts, defendants appeal to Supreme Court and assign error.

Bonner D. Sawyer and R. M. Gantt for plaintiffs, appellees.

Fuller, Reade, Umstead & Fuller for defendants, appellants.

WINBORNE, J. The question here is whether the trial court erred in its ruling denying defendants' motions for judgment as in case of nonsuit. Considered in the light most favorable to plaintiffs, the evidence offered on the trial in Superior Court, as shown in the case on appeal, as it relates to the cases of H. G. Wilson and Susan Ann Wilson, passengers in Glenn A. Wilson's automobile, dictates a negative answer, but as it relates to the case of Glenn A. Wilson, the driver of his automobile, an affirmative answer.

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

In this connection, G.S. 20-161 (a), pertaining to the stopping of vehicles upon the highways outside of business and residential districts, provides "that in the event that a truck, trailer or semi-trailer is disabled upon the highway that the driver of such vehicle shall display, not less than two hundred feet in the front or rear of such vehicle, a warning signal; that during the hours from sunup to sundown a red flag shall be displayed, and after sundown red flares or lanterns. These signals shall be displayed as long as such vehicle is disabled upon the highway."

Applying these principles and the provisions of the statute to the case in hand, the evidence is sufficient to take the case to the jury as to failure

of defendants in the performance of the duty required of them under the circumstances of this case, and as to its causal relation to the injuries of which complaint is made. See *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740.

But the plaintiff Glenn A. Wilson, who was driving his automobile at the time it collided with the disabled truck of defendants, had another hurdle to surmount, and on it he trips and goes down. The evidence of plaintiffs, even this plaintiff's own testimony, clearly and unmistakably shows that he was negligent in "outrunning his lights," or in failing to keep a proper lookout, and that such negligence on his part was a contributing cause of the collision. *Weston v. R. R.*, 194 N.C. 210, 139 S.E. 237; *Beck v. Hooks*, 218 N.C. 105, 10 S.E. 2d 608; *Allen v. Bottling Co.*, 223 N.C. 118, 25 S.E. 2d 388; *Caulder v. Gresham*, 224 N.C. 402, 30 S.E. 2d 312; *Tyson v. Ford*, 228 N.C. 778, 47 S.E. 2d 251; *Bus Co. v. Products Co.*, 229 N.C. 352, 49 S.E. 2d 623; *Cox v. Lee, ante*, 155, 52 S.E. 2d 355; *Brown v. Bus Lines, ante*, 493.

In *Allen v. Bottling Co., supra*, this Court cites the darkness of night as a condition a motorist is required to take into consideration in regulating his speed "as may be necessary to avoid colliding with any person, vehicle, or other conveyance,"—then Section 103, Chap. 407, P.L. 1937, now G.S. 20-141, and held, as had been done in many previous cases cited, that he, the motorist, "must operate his automobile at night in such manner and at such speed as will enable him to stop within the radius of his lights." To the same effect are the holdings in *Tyson v. Ford, supra; Cox v. Lee, supra;* and *Brown v. Bus Lines, supra.*

Moreover, in *Tyson v. Ford, supra*, a case similar in factual situation to the one in hand, *Stacy, C. J.*, writing for the Court, had this to say: "It is true that the driver of the Tyson car was not bound to foresee or to anticipate that an unlighted truck would be left standing on the traveled portion of the highway ahead of him without flares or other signs of danger, but this did not relieve him of the necessity of keeping a proper lookout and proceeding as a reasonably prudent person under the circumstances. 'While the plaintiff had the right to assume that other motorists would not obstruct the highway unlawfully, and would show the statutory lights if they stopped, he could not for that reason omit any of the care that the law demanded of him.' *Steele v. Fuller*, 104 Vt. 303, 158 Atl. 666."

To like effect are these cases: *Bus Co. v. Products Co., supra; Cox v. Lee, supra;* and *Brown v. Bus Lines, supra.*

Pertinent to these principles the testimony of this plaintiff shows that he had good lights on his car; that they were on full; that they shone ahead about 150 feet,—well enough to see an object ahead; that there was a heavy fog, but that he could see 150 feet ahead; that though he says he

was keeping a lookout, he had not seen any obstruction on the highway prior to the collision; that he was driving 35 miles per hour; and that he does not think he made any effort to slacken his speed. Moreover, he does not say that the lights of the approaching automobile blinded him.

This evidence brings this plaintiff's case within the line of decisions listed by *Stacy, C. J.*, in *Tyson v. Ford, supra,* in which contributory negligence has been held as a matter of law to bar recovery. We incorporate these cases here by reference. To like effect are these later cases: *Bus Co. v. Products Co., supra; Cox v. Lee, supra;* and *Brown v. Bus Lines, supra.*

It is sufficient to defeat recovery if plaintiff's negligence is one of the proximate causes of the injury. It need not be the sole proximate cause. *Beck v. Hooks, supra; Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565; *Austin v. Overton,* 222 N.C. 89, 21 S.E. 2d 887; *Tyson v. Ford, supra*

Defendants also assign as error the failure of the court to charge the jury on insulated negligence. In view of the pleadings, it may be fairly doubted that insulated negligence was before the court. But if it were, the charge as given would seem to be sufficient as to whether the negligence of Glenn A. Wilson was the sole proximate cause of the injuries of which the plaintiffs H. G. Wilson and Susan Ann Wilson complain. Moreover, the portion of the charge assailed for lack of clarity, is sufficient to withstand the attack.

After full consideration of all assignments of error, we find in the judgments in favor of H. G. Wilson and Susan Ann Wilson

No error.

But the judgment in favor of Glenn A. Wilson is

Reversed.

ERVIN, J., dissenting in part: I dissent from the decision of the majority in so far as it reverses the judgment rendered in favor of Glenn A. Wilson. In my opinion, the ruling that this particular plaintiff was contributorily negligent as a matter of law runs counter to a well established principle of the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others; but in the absence of anything which gives or should give notice to the contrary, he is entitled to assume and to act upon the assumption that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him only from the violation of duty or law by such other person. *Gaskins v. Kelly,* 228 N.C. 697, 47 S.E. 2d 34; *Cummins v. Fruit Co.,* 225 N.C. 625, 36 S.E. 2d 11; *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Cab Co. v. Sanders,* 223 N.C. 626, 27 S.E. 2d 631; *Tarrant v. Bottling Co.,* 221 N.C. 390, 20 S.E. 2d 565;

Murray v. R. R., 218 N.C. 392, 11 S.E. 2d 326; *Hancock v. Wilson*, 211 N.C. 129, 189 S.E. 631; *Jones v. Bagwell*, 207 N.C. 378, 177 S.E. 170; *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840; *Wilkinson v. R. R.*, 174 N.C. 761, 94 S.E. 521; *Wyatt v. R. R.*, 156 N.C. 307, 72 S.E. 383.

The plaintiff undertook to drive his automobile on the public highway during the nighttime. In so doing he had the right to take it for granted in the absence of circumstances indicating the contrary that no other motorist would permit a motor vehicle either to move or to stand on the highway without displaying thereon a lamp projecting a red light visible under normal atmospheric conditions from a distance of five hundred feet to its rear. G.S. 20-129 (d); G.S. 20-134. Moreover, he had the further right to presume until given reasonable grounds for thinking otherwise that the driver of any truck becoming disabled on the highway after sundown would display red flares or lanterns at least two hundred feet to the rear of the disabled truck as a warning to approaching motorists of the impending peril. G.S. 20-161.

The answers of the jury to the first issue in each of the cases make it plain that the collision would not have happened if the defendants had obeyed the law and performed their duty. When I interpret the testimony in the light most favorable to the plaintiff, Glenn A. Wilson, I reach the conclusion that it reasonably warrants the inferences that Glenn A. Wilson governed his lookout and speed at the time and place named in the pleadings by the assumption that all precautions required of others for his protection from injury had been taken; that he was justified in so doing because no circumstances indicated anything to the contrary; and that by reason thereof he acted as a reasonably prudent person would have done under the circumstances as they presented themselves to him. In consequence, I think that the trial court did not err in refusing to dismiss his action upon a compulsory nonsuit, and vote to affirm the judgment in his favor. This conclusion finds support in these decisions: *Thomas v. Motor Lines, ante*, 122, 52 S.E. 2d 377; *Cummins v. Fruit Co., supra; Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729; *Clarke v. Martin*, 215 N.C. 405, 2 S.E. 2d 10; *Cole v. Koonce*, 214 N.C. 188, 198 S.E. 637; *Williams v. Express Lines*, 198 N.C. 193, 151 S.E. 197.

SEAWELL, J., concurs in dissent.

STATE v. ALLEN T. REID.

(Filed 16 June, 1949.)

1. Jury § 3: Criminal Law § 81h—

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, are conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presents no reviewable question of law in such instance.

2. Criminal Law § 79—

Exceptions in support of which no argument is made or authority cited will be deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

3. Burglary § 11—

The indictment charged defendant with burglarious entry with felonious intent to commit rape. The evidence tended to show that defendant entered the apartment of the prosecuting witness at nighttime by cutting the window screen, that he awoke prosecutrix by touching her shoulder, threatened her if she screamed, announced his intent to commit a crime against nature, and fled out the window when she screamed. *Held:* Whether defendant intended to commit a crime against nature or whether he intended to rape prosecutrix is a question for the jury on the evidence, and defendant's motion to nonsuit on the ground of insufficiency of evidence of intent to commit rape, was properly denied.

4. Burglary § 10—

Evidence as to the conduct of defendant after breaking and entering may be considered by the jury in ascertaining the intent of the accused at the time of the breaking and entering.

5. Criminal Law § 52a (1)—

Defendant's motion to nonsuit is properly denied if there is any competent evidence to support the allegations of the bill of indictment, considering the evidence in the light most favorable to the State and giving it every reasonable inference to be drawn therefrom.

6. Burglary § 11: Criminal Law § 52a (3)—

Testimony of experts that fingerprints taken from the window sill at the apartment of the prosecuting witness where entrance had been effected by cutting the screen, which fingerprints had been taken shortly after an intruder had attacked prosecutrix, were identical with those of defendant, together with other evidence of defendant's guilt, *held* sufficient to be submitted to the jury on the question of defendant's identity as the perpetrator of the crime. *S. v. Minton*, 228 N.C. 518, cited and distinguished, since in the instant case defendant could not have been lawfully at the scene.

APPEAL by defendant from *Burgwyn, Special Judge,* at December Term, 1948, of WILSON.

Criminal prosecution tried upon indictment charging defendant with the crime of burglary in the first degree.

When the case was called for trial, and before the trial jury was chosen, sworn or impaneled, counsel for the defendant filed a motion challenging the array of petit jurors, upon the ground of disproportionate representation of Negroes on petit juries in Wilson County, and long, continuous and systematic exclusion of Negroes from petit juries solely and wholly on account of their race and color, contrary to the laws of the State of North Carolina and the United States.

The defendant offered evidence in an effort to sustain his challenge to the array of petit jurors. Upon the evidence produced by counsel for defendant, the court found as a fact that the officers whose duty it was to prepare the jury list and draw the panels of veniremen to be summoned by the Sheriff of Wilson County "from which petit jurors were drawn, have not selected and summoned jurors for the December 6 Term, 1948, in violation of G.S. of 1943, Chapter 9, Sections 1, 2, 3 and/or 9, and the Constitution and Laws of the United States, with the unlawful and avowed purpose of discriminating against persons of the Negro race; and that there is no evidence before the Court to show that the said officers have been systematically and continuously, over a long period of years, excluding Negroes from said juries in said county solely on account of their race or color; to the contrary, it has been effectively shown that there are the names of Negroes in the jury boxes of Wilson County, and that one member of that race was drawn and served as a member of the Grand Jury which returned the Bill of Indictment in this case, and that four or five members of the colored race were drawn for the special venire and summoned for the purpose of the trial of this case." Whereupon the court overruled the motion, and the defendant excepted. Exception No. 15.

It is disclosed by the evidence that Mr. and Mrs. James Barnes, at the time the alleged crime was committed, were living in a ground floor apartment, at 204 Park Avenue, in the City of Wilson.

The night of the alleged crime Mr. Barnes was in Washington, D. C., and Mrs. Barnes retired in the early morning of 2 September, 1948; no other member of the family or guests being in the apartment at the time. About 2:30 a.m., she was awakened by someone placing a hand on her shoulder. She was on an antique bed about three and a half feet high. The person who touched her was on the far side of the bed and when she realized that the hand was on her shoulder, she immediately got off the bed away from the person. The person grabbed both her wrists and ordered her to be quiet and not to scream. She asked the person who he was, and he replied, "Never mind who I am." She asked him how he entered the room and he said, "That's all right; I got in here." The

prosecuting witness managed to free her right wrist after several minutes. The person then ordered her to get back on the bed. She asked him what he wanted. He stated that he wanted to commit an act, which would have been, if accomplished, a crime against nature. He also said to her several times: "If you scream, you know what I have." She told him to leave and he told her if she would just get back on the bed it wouldn't take long. She would not get back on the bed and he began twisting her left wrist. She testified that she realized something had to be done, and she yelled for Mrs. Mayo, the lady in whose home the apartment is located. The person then jumped out the bedroom window, head first. Mrs. Barnes further testified she did not know who the party was, except her assailant was a male person; that when she went to bed the window in her bedroom was approximately two-thirds raised; that there was a screen in the window which hooked into the side of the window and it was in good condition when she retired.

Mrs. Sarah Mayo testified that when she heard Mrs. Barnes scream "Sarah," she immediately got out of bed, called her son and went into Mrs. Barnes' apartment, and found her at the telephone. She noticed that the screen was cut but did not see anyone leave the house.

A witness who lived next door to Mrs. Mayo testified she was reading in bed and heard Mrs. Barnes scream about 2:30 a.m.; that she looked but did not see anyone but heard "footsteps running." She then heard a car start.

A member of the Police Department of the City of Wilson, in response to a call, went to the Barnes apartment. He examined the window and found that the screen outside the window had been cut all the way from the top to the bottom with some sharp instrument. He found two razor blades just underneath the window on the outside. The razor blades were "Treet" blades. He also found a paper wrapping that goes on razor blades. Shortly thereafter police officers found a wrecked Chevrolet car on the railroad track of the Norfolk & Southern Railroad, four blocks from the Barnes apartment. In the car the officers found a wrapping from a "Treet" razor blade, which was on the floorboard of the front seat. The wrecked car belonged to the father of the defendant. The father testified the defendant took the car on the night of September 1st, and said he wanted to go to a show; that he did not see the car any more until it was pulled in after the wreck. The husband of the prosecuting witness testified he had never used "Treet" blades, and had no such blades in his home.

Between 8:30 and 8:45 on the morning of 2 September, 1948, A. J. Hayes, Jr., the identification officer of the Wilson Police Department, who was found by the court to be a fingerprint expert, went to the Barnes apartment and made an investigation for fingerprints. He testified that

on the inside of the window through which the entrance to the Barnes apartment had been made, he found a fingerprint on the lower right-hand corner of the window sill and bottom section of the window; that he photographed the fingerprint. At the trial this witness, and two other witnesses who are with the State Bureau of Investigation and were qualified as fingerprint experts, compared the fingerprint found in the Barnes apartment with fingerprints of the defendant made after his arrest in Norfolk, Va., on 25 October, 1948, and each one of them testified that the fingerprint found on the window sill on the inside of the Barnes apartment was identical with the fingerprint of the right index finger of the defendant.

The defendant offered no evidence.

From a verdict of guilty of burglary and sentence of death by asphyxiation, the defendant appeals and assigns error.

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

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

DENNY, J. The exception to the failure of the court to sustain defendant's challenge to the entire array of petit jurors is not brought forward, as required by the Rules of this Court, Rule 28. However, the defendant discusses the exception at some length in his brief. Consequently, we have considered the exception and find it without merit.

His Honor's findings of fact are supported by the evidence and are conclusive on appeal, since the exception presents no reviewable question of law. G.S. 9-14; *S. v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *S. v. Lord,* 225 N.C. 354, 34 S.E. 2d 205; *S. v. DeGraffenreid,* 224 N.C. 517, 31 S.E. 2d 523; *S. v. Walls,* 211 N.C. 487, 191 S.E. 232; *S. v. Cooper,* 205 N.C. 657, 172 S.E. 199; *S. v. Daniels,* 134 N.C. 641, 46 S.E. 743. The question raised has been considered in a number of recent cases before this Court and no useful purpose would be served by a further discussion of the subject here. See *S. v. Speller, ante,* 345, 53 S.E. 2d 294; *S. v. Speller,* 229 N.C. 67, 47 S.E. 2d 537; *S. v. Brunson,* 229 N.C. 37, 47 S.E. 2d 478; *S. v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77, *certiorari* denied 332 U.S. 768, 92 L. Ed. 354, and a rehearing denied 332 U.S. 812, 92 L. Ed. 390; and the cases cited.

Exception No. 16 is brought forward in the brief, but no argument is made or authority cited in support thereof, hence it will be considered as abandoned. Rules of Practice in the Supreme Court, Rule 28, 221 N.C. 546.

The defendant moved for judgment as of nonsuit at the close of the State's evidence, on the ground that while the bill of indictment charges

the defendant with burglarious entry with the felonious intent to ravish and carnally know Mrs. James Barnes, forcibly and against her will, the evidence he contends, tends to show only an intent to commit a crime against nature, condemned by G.S. 14-177.

The conduct of the defendant in breaking and entering the bedroom of the prosecutrix in the nighttime, and under the circumstances disclosed by the evidence, indicates the extent to which he was willing to go to accomplish his purpose. He might have preferred and intended to commit a crime against nature, or his statement in that respect might not have been indicative of his actual intent. We think the evidence was sufficient to carry the case to the jury under the allegations contained in the bill of indictment, and it was for the jury to determine, under all the circumstances, whether or not the defendant had the ulterior criminal intent at the time of the breaking and entering, to commit the felony charged in the bill of indictment. *S. v. Allen,* 186 N.C. 302, 119 S.E. 504; *S. v. Boon,* 35 N.C. 244.

The trial judge charged the jury on the defendant's contention in this respect, and instructed the jury to acquit the defendant if it found as a fact that the defendant entered the home of the prosecuting witness with the intent to commit a crime against nature and not with the intent to commit rape, as alleged by the State in the bill of indictment.

In *S. v. Boon, supra, Pearson, J.,* in speaking for the Court, said: "The evidence of the intent charged is certainly very slight, but we cannot say there is no evidence tending to prove it. The fact of the breaking and entering was strong evidence of some bad intent; going to the bed and touching the foot of one of the young ladies tended to indicate that the intent was to gratify lust. . . . And the hasty retreat without any attempt at explanation, as soon as the lady screamed, was some evidence that the purpose of the prisoner, at the time he entered, was to gratify his lust by force. It was, therefore, no error to submit the question to the jury. Whether the evidence was sufficient to justify a verdict of guilty is a question about which the Court is not at liberty to express an opinion.

In the instant case, it is clear the defendant wanted the prosecutrix to know he would resort to other means if she screamed. Whether he had the intent to commit the crime of rape, as charged, or the intent to commit a crime against nature, at the time of breaking and entering, was a question of fact to be determined by the jury.

Evidence as to the conduct of the defendant after breaking and entering may be considered by the jury in ascertaining the intent of the accused at the time of the breaking and entering. But where there is a breaking and entering into a dwelling house of another, in the nighttime, with the intent to commit a felony therein, the crime of burglary is con-

summated, even though the accused person by reason of unexpected resistance or the outcry of his intended victim, may abandon his intent to commit the felony. *S. v. Hooper,* 227 N.C. 633, 44 S.E. 2d 42; *S. v. Allen, supra; S. v. McDaniel,* 60 N.C. 245; *S. v. Boon, supra.*

Exceptions 65 and 67 are directed to the refusal of the court below to grant the defendant's motion for judgment as of nonsuit, challenging the sufficiency of the evidence to warrant its submission to the jury.

The appellant is relying largely on the case of *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296, where the defendant's fingerprint was found upon broken glass from the front door of a store that had been unlawfully entered. That case is distinguishable from the present one. The defendant in the *Minton case* was lawfully in the store in the afternoon of the day on which the crime was committed, and he may have made the fingerprint at that time.

We must keep in mind that a motion for judgment as of nonsuit in a criminal prosecution is properly denied if there is any competent evidence to support the allegations of a bill of indictment; and all the evidence tending to sustain the allegations in the bill of indictment upon which a defendant is being tried, will be considered in a light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *S. v. Braxton, ante,* 312, 52 S.E. 2d 895; *S. v. Gentry,* 228 N.C. 643, 46 S.E. 2d 863; *S. v. Webb,* 228 N.C. 304, 45 S.E. 2d 345; *S. v. Hough,* 227 N.C. 596, 42 S.E. 2d 659; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606; *S. v. Brown,* 218 N.C. 415, 11 S.E. 2d 321. Here the defendant was never lawfully in the apartment of the prosecutrix, and the presence of his fingerprint on the inside of the window sill in the sleeping quarters of the prosecutrix, when considered with the other evidence, was sufficient to carry the case to the jury.

The defendant has abandoned the remaining sixty-seven exceptions set out in the record.

The exceptions brought forward and argued in the defendant's brief fail to show any prejudicial error in the trial below.

No error.

IN RE TAYLOR (STATE v. TAYLOR).

(Filed 16 June, 1949.)

1. Criminal Law § 57d—

The common law writ of error *coram nobis* to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. G.S. 4-1.

2. Same: Constitutional Law § 10d—

The Supreme Court, in its supervisory power, has authority to entertain an application for permission to apply to the Superior Court for a writ of error *coram nobis*. Constitution of N. C., Art. IV, sec. 8.

3. Constitutional Law § 34d—

The appointment of counsel for a defendant charged with felonies less than capital is within the discretion of the trial court; but in prosecutions for capital offenses the appointment of counsel is mandatory. G.S. 15-4.

4. Criminal Law § 57d: Constitutional Law § 10d—

Where verified petition for leave to apply to the Superior Court for writ of error *coram nobis*, the record in the cases in which petitioner was convicted, and *habeas corpus* proceedings instituted by him, make it appear that petitioner was confronted with indictments for capital offenses and indictments for felonies less than capital, and that the trial court failed to appoint counsel to represent him notwithstanding his alleged inability to employ counsel and his request for counsel, the petition will be allowed in respect of the capital felonies and denied in respect of the felonies less than capital upon such *prima facie* showing.

5. Same—

Upon application to the Supreme Court for leave to apply to the Superior Court for writ of error *coram nobis*, the application will be allowed upon a *prima facie* showing, but the ultimate merits of petitioner's claim are for the trial court.

6. Criminal Law § 57d—

If the trial court denies petitioner's application for writ of error *coram nobis* it should find the facts, and petitioner should be returned to prison and be allowed to appeal as in other proceedings; if it grants the petition, the judgments should be vacated, the pleas stricken out or permitted to be withdrawn, and the cases restored to the docket for trial in accordance with law.

ORIGINAL application by Laurie D. Taylor, Jr., for leave to apply to the Superior Court of Pitt County for relief from judgments alleged to have been induced by factual and constitutional defects at the January Term, 1947.

Following the disposition of application for writ of *certiorari* to review judgment on *habeas corpus* at the Fall Term, 1948, reported in 229 N.C. 297, 49 S.E. 2d 749, the petitioner of his own volition and *inops consilii*, applied to the District Court of the United States for the Eastern District of North Carolina for writ of *habeas corpus* to test the legality of his imprisonment. The Federal Court dismissed his petition on the ground that the petitioner had not exhausted his State remedies. Again of his own volition and *inops consilii*, he filed application here for leave to apply to the Superior Court of Pitt County for writes of error *coram*

nobis to determine the lawfulness of his present incarceration. The court referred his unverified application to J. C. B. Ehringhous, Jr., Esquire, of the Raleigh Bar, and requested that he again counsel with the petitioner and advise him of his rights. As a result, the applicant has verified his petition and insists upon its being granted. This is the course which he elected not to pursue at the last term as will appear from the reported case. He has now changed his mind in respect of the matter, or perhaps time and what he regards as a more propitious circumstance have changed it for him.

The substance of the petition is that at the January Term, 1947, Pitt Superior Court, the petitioner, then a minor, eighteen years of age, without legal knowledge or training and inexperienced in court procedure, was required to plead to three indictments charging him with burglary in the first degree and four indictments charging him with housebreaking and larceny; that before entering pleas to the indictments the petitioner informed the trial court that he was unable to employ counsel and requested the court to appoint counsel to advise with him and to protect his rights, but no counsel was appointed to represent him at the time; that the petitioner being apprehensive of the consequences that might result to him from a public hearing of the offenses which were alleged to have occurred only a few weeks prior thereto, entered pleas of guilty to the indictments for housebreaking and 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 in prison on each of the housebreaking and larceny charges, the sentences in all of the cases to run concurrently, and that the petitioner is now serving his sentences in the Central Prison at Raleigh.

It is further 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.

Answering the allegations of the petition, the Director of Prisons of the North Carolina Highway and Public Works Commission, concedes that the petitioner is being held in the Central Prison at Raleigh on seven commitments, three for life and four for ten years each, all running concurrently. He further alleges that while the petitioner may have been a minor at the time of his hearing in Pitt Superior Court, he looks and acts the part of an adult; that he is at least twenty years of age, or thereabout, self-willed, familiar with the courts, and no stranger to the ways of crime, especially those of burglary, housebreaking and larceny; that respondent is informed, and the records in subsequent proceedings indicate, the petitioner was fully acquainted with the charges against

him, and his pleas were tendered and accepted only after careful consideration and counseling on the part of the trial court.

The respondent further points out that at least in the four non-capital indictments, the appointment of counsel for the accused was a matter resting in the sound discretion of the trial court. Wherefore, he suggests the propriety of dismissing the petition, certainly in respect of these indictments.

J. C. B. Ehringhaus, Jr. (by Court appointment) for petitioner.

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

R. Brookes Peters for State Highway and Public Works Commission.

STACY, C. J. The question posed is the sufficiency of the application and showing for permission to apply for writs of error *coram nobis*. The record suggests a limited allowance.

The writ of error *coram nobis* is an established common-law writ. 24 C.J.S. 143 *et seq.* It is therefore available under our procedure in a case like the present. G.S. 4-1; *In re Taylor,* 229 N.C. 297, 49 S.E. 2d 749; *Roughton v. Brown,* 53 N.C. 393; *Williams v. Edwards,* 34 N.C. 118; *Lassiter v. Harper,* 32 N.C. 392; *Tyler v. Morris,* 20 N.C. 625. See *Massie v. Hainey,* 165 N.C. 174, 81 S.E. 135; *Roberts v. Pratt,* 152 N.C. 731, 68 S.E. 240; 27 N.C.L. 254; also *Young v. Ragen,* ..... U.S. ....., 69 S. Ct. 1073, decided June 6, 1949. The instant application for permission to apply to the trial court for relief is addressed to the supervisory authority of this Court over "proceedings of the inferior courts" of the State. Const. Art. IV, Sec. 8; *S. v. Lawrence,* 81 N.C. 522; *S. v. Green,* 85 N.C. 600. See, also, note to *Halford v. Alexander,* 46 Am. Dec. 253-257.

The gravamen of the petition is the factual allegation, extraneous of the record, that the petitioner was unable to employ counsel, and notwithstanding his manifest inability to safeguard his rights and his request for counselor aid, the court failed to appoint counsel to represent him. In addition to the four charges of housebreaking and larceny—serious felonies within themselves, though less than capital—the petitioner was faced with three capital indictments of burglary in the first degree. G.S. 14-51.

Ordinarily, the appointment of counsel to represent the accused in cases less than capital is discretionary with the trial court. *In re Taylor,* 229 N.C. 297, 49 S.E. 2d 749; *S. v. Hedgebeth,* 228 N.C. 259, 45 S.E. 2d 563. See *Gibbs v. Burke,* ..... U.S. ....., 69 S. Ct. 1247, decided 27 June, 1949; *Uveges v. Pa.,* 335 U.S. 437. It is otherwise, however, in capital cases. 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. 527.

The petitioner offers in support of his allegations his own verification and the record in the cases, together with the record in the *habeas corpus* proceedings. These suffice, we think, to make a *prima facie* showing of substantiality. The ultimate merits of the petitioner's claim are not for us, but for the trial court. His petition for leave to apply to the Superior Court of Pitt County for the relief which he seeks will be granted in respect of the capital indictments. *Ex parte Taylor,* 249 Ala. 667, 32 So. 2d 659; *S. c.* (sub. nom.) *Taylor v. Alabama,* 335 U.S. 252; *Hysler v. Florida,* 146 Fla. 593,, 1 So. 2d 628; *S. c.,* 315 U.S. 411, 86 L. Ed. 932. See *Nickels v. State,* 86 Fla. 208, 98 So. 502, as closely parallel in factual situation, and *Chambers v. State,* 117 Fla. 642, 158 So. 153, on procedure. No sufficient showing has been made to warrant the granting of his application in respect of the non-capital indictments.

The prison authorities will afford the petitioner an opportunity to appear at the next term of the Superior Court of Pitt County to be held for the trial of criminal cases, so that he may apply for writs of error *coram nobis* in respect of the three capital indictments as sought in his petition. Before entertaining his application, however, the trial court will see to it that the petitioner is represented by counsel, either of his own choosing and employment, or by appointment of the court. If under the advice of counsel, the petitioner elect to proceed further, the court will entertain his application and make decision thereon. If the application be denied, findings of fact should be made as a basis therefor, the petitioner returned to the Central Prison, and allowed to appeal as in other proceedings.

If the application be granted, the judgments should be vacated, the pleas stricken out or permitted to be withdrawn, and the cases restored to the docket for trial In this latter event, the petitioner will be afforded an opportunity to confer with counsel, prepare his defense, and appear at his trial.

Mr. Ehringhaus is relieved of any further duty under his appointment here. He has secured for the petitioner the privilege of applying to the trial court for part of the relief which he desires, and which he may there seek.

Petition allowed in part.

D. W. HOOPER v. ROBERT H. GLENN.

(Filed 16 June, 1949.)

1. Pleadings § 22b: Appeal and Error § 40b—

An application for leave to amend a pleading after time for filing has expired is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of discretion.

2. Automobiles § 20a—

In this action by a passenger against the driver of the vehicle, defendant alleged that the accident was caused by the interference of the passenger with defendant's driving when they were confronted with an emergency. The only evidence of interference was that the passenger exclaimed "Look out . . . that car is going to hit you," and defendant testified that the exclamation had no effect on him. *Held:* The refusal of the court to submit an issue of contributory negligence was not error.

3. Trial § 38—

The refusal to submit an issue tendered is not error when there is no evidence in support of such issue adduced at the trial.

4. Appeal and Error § 39f—

Exceptions to the charge will not be sustained when the charge is free from prejudicial error when construed contextually.

APPEAL by defendant from *Coggin, Special Judge,* and a jury, at the September Term, 1948, of FORSYTH.

On 15 February, 1947, the plaintiff, D. W. Hooper, was a guest in a motor truck which the defendant, Robert H. Glenn, was driving along a public highway in Forsyth County. The truck suddenly left the road and crashed against a nearby tree, inflicting substantial personal injuries upon the plaintiff. The plaintiff sued the defendant for damages for such personal injuries, and the defendant answered, denying liability to plaintiff in the premises.

When viewed most strongly in his favor, the plaintiff's testimony tended to show that the defendant drove the truck at a speed of not less than fifty miles per hour along his left half of an unpaved public highway having a width of thirty feet; that the defendant met another automobile proceeding in the opposite direction "on its extreme right-hand side of the highway," *i.e.,* the defendant's left-hand side of the highway; and that the defendant thereupon abruptly jerked the steering wheel of the truck to his right, left the highway, crashed against a tree standing some distance to the right of the highway, and injured the plaintiff, notwithstanding that at least two-thirds of the roadway was open for the free and unobstructed passage of the truck.

The defendant offered evidence, however, indicating that he operated the truck on his right half of the highway at a speed of about thirty-five miles per hour; that he met the other automobile proceeding in the opposite direction along his right half of the highway at a speed approximating seventy miles an hour; that both he and the plaintiff were placed in imminent danger of death or enormous bodily harm in a threatened head-on collision between the truck and the rapidly approaching automobile; and that he thereupon drove the truck from the highway in a reasonable effort to extricate himself and the plaintiff from the impending peril which had arisen without fault on his part.

The court submitted these issues to the jury:

1. Was the plaintiff injured by the negligence of the defendant, Robert H. Glenn, as alleged in the complaint?

2. What damages, if any, is plaintiff entitled to recover?

The jury answered the first issue "Yes" and the second issue "$15,000.00."

Judgment was entered on the verdict, and the defendant appealed, assigning errors.

Higgins & McMichael for plaintiff, appellee.
Deal & Hutchins for defendant, appellant.

ERVIN, J. The defendant reserved an exception to the refusal of the trial judge to permit him to amend his answer so as to set up a new plea of contributory negligence in these words, namely: "The defendant, Robert H. Glenn denies that he had used or was under the influence of intoxicants at the time of the accident, but avers that if he was intoxicated and if he and the plaintiff, D. W. Hooper, had been drinking intoxicants together, and the use of intoxicants by defendant Glenn was one of the proximate causes of the accident resulting in injuries to the plaintiff, then the plaintiff himself was guilty of contributory negligence in that he used intoxicants with the defendant Glenn, that he knew that the defendant Glenn had been drinking intoxicants and was under the influence thereof, but nevertheless the plaintiff continued to ride in the truck with the defendant Glenn, and that such conduct on the part of the plaintiff constituted contributory negligence, and, therefore, this defendant pleads the contributory negligence of the plaintiff, D. W. Hooper, in this respect in addition to the other facts pleaded as contributory negligence in his answer to the amended complaint in bar of the plaintiff's recovery in this action."

The court expressly stated that its ruling denying the defendant leave to file the amendment to the answer was made in the exercise of its discretion. This being so, the defendant's exception is untenable. It is a firmly established rule of practice in this jurisdiction that an application

for leave to amend a pleading after time for filing has expired, is a matter addressed to the sound discretion of the trial court, and that a ruling thereon is not subject to review on appeal unless the circumstances affirmatively disclose a manifest abuse by the court of its discretionary power. G.S. 1-163; *Hogsed v. Pearlman,* 213 N.C. 240, 195 S.E. 789. The record presently presented does not justify an inference that the court abused its discretion in the premises. While some of the witnesses called to the stand by counsel for the defense testified that the plaintiff and the defendant bore the odors of liquor when removed from the wreckage of the truck after the collision, the plaintiff's cause of action was not predicated, either in whole or in part, upon any allegation or evidence that the defendant lost control of the truck by reason of intoxication. Besides, the defendant testified in his own behalf with unvarying positiveness that he was completely sober at the place and time named in the pleadings. Moreover, the defendant did not ask for leave to amend until all the evidence was in, and both sides had rested.

The defendant assigns as error the refusal of the court to submit to the jury this issue: "Was the plaintiff, Daniel W. Hooper, guilty of contributory negligence as one of the proximate causes of his injuries, as alleged in the answer of Robert H. Glenn?" The answer alleged on this phase of the case "that the accident . . . was due to and proximately arose on account of the careless and negligent conduct of the plaintiff himself in that the plaintiff had been drinking intoxicating liquors and became excited and interfered with the operation of the truck in trying to turn the truck to the right, and this defendant pleads the contributory negligence of the plaintiff in bar of his right to recover in this action."

No evidence was adduced at the trial tending to show any attempt on the part of the plaintiff to interfere with the operation of the truck outside of the testimony of the defendant to the effect that the plaintiff made this exclamation just as the other automobile was about to collide head-on with the truck: "Look out, look out, Rob! That car is going to hit you." The defendant testified, however, that this declaration "didn't have no effect on me." Thus, it appears that there was no evidence to support the plea of contributory negligence set out in the answer, and that the court rightly declined to submit to the jury the issue in question. *Kjellander v. Baking Co.,* 197 N.C. 206, 148 S.E. 40.

The defendant assigns three portions of the charge as error. Standing alone, these excerpts seem somewhat wanting in dexterity of statement. But when they are placed in their context and the instructions of the court are read as a whole, it appears that the charge was free from prejudicial error. *Wyatt v. Coach Co.,* 229 N.C. 340, 49 S.E. 2d 650.

Since no reversible error has been shown, the verdict and judgment will be sustained.

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1949

MAMIE E. WILLIAMS, HELEN W. MEDLIN AND HUSBAND, DURWOOD P. MEDLIN, F. WEBB WILLIAMS, AND DAN E. WILLIAMS AND WIFE, LILLIAN T. WILLIAMS, v. CHARLES M. TRAMMELL AND CHARLES M. TRAMMELL, JR.

(Filed 21 September, 1949.)

1. Judgments § 17a—

While formal recitals in a judgment are not required by statute they are, nevertheless, not improper and are not to be regarded as unimportant.

2. Judgments § 18—

In determining whether jurisdiction is acquired by the court rendering a judgment, the entire record is to be considered, and jurisdictional recitals in the judgment will not prevail over recitals in other parts of the judgment roll establishing facts to the contrary. G.S. 1-232.

3. Judgments § 25—

Fatal defect in service of process which renders a judgment absolutely void must appear positively on the face of the record and not by evidence *aliunde* in order for the judgment to be subject to collateral attack on that ground.

4. Judgments § 18—

The judgment roll in a tax foreclosure suit contained one summons with endorsement thereon showing personal service on the president of the defendant corporation and another summons of precisely similar form and import with defective affidavit upon which service by publication was had. The judgment recited service by publication. *Held:* It appearing from the judgment roll that valid service on the corporation was had by per-

sonal service on its president, the judgment roll establishes jurisdiction notwithstanding the subsequent attempt of service by publication or the recital thereof in the judgment, and such judgment is not subject to collateral attack in an action to remove cloud on title.

DEFENDANTS' appeal from *Morris, J.*, at May Term, 1949, of DARE.

This action was brought to remove a cloud from the title to the lands described in the complaint, of which plaintiffs claim to be owners. Answering, the defendants affirm their claim of ownership, denying plaintiffs' title and interest.

Since defendants claim title through a deed executed by Martin Kellogg, Jr., Commissioner, in a tax foreclosure suit entitled "Dare County, Plaintiff, *v.* Seligman, Williams & Ball, Inc., *et als.*, Defendants," for nonpayment of taxes on the lands described, and by *mesne* conveyance, and no attack is made upon the defendants' title except with respect to the validity of service in the foreclosure suit, and hence validity of the Commissioner's deed and effectiveness to divest defendants in that case, (and present plaintiffs), of their title to the property, appropriate stipulations were made by the parties controlling the "method of trial" and confining the investigation to the matter of service of summons in the foreclosure suit and the effect of the recital in the judgment with respect thereto.

The cause was submitted to Judge Chester Morris, on stipulation, facts and evidence taken on the trial, jury having been waived by consent.

In view of the narrowed scope of the controversy, the necessities of review do not require a comprehensive resumé of the evidence, including deeds and other matters not directly bearing on the question of service and the recital with respect thereto in the judgment, and these are omitted.

These facts, however, appear:

Seligman, Williams & Ball, Inc., was a North Carolina corporation with the principal place of business in Pasquotank County, in said State; the entire record in the foreclosure suit, including the Judgment Roll, was put in evidence; in this judgment roll is a summons dated November 27, 1935, and another, of precisely similar form and import, dated December 14, 1935, commanding service upon Seligman, Williams & Ball, Inc., F. Webb Williams, President, L. S. Gordon, the defendants above named; (only the part of this summons significant to the issue is quoted). On this summons is endorsed:

> "Received 12/18/35; served 12/20/35 by delivering a copy of the within summons and a copy of the complaint to each of the following defendants: L. S. Gordon, F. Webb Williams, Pres. Seligman, Williams & Ball. Charles Carmine, Sheriff Pasquotank County."

Subsequently a defective affidavit of Melvin R. Daniels was filed, averring that summons had been returned by the sheriff with the endorsement: "After due diligence and search Seligman, Williams & Ball, Inc., cannot be found in Dare County," without further averment that an officer or agent of the corporation upon whom service of process could be made could not, after due diligence, be found in the State. Upon this affidavit service by publication was made, and the proceeding continued in course to judgment.

Upon the hearing the plaintiffs introduced the Judgment Roll in the tax proceeding referred to for the purpose of attack on the service of process and the ensuing judgment. The defendant also introduced practically all of the same Judgment Roll and various deeds and other matters.

At the conclusion of the plaintiffs' evidence the defendants demurred thereto and moved for judgment as of nonsuit, which was declined. At the conclusion of all the evidence the motion was renewed and again disallowed. Defendants took proper exceptions. Judge Morris rendered judgment that the tax proceeding was ineffective to divest title to the lands in dispute from the defendants therein and that the present plaintiffs were owners in fee, and defendants had no interest therein. Defendants appealed, assigning error.

John H. Hall and McMullan & Aydlett for plaintiffs, appellees.

Martin Kellogg, Jr., and J. Henry LeRoy for defendants, appellants.

SEAWELL, J. It is agreed between the parties that the plaintiffs' title to the disputed lands depends entirely on whether the tax foreclosure action brought by Dare County *v.* Seligman, Williams & Ball, Inc., is effective to divest title thereto from that corporation from whom they claim title by *mesne* succession; and this is narrowed to the contention that the judgment in that proceeding is void for want of valid service of summons on the corporation and, therefore, subject to collateral attack. The regularity of the proceeding in other respects is not challenged.

Plaintiffs introduced the Judgment Roll of the foreclosure suit for purpose of attack on the service of notice and the validity of the judgment. Defendants also introduced, item by item, practically all of the same Judgment Roll, including the above mentioned summons to the Sheriff of Pasquotank County and the return thereon of Carmine, Sheriff of Pasquotank County, containing endorsement of personal service on F. Webb Williams, President Seligman, Williams & Ball, and another named person.

The Judgment Roll contains, therefore, two summonses: One purporting by endorsement to have been personally served on the President of the

defendant corporation in the manner required by the statute, and another served by publication procured on a defective affidavit, which defective service and the recital in the judgment referring to it the plaintiffs contend completely vitiate any former notice and result in a void judgment.

We may concede, without the necessity of deciding, that the attempted service of summons by publication conferred no jurisdiction on the court; and if no other valid service appeared in the record, the judgment would be void and subject to collateral attack.

Also, it may be inferred from the recital of publication of summons in the judgment that the reference is to that attempted service by this method as appears in more detail in the record; and if no other service of summons appeared it would not be presumed, in this State at least, that another and better service was had, thus saving the judgment from collateral attack. Freeman on Judgments, 5th Ed., p. 812. We can go this far with the plaintiffs, although the expression is *obiter*. It can avail the plaintiffs nothing since the record, as we have seen, discloses that a valid service on the corporation was made by personal service on its president. G.S. 1-232.

In the instant case the defendants do not allege or attempt to prove that such service was not actually made on the corporation in this manner. They do contend that this service is in some way challenged by the recital in the judgment of service by publication, reference to which service proves it defective; and that the effectiveness of the personal service is thus destroyed,—by abandonment, or by some sort of legal necessity which confines the question of jurisdiction to the recital of service by publication, excluding the record of personal service.

While the formal recitals in a judgment are not improper, especially when judgment is taken by default, they are not required by our statute. The court here is one of general jurisdiction and the judgment is sufficiently supported by actual proof of service found elsewhere in the record. The Judgment Roll, the selected parts of the proceedings which the law sets apart and requires to be attached together and filed with the judgment as evidential support of the court's solemn decrees, is significant in its every part. We must look to the entire record to see whether jurisdiction is actually acquired, notwithstanding inadvertent, inaccurate or mistaken recitals in the judgment. Freeman on Judgments, 5th Ed., p. 811, sec. 381. If it has been so acquired in fact it is not repudiated or affected by a mere recital, nor will it lose its force, as supporting the decree, by reason of reference to another independent ineffective attempt at service. 49 C.J.S., "Judgments," sec. 71, and authorities cited; Freeman on Judgments, 5th Ed., p. 811; *Brickhouse v. Sutton,* 99 N.C. 103, 108, 5 S.E. 380.

It must not be inferred from these observations respecting jurisdictional recitals in a judgment that they are to be regarded as unimportant, even when not required by statute. We intend only to point out that the recitals are relative to other parts of the record, of equal or greater dignity, and to show the necessity of determining the question of validity of the service by examination of the whole record.

Indeed there is a long line of authority, to which North Carolina has contributed, to the effect that recitals of jurisdictional facts rendered by a court of general jurisdiction cannot be collaterally attacked. *McDonald v. Hoffman,* 153 N.C. 254, 69 S.E. 49; *American Cotton Oil Co. v. House,* 68 A.L.R., anno. at p. 385. Where there is only one service involved and the recital is totally contradicted by the record, the latter prevails. *Johnson v. Whilden,* 171 N.C. 153, 88 S.E. 223; *Ricaud v. Alderman,* 132 N.C. 62, 43 S.E. 543. This is but a repetition of the principle, still adhered to, that in order to let in collateral attack the fatal defect in the service, rendering the judgment absolutely void, must appear positively on the face of the record,—and not by evidence *aliunde. Smathers v. Sprouse,* 144 N.C. 637, 57 S.E. 392; *Simmons v. Box Co.,* 148 N.C. 344, 345, 62 S.E. 435, and cases cited.

It is unnecessary to point out again and with any greater emphasis that an examination of the whole record discloses valid service upon the corporation in the tax suit, and, therefore, it does not appear affirmatively on the face of the record that the corporation was not duly served with process. Considering, then, that the defective service by publication is thus by reference incorporated in the recital, the record containing the personal service is in contradiction with the recital and must control. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26.

Applying these principles to the case at bar, we conclude that actual jurisdiction was acquired by the court by the personal service of summons on the president of the corporation sued in the tax foreclosure proceeding under review, and that this jurisdiction was not affected by the subsequent independent attempt at service by publication, or in the recitals thereof in the judgment.

Defendants' motion for judgment of nonsuit should have prevailed. The judgment to the contrary is

Reversed.

M. & J. FINANCE CORPORATION v. M. S. HODGES, SHERIFF OF ROCKINGHAM COUNTY, AND BANK OF REIDSVILLE, INC.

(Filed 21 September, 1949.)

1. Registration § 1—

Claims in equity resting in parol do not come within the purview of our registration statutes.

2. Chattel Mortgages § 10e: Registration § 5c—

An unregistered chattel mortgage creates no equity in the mortgagee.

3. Same—

The rule that the equitable owner may assert his claim against the grantee or lienee of the apparent owner unless such grantee or lienee is a purchaser for value without notice, does not apply to the mortgagee in an unregistered chattel mortgage, since an unregistered chattel mortgage creates no equity in the mortgagee.

4. Trusts § 5d—

A purchaser for value who takes free from claims in equity resting in parol is one who has advanced some new consideration or incurred some new liability on the faith of apparent ownership, and an antecedent debt will not suffice for this purpose.

5. Chattel Mortgages § 10b—

A chattel mortgage is effective as against creditors and purchasers for value only from the time of registration.

6. Chattel Mortgages § 10c—

A creditor is not protected from the claim of the mortgagee in an unregistered chattel mortgage until he has in some legal manner acquired a lien against the personal property, but a pre-existing debt is a valuable consideration and is sufficient to support the claim of the creditor when he has acquired a lien on the property thereunder.

7. Judgments § 22a—

A judgment does not constitute a lien against the personal property of the judgment debtor.

8. Execution § 7—

A lien against the personal property of the judgment debtor is acquired upon seizure of the property by an officer under authority of an execution.

9. Execution § 8: Chattel Mortgages § 10d—

An automobile of the judgment debtor was seized under execution prior to the registration of a chattel mortgage executed by him subsequent to the judgment but before the issuance of execution thereon. *Held:* The lien of execution has priority over the lien of the subsequently registered chattel mortgage.

APPEAL by defendants from *Gwyn, Resident Judge,* 2 April, 1949, ROCKINGHAM. Reversed.

Civil action in claim and delivery to recover the possession of an automobile.

James Moore is a resident of Rockingham County, N. C. On 30 September, 1948, he purchased a Plymouth 4-Door Sedan from City Auto Sales Company and gave his note in the sum of $1,508.40, secured by a chattel mortgage on the automobile, in part payment of the purchase price. On the same day the seller transferred and assigned the note and mortgage to the plaintiff herein. This mortgage was duly registered 26 October, 1948.

In January 1948, defendant Bank of Reidsville procured judgment against James Moore in the sum of $961.06, interest and costs. This judgment was duly docketed in Rockingham County.

On 22 October, defendant Bank caused execution to issue on said judgment and the defendant sheriff, under authority thereof, duly levied upon and took into his possession said automobile for the purpose of selling the same to satisfy said execution. He proceeded to advertise the same for sale as required by law.

On 15 November 1948 the plaintiff instituted this action and procured the issuance of a writ of claim and delivery under which the coroner of Rockingham County seized said automobile and, the defendants having failed to replevy, delivered possession thereof to plaintiff. The automobile was sold and the proceeds of sale are being held pending the determination of the controversy respecting the priority of liens. The sale price was insufficient to satisfy plaintiff's claim so that if it holds the first lien, the defendants recover nothing.

The parties entered into a stipulation waiving trial by jury and submitting the cause to the resident judge on facts agreed. The judge, being of the opinion that the lien of plaintiff is superior to and takes priority over the levy under execution, rendered judgment that plaintiff have and recover possession of said automobile. Defendants excepted and appealed.

D. F. Mayberry for plaintiff appellee.

Scurry & McMichael for defendant appellants.

BARNHILL, J. The plaintiff's chattel mortgage was executed 30 September 1948 but was not registered until 26 October 1948. The automobile was seized under execution on defendant's judgment 22 October 1948. Thus on the date of seizure under execution, plaintiff's mortgage was not of record. Which party holds the prior lien? This is the one question posed by this appeal. Our decisions answer in favor of defendants.

The plaintiff stressfully insists that the defendant bank is not a creditor or purchaser for value within the meaning of our registration statute

for the reason its judgment was rendered on an antecedent or pre-existing debt. This contention cannot be sustained.

Where a third party is the owner of the equitable title to property by virtue of some equity resting in parol, the grantee or lienee of the apparent owner is protected against the claim of the beneficial owner only in the event he is a purchaser for value without notice, and to constitute him a purchaser for value he must have advanced some new consideration or incurred some new liability on the faith of the apparent ownership. There must be a new consideration moving between the parties, and for such purpose an existing or antecedent debt will not suffice. That is to say, claims in equity resting in parol do not come within the purview of our registration statutes. G.S. Chap. 47, Art. 2. *Small v. Small,* 74 N.C. 16; *Southerland v. Fremont,* 107 N.C. 565; *Wallace v. Cohen,* 111 N.C. 103; *Carpenter v. Duke,* 144 N.C. 295; *Bank v. Bank,* 158 N.C. 238, 73 S.E. 157; *Bank v. Cox,* 171 N.C. 76, 87 S.E. 967; *Spence v. Pottery Co.,* 185 N.C. 218, 117 S.E. 32; *Weil v. Herring,* 207 N.C. 6, 175 S.E. 836.

That line of cases has no bearing on the question here presented. Plaintiff claims under an unregistered mortgage which creates no equity. *Weil v. Herring, supra; Todd v. Outlaw,* 79 N.C. 235.

The mortgagor was a resident of Rockingham County. Hence, G.S. 47-20 is controlling. That statute regulates priorities as between written instruments affecting the title to property and other legal claims and is designed to protect creditors and purchasers for value against any adverse claim founded on an unrecorded lien.

Unregistered mortgages are of no validity whatsoever as against creditors and purchasers for value unless they are registered. They take effect as against such interested third parties from and after registration just as if they had been executed then and there. *Robinson v. Willoughby,* 70 N.C. 358; *Bostic v. Young,* 116 N.C. 766; *Bank v. Cox, supra.*

Even so, it is not every creditor who is protected against unrecorded mortgages. A creditor has no claim to the personal estate of his debtor until he has first fastened a lien upon it in some manner sanctioned by law.

As to liens coming within the purview of the registration statute, a pre-existing debt is a valuable consideration and is sufficient to support the claim of a creditor who has fastened his lien upon the property of his debtor. *Bank v. Cox, supra; Brem v. Lockhart,* 93 N.C. 191; *Moore v. Sugg,* 114 N.C. 292; *Odom v. Clark,* 146 N.C. 544; *Weil v. Herring, supra; Sansom v. Warren,* 215 N.C. 432, 2 S.E. 2d 459; *Bostic v. Young, supra; Fleming v. Graham,* 110 N.C. 374; *Brown v. Mitchell,* 168 N.C. 312, 84 S.E. 404; *Southerland v. Fremont, supra.*

Thus the title of a receiver in an insolvency proceeding, *Acceptance Corporation v. Mayberry,* 195 N.C. 508, 142 S.E. 767; *Sermons v. Allen,* 184 N.C. 127, 113 S.E. 605; *Starr v. Wharton,* 177 N.C. 323, 98 S.E. 818, or of a trustee under a deed of assignment for the benefit of creditors, *Brem v. Lockhart, supra; Drill Co. v. Allison,* 94 N.C. 548; *Observer Co. v. Little,* 175 N.C. 42, 94 S.E. 526; *Starr v. Wharton, supra,* or of an attaching creditor, *Salassa v. Mortgage Co.,* 196 N.C. 501, 146 S.E. 83, or of a trustee in bankruptcy, *Hetherington & Sons v. Rudisill,* 62 A.L.R. 377, is superior to the claim of a mortgagee who has failed to record his lien.

While a judgment constitutes no lien upon the personal estate of the judgment debtor, seizure thereof by an officer under authority of an execution creates a special property therein and a lien thereon for the purpose of satisfying the execution. It is the levy under execution that creates the lien in favor of the judgment creditor. *Penland v. Leatherwood,* 101 N.C. 509; *Discount Corporation v. Radecky,* 205 N.C. 163, 170 S.E. 640.

At the time of the seizure under execution by defendant sheriff, plaintiff's mortgage was not of record. As against the defendants it was ineffectual to convey title to or create a lien upon the automobile. The seizure and sequestration of the property under authority of the execution created a claim to the property superior in point of time and effect to the claim of plaintiff. Its lien attached subsequent to the one acquired by defendant and its claim is subordinate thereto.

Discount Corporation v. Radecky, supra, is directly in point and sustains this conclusion. There the mortgagor was a nonresident, but the automobile had acquired a *situs* in Madison County. Subsequent to the execution of the plaintiff's chattel mortgage but prior to its registration in Madison County, defendant obtained a judgment on a pre-existing debt against the mortgagor and the automobile was seized under execution issued on the judgment. Plaintiff thereafter recorded its mortgage in Madison County. The trial court held that the lien created by the levy under execution was superior to the claim of the mortgagee and so adjudged. This Court affirmed.

Cox v. Lighting Co., 151 N.C. 62, 65 S.E. 648, cited and relied upon by plaintiff is not in point. Decision there was controlled by a principle of law not applicable here. Nor is *Credit Corp. v. Walters,* 230 N.C. 443, controlling. There the material facts failed to bring the defendant within the protective provisions of the statute.

As the defendants acquired an effective lien upon the automobile prior to the registration of plaintiff's mortgage their lien is superior. Therefore, the judgment entered must be

Reversed.

MARGARET M. ELEDGE, ADMINISTRATRIX OF JOHN J. ELEDGE, v. CAROLINA POWER & LIGHT COMPANY (ORIGINAL PARTY DEFENDANT), AND M. B. HAYNES AND COAL OPERATORS CASUALTY COMPANY (ADDITIONAL PARTIES DEFENDANT).

(Filed 21 September, 1949.)

1. Master and Servant § 41—

Under the Workmen's Compensation Act as amended, the employer or its insurance carrier who has paid or admitted liability under the Act may bring an action in the name of the injured employee or his personal representative against a third person upon allegations that the negligence of such third person caused injury to or death of the employee, and if such action is not brought within six months by the employer or its carrier, the employee or his personal representative may institute such action. G.S. 97-10.

2. Same—

The insurance carrier can have no greater rights against a third person tort-feasor than the employer, G.S. 97-10, and therefore the insurance carrier prosecuting an action against such third person in the name of the personal representative of the deceased employee may not recover anything from such third person if the employer's negligence contributed to or concurred with the negligence of such third person in causing the death of the employee.

3. Same—

The employer and a third person tort-feasor are not joint tort-feasors, and therefore such third person is entitled to plead contributory negligence of the employer as a bar to any recovery by the employer or the insurance carrier who has been subrogated to the rights of the employer, and to this end is entitled to plead the payment of an award to the personal representative of the deceased employee as a basis for its plea of contributory negligence on the part of the employer. G.S. 97-10.

4. Same—

Since neither the employer nor the insurance carrier is entitled to recover from a third person tort-feasor if the negligence of the employer is the proximate cause or one of the proximate causes of the injury or death of an employee, there is no basis for a cross-action by such third person against the employer or its insurance carrier upon allegations that the employer had executed a contract indemnifying such third person from liability, and allegations of such cross-action are properly stricken on motion, since such third person is not entitled to be indemnified against its own negligence as to any recovery by the personal representative of the deceased employee.

APPEAL by plaintiff and defendant Carolina Power & Light Company, from *Moore, J.*, at January Term, 1949, of HAYWOOD.

This is a civil action to recover for the wrongful death of plaintiff's intestate, whom she alleges was killed by the negligence of the Carolina

Power & Light Company, while he was engaged in the repair of one of its electric lines as an employee of M. B. Haynes.

The Carolina Power & Light Company, hereinafter referred to as "Power Company," alleged in its answer that it entered into a contract with M. B. Haynes to construct or repair certain electric lines for the Power Company; that the Power Company required Haynes to carry Workmen's Compensation insurance on his employees and authorized the cost thereof to be included in the contract price and to be paid for by the Power Company.

The defendant Power Company further alleged that pursuant to the terms of the contract between it and M. B. Haynes, the Coal Operators Casualty Company became the insurance carrier for the said Haynes and that the carrier has heretofore entered into an agreement for the payment of compensation for the death of plaintiff's intestate, and further alleged as a defense, that the defendant Power Company held an indemnity agreement with M. B. Haynes, wherein he obligated himself to indemnify and hold the Power Company harmless from any damages or other liability in connection with the work to be done pursuant to the terms of the contract, and filed a cross action against M. B. Haynes and the insurance carrier, alleging the negligence of M. B. Haynes as a proximate cause of the death of plaintiff's intestate, and made a motion before the Clerk of the Superior Court of Buncombe County that they be made parties to the action. The motion was allowed.

Thereafter this cause was removed to Haywood County, by consent of the parties and in the discretion of the trial judge.

In apt time, the plaintiff and the defendants, M. B. Haynes and the Coal Operators Casualty Company, moved to strike from the answer of the Power Company all reference to the Workmen's Compensation Act, the indemnity agreement and the cross action against Haynes and the Casualty Company.

The trial judge ordered the cross action stricken out, the plea setting up the indemnity agreement as a defense, and all other allegations directed against Haynes and the Casualty Company in other parts of the answer, and dismissed the action as to them "with leave to the Carolina Power & Light Company, if it so desires, to amend its answer to set forth allegations concerning coverage of the Workmen's Compensation Act and agreement for payment of compensation thereunder to the dependents of plaintiff's intestate by M. B. Haynes, without reference to the amount of such compensation as may be necessary to support its special plea of negligence of said M. B. Haynes as a defense to the action of the plaintiff."

From this ruling the plaintiff and the defendant, Carolina Power & Light Company, appealed, assigning error.

Smith, Leach & Anderson and Sale, Pennell & Pennell for plaintiff.

R. F. Phillips; Robinson & Morgan and A. Y. Arledge for Carolina Power & Light Company.

J. W. Haynes for M. B. Haynes.

Smith, Leach & Anderson for Coal Operators Casualty Company.

DENNY, J. It clearly appears from the record herein, that a settlement has been agreed upon between the plaintiff as the personal representative of her intestate and the Coal Operators Casualty Company, the insurance carrier for M. B. Haynes, pursuant to the provisions of the Workmen's Compensation Act; and that this action was instituted within six months of the injury and death of plaintiff's intestate.

Under the original provisions of our Workmen's Compensation Act, Section 11, Chapter 120, of the Public Laws of 1929, an employee or his personal representative had to elect whether he would accept the benefits available to him under the Workmen's Compensation Act, or would proceed in a suit at common law against a third party to recover damages for such injury. And where the injured employee or his personal representative elected to accept the benefits available under the provisions of the Workmen's Compensation Act, such acceptance was a complete bar to his right to proceed with the alternate remedy.

The Act, however, has always provided that where an employer has assumed liability for an award for compensation, he shall be subrogated to such rights as the injured employee or his personal representative had against any other party for such injury or death. Likewise, the Act provided that where an insurance carrier has paid an award for which the employer was liable, the insurance carrier shall be subrogated to all the rights of the employer, and that such subrogated rights may be enforced against a third party in the name of the employer, or the insurance carrier, as the case may be, or in the name of the injured employee or his personal representative.

The case of *Brown v. R. R.*, 202 N.C. 256, 162 S.E. 613, was decided while the original provisions of our Workmen's Compensation Act were in full force and effect. The Court held in that case that while the suit was brought for the primary benefit of the employer or its carrier, if any, neither the employer nor its carrier was a necessary or proper party to the action. However, on a second appeal, reported in 204 N.C. 668, 169 S.E. 419, the Court held that an answer filed by the defendant, pleading the acceptance of an award, pursuant to the provisions of the Workmen's Compensation Act, by the intestate's personal representative, and a plea of negligence on the part of the employer as a bar to any recovery in the action in so far as the employer or its carrier may be beneficiaries

in whose behalf the action was prosecuted, was proper and reversed the trial court which had allowed a motion to strike the answer.

In 1933 the General Assembly amended the Workmen's Compensation Act, eliminating the requirement for an election of remedies, and authorizing the employee or his personal representative to bring an action against a third party if the employer had not instituted such action within six months of the date of such injury or death. Chapter 449, Public Laws of 1933. The Act was amended again by Chapter 622, Session Laws of 1943, which amendment provided "that after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability in writing and filed the same with the Industrial Commission, the employer or his carrier shall have the exclusive right to commence an action." Such action may still be instituted in the name of the injured employee, or his personal representative, and if not brought within six months by the employer or his carrier, the employee or his personal representative may institute such action. G.S. 97-10.

The first question for determination is whether or not the defendant Power Company has the right to plead the payment of an award to the personal representative of the plaintiff's intestate, pursuant to the provisions of the Workmen's Compensation Act, so as to lay the basis for its plea of contributory negligence against M. B. Haynes, the employer. For the insurance carrier in whose behalf this action was in fact instituted is not entitled to recover anything from the defendant Power Company if the employer's negligence contributed to or concurred with the negligence of the defendant in producing plaintiff intestate's injury and death. *Brown v. R. R.*, 204 N.C. 668, 169 S.E. 419. The statute, G.S. 97-10, provides that the insurance carrier shall have no "further rights than those existing in the employer at the time of the injury to or death of the employee."

The defendant Power Company and the employer are not joint tort-feasors, *Brown v. R. R., supra* (202 N.C. 256), consequently the Power Company is entitled to plead the contributory negligence of M. B. Haynes, the employer, as a bar to any recovery by the insurance carrier, who has been subrogated only to his rights. G.S. 97-10; *Brown v. R. R., supra* (204 N.C. 668).

The case of *Sayles v. Loftis*, 217 N.C. 674, 9 S.E. 2d 393, cited by the plaintiff appellee, is not in point. The allegations in the answer filed in that case relative to the payment of compensation under the Workmen's Compensation Act, were not coupled with any plea of negligence on the part of the employer, or with any other defense, and were properly stricken.

The allegations by the Power Company relative to the contract of indemnity and its cross action were properly stricken, since no judgment for damages can be obtained against the Power Company in this action, unless the jury finds that its negligence was the proximate cause, or one of the proximate causes, of the death of plaintiff's intestate. Moreover, if upon the trial the jury should find that the negligence of the employer, M. B. Haynes, contributed to the injury and death of plaintiff's intestate, the insurance carrier cannot recover. Only the excess over and above the amount paid by the carrier, if the amount awarded by the jury should be in excess of that amount, could be collected from the Power Company. Hence, there is no basis for a cross action against the employer or his insurance carrier, *Evans v. Johnson,* 225 N.C. 238, 34 S.E. 2d 73, and the Power Company is not entitled to be indemnified against its own negligence.

Plaintiff's appeal—Affirmed.

Defendant's appeal—Affirmed.

JOHN FRANCIS FOSTER v. CAROLINA POWER & LIGHT COMPANY (ORIGINAL PARTY DEFENDANT) AND M. B. HAYNES AND COAL OPERATORS CASUALTY COMPANY (ADDITIONAL PARTIES DEFENDANT).

(Filed 21 September, 1949.)

APPEAL by plaintiff and defendant Carolina Power & Light Company from *Moore, J.,* at January Term, 1949, of HAYWOOD.

Smith, Leach & Anderson; Jones & Ward and John C. Joyner for plaintiff.

R. F. Phillips; Robinson & Morgan and A. Y. Arledge for Carolina Power & Light Company.

J. W. Haynes for M. B. Haynes.

Smith, Leach & Anderson for Coal Operators Casualty Company.

PER CURIAM. This is a civil action to recover for personal injuries. The legal questions involved in this appeal are identical with those in the case of *Eledge, Administratrix, v. Carolina Power & Light Company, ante,* 584, and the ruling of the court below is upheld for the reasons stated therein.

Plaintiff's appeal—Affirmed.

Defendant's appeal—Affirmed.

STATE v. J. P. STANSBURY.

(Filed 21 September, 1949.)

1. Criminal Law § 17c—

Plea of *nolo contendere* is tantamount to a plea of guilty for the purposes of the particular prosecution, and empowers the court to pronounce judgment against the accused for the crime charged in the indictment.

2. False Pretense § 2: Criminal Law § 62a—

A sentence upon a plea of *nolo contendere* in a prosecution for false pretense that defendant be confined in the State Prison for a period of not less than five nor more than six years, to be assigned to hard labor under the supervision of the State Highway and Public Works Commission, conforms to that authorized by G.S. 14-100 and is within constitutional limitations. N. C. Constitution, Art. XI, Sec. 1.

3. Criminal Law § 62a—

Sentence within the limits prescribed by valid statute cannot be held cruel or unusual in the constitutional sense. N. C. Constitution, Art. I, Sec. 14.

4. Same—

The court, in imposing sentence within the limits prescribed by statute for an offense against the laws of this State, does not abuse its discretion in failing to take into consideration sentence theretofore served by the defendant for a related offense against the laws of the United States, but on the present record it affirmatively appears that the court carefully heard and painstakingly considered all available information concerning the nature of the offense, the character and propensities of defendant and his past record, in fixing the kind and amount of his punishment.

APPEAL by defendant from *Sink, J.*, at the April Term, 1949, of STOKES.

The defendant was brought before the court upon a bill of indictment charging him with obtaining $15.90 in money from the prosecuting witness, M. R. Wall, by falsely pretending "that he, the said J. P. Stansbury, was John Mitchell and was representing the American Legion and was distributing and selling a book containing the photographs of all Stokes County Veterans of World War II," including that of a son of the prosecuting witness who had died while serving in the armed forces of the United States. When the case came on for trial, the defendant entered a plea of *nolo contendere*, which was accepted by the Solicitor by leave of the court. Before pronouncing sentence, the court heard evidence from both the prosecution and the defense with a view to determining what punishment should be meted out to the accused. Such testimony tended to show not only that the defendant had committed the crime charged in the indictment, but also that he had preyed during a substantial period

of time in a like criminal manner upon numerous other persons in North Carolina and elsewhere who had lost sons in the Second World War. Moreover, it appeared on the hearing that between the time of the commission of the specific offense named in the indictment and the trial in this case the defendant had committed a crime against the United States, to-wit, falsely impersonating an officer of the United States and in such pretended character obtaining money from another with intent to defraud such other contrary to the statute embodied in 18 U.S.C.A. 76, and had served 18 months in prison therefor under sentence of the United States District Court for the Eastern District of Tennessee. After hearing all of the testimony on both sides, the court ordered that the defendant "be confined in the State Prison at Raleigh, North Carolina, for a period of not less than 5, nor more than 6 years, to be assigned to hard labor as provided by law under the supervision of the State Highway and Public Works Commission." The defendant excepted to this judgment, and appealed.

Attorney-General McMullan and John R. Jordan, Jr., Member of Staff, for the State.

Buford T. Henderson for the defendant, appellant.

ERVIN, J. Appellant asserts that the sentence is invalid for these reasons: (1) That it inflicts a cruel or unusual punishment upon him contrary to Article I, Section 14, of the Constitution; and (2) that in pronouncing the judgment the court abused its discretion by "failing to take into consideration defendant's sentence in Federal Court for a similar offense."

The defendant's plea of *nolo contendere* constituted a formal declaration on his part that he would not contend with the Solicitor in respect to the charge, and was tantamount to a plea of guilty for the purposes of this particular criminal action. Consequently, the court acquired full power to pronounce judgment against the accused for the crime charged in the indictment, *i.e.*, the felony of obtaining property by false pretenses as defined by G.S. 14-100, when it permitted the State to accept the plea tendered by him. *S. v. Parker,* 220 N.C. 416, 17 S.E. 2d 475; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473, L.R.A. 1918A, 955.

The Legislature has expressly stipulated that any person obtaining property by false pretenses "shall be guilty of a felony, and shall be imprisoned in the State's Prison not less than four months nor more than ten years, or fined, in the discretion of the court." G.S. 14-100. In fixing the punishment for this crime, the lawmakers observed the relevant constitutional limitations. N. C. Const., Art. XI, Sec. 1. Furthermore, the punishment imposed upon the defendant by the judgment of the court

conforms in all respects to that authorized by the statute. Since the sentence in issue finds complete sanction in a valid legislative enactment, it cannot be deemed violative of Article I, Section 14, of the Constitution, forbidding the infliction of "cruel or unusual punishments." *S. v. Levy,* 220 N.C. 812, 18 S.E. 2d 355; *S. v. Brackett,* 218 N.C. 369, 11 S.E. 2d 146; *S. v. Daniels,* 197 N.C. 285, 148 S.E. 244; *S. v. Blake,* 157 N.C. 608, 72 S.E. 1080; *S. v. Manuel,* 20 N.C. 144.

This brings us to a consideration of the second ground urged by the defendant as a basis for invalidating the judgment. The controlling principle on this aspect of the case is thus stated in *S. v. Sudderth,* 184 N.C. 753, 114 S.E. 828, 27 A.L.R. 1180: "It is the accepted rule with us that within the limits of the sentence permitted by law, the character and extent of the punishment is committed to the sound discretion of the trial court, and may be reviewed by this Court only in case of manifest and gross abuse."

Appellant contends that the trial court abused its statutory discretion in pronouncing judgment against him by "failing to take into consideration defendant's sentence in the Federal Court for a similar offense."

This position is insupportable even if it be taken for granted that the court ignored this matter when it pronounced the judgment in controversy. When it passed sentence, the court imposed punishment upon the accused for a crime against North Carolina, *i.e.,* obtaining property by false pretenses, and its power to act in the premises within the discretionary limits established by the Legislature of the State was in no wise circumscribed by the fact that the defendant had been punished by the United States for an offense against it, *i.e.,* falsely impersonating an officer of the United States and in such pretended character obtaining money from another with intent to defraud such other. Besides, it is to be noted that nothing in the record indicates that the court ignored the punishment visited upon the defendant by the United States District Court for the Eastern District of Tennessee when it rendered the judgment in controversy. Indeed, the converse is true. The record affirmatively shows that the court carefully heard and painstakingly considered all available information concerning the nature of the offense with which the accused was charged, and his character, propensities, and past record in fixing the kind and amount of his punishment. In so doing, the court followed a time-honored practice. *S. v. Beavers,* 188 N.C. 595, 125 S.E. 258; *S. v. Woodlief,* 172 N.C. 885, 90 S.E. 137; *S. v. Wilson,* 121 N.C. 650, 28 S.E. 416.

The reasons given necessitate an affirmance of the judgment.

Affirmed.

WACHOVIA BANK & TRUST COMPANY, EXECUTOR AND TRUSTEE UNDER THE WILL OF MARY BELLE BURRUS, v. ROBERT BURRUS AND WIFE, ORA LEE BURRUS.

(Filed 21 September, 1949.)

1. Wills § 44—

A devisee or legatee is put to his election when the will purports to devise or bequeath to another property belonging to the beneficiary, and at the same time devises or bequeaths to the beneficiary property belonging to testator.

2. Same—

The doctrine of election does not apply unless it clearly appears from the will that testator intended to dispose of property belonging to the beneficiary.

3. Same—

The doctrine of election does not apply when the testator purports to devise or bequeath to the beneficiary her own property and at the same time leaves other property owned by testator to the beneficiary, since, in such event, it will be presumed that testator intended the beneficiary to have both.

4. Same—

Testator devised to his wife a life estate in lands owned by them by entireties and devised the remainder after the life estate to another, and also devised to his wife a life estate in other lands actually owned by him which had a value in excess of her rights had she dissented from the will. *Held:* The widow was put to her election, and her acceptance of the life estates with knowledge of the nature of her title in the lands theretofore held by entireties estops her heirs from claiming the remainder therein, the intent of the testator to limit her interest in the land theretofore held by entireties and to devise the remainder to another being apparent from the will.

APPEAL by plaintiff from *Clement, J.*, at July Term, 1949, of SURRY.

This is a civil action brought by the Wachovia Bank & Trust Company, as Executor and Trustee under the will of Mary Belle Burrus, against Robert Burrus and wife, Ora Lee Burrus, to remove a cloud from title of a tract of land in Surry County, North Carolina, known as the Hollifield tract.

The property was conveyed to Dr. J. T. Burrus, and wife, Mrs. J. T. Burrus, as an estate by the entirety, by deed dated 21 August, 1933, and duly recorded.

Dr. Burrus died 8 June, 1936, leaving surviving him his widow, Mary Belle Burrus, who, together with the Wachovia Bank & Trust Company, qualified as Executors of the will of Dr. J. T. Burrus. Dr. Burrus in his last will and testament devised the property in question to his wife,

Mary Belle Burrus, for life, and then to the defendant Robert Burrus, in fee simple.

It is admitted that Mrs. Burrus did not know the title to the Hollifield tract of land had been held by her and her husband previous to his death as tenants by the entirety, at the time she qualified as Executrix, but she was informed of the status of the title, both as Executrix and individually, and having such knowledge took a life estate under the will of her husband, Dr. Burrus, in other property which was worth in excess of $100,000.00 During the remainder of her life, she permitted the defendant, Robert Burrus, to remain in possession of the land now in dispute, without the payment of rent and exercised no control thereof except to list the land for taxes and to pay the taxes thereon.

Mary Belle Burrus died 8 September, 1947, leaving a last will and testament, which has been duly probated; by the terms of such will she devised certain real property, including the Hollifield tract, to the plaintiff in trust.

The parties waived a trial by jury and agreed that the trial judge might hear the case upon the pleadings, the will of Dr. J. T. Burrus, and the stipulations of counsel filed in the record, the pertinent parts of which are set forth above.

His Honor held that Mary Belle Burrus was required to elect as to whether or not she would waive any interest that she had in the lands described in the complaint, and take under the will, or dissent therefrom; and being of the opinion that she elected to take under the will, a decree was entered adjudging the defendants the owners in fee simple of the land in controversy. From this ruling the plaintiff appeals, assigning error.

Roberson, Haworth & Reese for plaintiff.

Woltz & Barber, Attorneys Amici Curiæ.

Allen & Henderson for defendants.

DENNY, J. The sole question for us to determine is whether or not the doctrine of election is applicable to the facts in this case.

The doctrine of election is based upon the principle that a devisee or donee cannot take benefits under a will and reject its adverse provisions. *Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29. The beneficiary under a will is not required to elect unless two benefits are presented which are inconsistent with each other. And when the beneficiary chooses to accept one of them such choice is tantamount to a rejection of the other. He will not be permitted to take under the will and against it. And where the devisor purports to devise property which belongs to the beneficiary, giving it to another, and also devises property of his own to the beneficiary, such beneficiary must make a choice between retaining his own

property, which has been given to another, or take the property which has been given him under the terms of the will. By electing to take the gift from devisor's estate, he is estopped from claiming his own property. *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162; 57 Am. Jur. 1060; 69 C.J. 1089.

In the case of *Elmore v. Byrd, supra, Walker, J.,* in speaking for the Court, said: "It is true there is a *prima facie* presumption, always, that a testator means only to dispose of what is his own, and what he has a right to give; and if it be doubtful, by the terms of his will, whether he had in fact a purpose to dispose of property really belonging to another, that doubt will govern the courts, so that the true owner, even though he shall derive other benefits under the will, will not be driven to make an election. But if, on the other hand, there should be a manifest purpose expressed in the will to dispose of the thing itself, then it is wholly immaterial whether he should recognize it, or not, as belonging to another, or whether he should believe that the title and the right to dispose of it rested in himself or not."

In the recent case of *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584, *Seawell, J.,* points out that where a husband merely attempts "to ration the needs of the wife in her own lands without an alternate gift of his own property, which, under the law is available to her, there is no election, and the probate of the will raises no estoppel and is not detrimental to her assertion of her independent right. There are other duties of her office, the performance of which are not inconsistent with such assertion of right." This principle was determinative of the appeal in *Lamb v. Lamb, supra.*

"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 case 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.

In accord with the above authority, this Court held in *Byrd v. Patterson,* 229 N.C. 156, 48 S.E. 2d 45, that where a husband devised to his wife a life estate in lands held by them as tenants by the entirety, but made no disposition of the remainder which was hers by survivorship, the doctrine of election did not apply, notwithstanding the fact that he gave her other property and she qualified as executrix of the will.

The facts in this case, under our decisions, made an election by Mrs. Burrus imperative. There can be no doubt about the intention of Dr. Burrus to dispose of the land held by him and his wife as tenants by the entirety. He described it as the Hollifield tract. *Elmore v. Byrd, supra.* Furthermore, he limits his wife's interest in the land to a life estate and

devises the remainder to another. But in the face of this limitation of her estate, and the devise of the remainder to another, she proceeded to take a life interest under the terms of the will, in other property which belonged to her husband's estate, worth in excess of $100,000.00. For more than eleven years she accepted the income from the estate of her husband according to the provisions of his will, some of which income would not have been available for her use and enjoyment had she dissented from the will. *Hoggard v. Jordan,* 140 N.C. 610, 53 S.E. 220.

We concur in his Honor's ruling, and the judgment entered below will be upheld.

Affirmed.

JUNE PLEMMONS AND HUSBAND, JAMES PLEMMONS, v. MATILDA CUTSHALL AND HUSBAND, E. L. CUTSHALL, AND SHERMAN TWEED AND WIFE, BELLE TWEED.

(Filed 21 September, 1949.)

1. Courts § 4c—

Since the Superior Court acquires jurisdiction of any special proceeding sent to it on any ground whatever from the clerk, with discretionary power in the Superior Court to remand, G.S. 1-276, a motion in the Superior Court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket, is untenable.

2. Boundaries § 9: Adverse Possession § 17—

The burden is on defendants in a processioning proceeding to establish title by adverse possession when relied on by them, since such claim of adverse possession constitutes an affirmative defense.

3. Boundaries § 10—

Where in a processioning proceeding it appears that the parties are owners of adjoining tracts and that a *bona fide* dispute exists between them as to the location of the dividing line, nonsuit is not proper.

4. Same: Parties § 9: Trial § 21—

Nonsuit on the ground of want of necessary parties is improper, but if other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. G.S. 1-73.

APPEAL by plaintiffs from *Clement, J.,* at February Term, 1949, of MADISON. Reversed.

Processioning proceeding under G.S. Chap. 38, to locate and establish a disputed boundary line between adjoining property owners.

The plaintiffs allege that they and defendants own adjoining tracts of land and that the true dividing line is in dispute. Defendants, answering, admit they and plaintiffs are adjoining property owners, plead the indefiniteness of the line as claimed by plaintiffs as set forth in their complaint, and allege ownership by adverse possession for more than twenty years. They do not describe the true line as contended for by them or plead adverse possession under color of title.

The clerk, being of opinion the pleadings raised an issue of title to real estate, transferred the cause to the civil issue docket for trial.

During the trial in the court below, the court announced that it had concluded that it is necessary to bring in other parties to the end that the whole controversy may be determined and that "judgment even after verdict could not be signed . . . he could not sign a judgment in the matter even if proceeded with to the jury and a verdict." Plaintiffs moved for time to bring in other parties and for a continuance to that end. The motion was denied. Then, after defendants had examined another witness but before plaintiff closed, the court, on motion of defendants, entered judgment of nonsuit. Plaintiffs requested that the judgment show the case is dismissed for lack of necessary parties. The court replied that it was being dismissed because plaintiffs had failed to make out a case. Judgment of nonsuit was entered and plaintiffs excepted and appealed.

Calvin R. Edney and Geo. M. Pritchard for petitioner appellants.
Carl R. Stuart for respondent appellees.

BARNHILL, J. The appellees here assert that the case was improperly transferred to the civil issue docket and by reason thereof the judgment should be sustained for want of jurisdiction. This position is untenable.

The clerk is but a part of the Superior Court. *Williams v. Dunn,* 158 N.C. 399, 74 S.E. 99; *Bynum v. Bank,* 219 N.C. 109, 12 S.E. 2d 898. Whenever a special proceeding begun before him is, for any ground whatever, sent to the Superior Court before the judge, the judge has jurisdiction. G.S. 1-276; *McDaniel v. Leggett,* 224 N.C. 806, 32 S.E. 2d 602, and cases cited. This rule applies to a processioning proceeding. *Hill v. Young,* 217 N.C. 114, 6 S.E. 2d 830.

While it may be the court below could have remanded the cause, his failure to do so may not be held for error. G.S. 1-276; *York v. McCall,* 160 N.C. 276, 76 S.E. 84.

While the court surveyor ran many lines, apparently for the purpose of locating the disputed boundary, neither his testimony nor the court map definitely points out this line. The record is so lacking in clarity

it is difficult, if not impossible, to determine with assurance just which line is at issue.

The jurors found themselves in the same quandary. During the progress of the trial, one juror stated: "This jury would like to definitely know so that we can follow the witness: what is the dispute; we want to know if they will point out on this map just what is in dispute." Counsel then, at the suggestion of the court, agreed that a small diamond shaped tract, lines 3-4-5-6-3 on the map, is in dispute. Although the testimony seems to indicate that the mill tract or the boundary lines thereof is also in dispute, counsel for defendants stated they owned it. As counsel for plaintiffs did not challenge this statement, we assume it to be true.

This small tract joins plaintiffs' main boundary at point 3 on the map. They offered evidence tending to show record title thereto which would fix the dividing line as 3-4-5 on the map.

The defendants assert ownership by adverse possession of substantially all the small tract. But this is an affirmative defense and the burden of establishing it rests on them. *Hill v. Young, supra; Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633.

Thus it appears the parties are adjoining landowners and that there is a *bona fide* dispute as to the true location of the boundary line, which dispute puts the title to a small part of the land in issue. Judgment of nonsuit was not in order. *Cornelison v. Hammond, supra.*

We are unable to perceive why it was deemed necessary to bring in other parties. If it was necessary so to do, the court should have ordered a continuance so as to provide a reasonable time for them to be brought in and to plead. Absence of necessary parties did not warrant a nonsuit. G.S. 1-73; *Joyner v. Fiber Co.,* 178 N.C. 634, 101 S.E. 373; *Jones v. Griggs,* 219 N.C. 700, 14 S.E. 2d 836; *Moore v. Massengill,* 227 N.C. 244, 41 S.E. 2d 655; *Griffin & Vose, Inc. v. Minerals Corp.,* 225 N.C. 434, 35 S.E. 2d 247.

Whether other parties are necessary for a complete determination of the controversy is still open for the court below to decide. Such action is not precluded by this opinion.

If the location of lines other than those indicated is at issue, counsel may attribute the oversight on our part to the state of the record. In any event, neither party could be prejudiced thereby for there must be a new trial at which any issue properly arising on the pleadings and testimony may be submitted to the jury.

Reversed.

STATE v. ZENO HARDEN ABSHER, JUSTICE ODELL RICHARDSON, ARL BLAINE COCKERHAM AND BRUCE JOINES.

(Filed 21 September, 1949.)

1. Criminal Law §§ 34g, 53c—

Evidence of acts done by the defendants tending to show an unlawful conspiracy between them which culminated in the commission of the crime charged in the bill of indictment is competent notwithstanding the bill of indictment does not charge conspiracy, and the court properly charges the law of criminal conspiracy when warranted by such evidence.

2. Criminal Law § 52a (3): Larceny § 7—

Circumstantial evidence tending to show an unlawful conspiracy between the defendants to steal an automobile and steps taken by them after the car was stolen to conceal its identity by putting the body on the chassis of another vehicle bought by one of defendants, and registering the reassembled automobile in another state, *is held* sufficient to overrule defendants' motion to nonsuit in a prosecution for larceny.

3. Larceny § 5—

The finding of stolen property in defendants' possession some three months after it was stolen, under the circumstances of this case, *is held* too remote to raise a presumption of guilt of larceny, and the court's charge thereon *is held* for error upon exception.

APPEAL by defendants Absher and Joines from *Sink, J.*, at April-May Term, 1949, of SURRY. New trial.

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

Trivette, Holshouser & Mitchell for defendants, appellants.

DEVIN, J. The defendants were charged in the bill with the larceny of an automobile, the property of Troy Martin, and in a second count with receiving the stolen property knowing it to have been stolen. There was verdict of guilty on both counts as to defendants Absher and Joines. The other defendants named in the bill were not convicted. From judgment imposing prison sentence the defendants Absher and Joines appealed.

The defendants assign error in the denial of their motion for judgment of nonsuit, but we think the evidence produced by the State was sufficient to carry the case to the jury.

The State's evidence tended to show that on 8 March, 1948, witness Martin's 1947 Model Ford DeLuxe Sedan was stolen in Elkin in Surry County. Three months later, on 7 June, 1948, in North Wilkesboro in the adjoining County of Wilkes defendant Absher was found in posses-

sion of an automobile, the body of which was identified as having originally been a part of the automobile stolen from Martin, but the chassis and motor had belonged to a different vehicle. Defendant Absher produced a temporary registration card for this automobile, issued by the Motor Vehicle Department of Virginia, in name of Harden Absher, Galax, Virginia, dated 31 March, 1948. The officer testified Absher stated that while he was in Galax he bought this automobile from Joines, who was a stranger to him, and that he made application for title in Virginia. The State then offered evidence that in February, 1948, defendant Joines had purchased from the Ford automobile dealer in Elkin a 1947 Model Ford DeLuxe Sedan which had been wrecked. The top had been crushed in and a fender was off. Joines paid $450 for the chassis, motor, and remainder of the body. The motor number, or chassis serial number, of the car bought by Joines was the same as that found on the automobile in North Wilkesboro in possession of Absher. Both defendants are residents of Wilkes County, and when arrested were found in bed together in a place in that county. Joines stated to the officer he had known Absher two or three years. The defendants offered no evidence.

The court permitted the jury to consider this evidence as tending to show an unlawful conspiracy between those two defendants to steal Martin's automobile, disassemble it, and replace a part of it on a chassis of the same model which one of them had previously bought, and to register the reassembled automobile in Virginia so as to conceal its identity and enable them fraudulently to appropriate the property of the State's witness. Defendants' exception to the court's instruction to the jury on this phase is without substantial merit. It was not necessary, in order to submit to the jury the law as to criminal conspiracy, that the bill specifically charge conspiracy, if the evidence was sufficient to warrant this view. *S. v. Triplett,* 211 N.C. 105, 189 S.E. 123.

Considering the evidence offered in the light most favorable for the State, we think there were inferences legitimately deducible therefrom pointing to an unlawful agreement and plan on the part of these defendants, entered into and carried through, in the promotion of a common design and purpose, unlawfully to appropriate and possess this property as alleged in the bill of indictment. The evidence seems to tell a fairly connected story, and we conclude it was of sufficient probative force to withstand defendants' demurrer.

However, we think there was error in the court's charge to the jury in permitting them to take into consideration, in arriving at their verdict, inferences of guilt of larceny arising from the possession of the stolen property. After stating to the jury the general principle of law that when an article of personal property has been stolen and shortly thereafter is found in the possession of a person such person is presumed to be

the thief, the court charged, "Under this principle of law the State contends and insists that within a reasonable time the car, or part of the car, allegedly stolen from Martin, was found in possession of Absher in North Wilkesboro . . . that when you consider that, with all other testimony, the State insists you should conclude to a moral certainty that the entire transaction arose out of criminal conspiracy, and that your verdict should be guilty as charged in the bill of indictment."

In so charging we think the court inadvertently submitted to the jury a point of view more favorable to the State than the facts warranted. The jurors were permitted to consider the circumstances of this case in the light of the doctrine of the recent possession of stolen goods as creating an inference or presumption of guilt, and, under that principle of law, to give added weight to the evidence of the possession of the stolen property in North Wilkesboro, as ground for rendering verdict of guilty, when according to the evidence three months had elapsed from the time of the larceny of the automobile to the time a part of it was found in possession of the defendant in North Wilkesboro. Under the circumstances here this would not warrant submitting this principle to the jury as the basis for a verdict of guilty as charged in the bill. *S. v. Cameron,* 223 N.C. 449, 27 S.E. 2d 81; *S. v. Holbrook,* 223 N.C. 622, 27 S.E. 2d 725; *S. v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920; *S. v. Jones,* 227 N.C. 47, 40 S.E. 2d 458.

We think this instruction must be held for error, and the defendants Absher and Joines entitled to a new trial, and it is so ordered.

New trial.

COY G. SMITH v. J. J. GIBBONS.

(Filed 21 September, 1949.)

1. Pleadings § 2—

The word "transaction" as used in G.S. 1-123 (1) means something which has taken place whereby a cause of action has arisen, either *ex contractu* or in tort; and the term "subject of action" as used in this statute means the thing in respect to which plaintiff's right of action is asserted.

2. Same—Cause ex contractu and causes in tort held not to have arisen from same transaction nor transactions connected with same subject of action.

A cause of action to recover the balance of compensation due plaintiff under an express contract of employment is improperly united with a cause of action to recover damages for assault committed by defendant upon plaintiff when he visited the office of the defendant to discuss the matter, and a cause of action to recover damages for false imprisonment of plaintiff by defendant growing out of the assault, since the action *ex contractu*

is asserted in respect to the contract of employment and arose out of the wrongful breach thereof by defendant, while the causes of action in tort are addressed to the violation of right of liberty and security of person, constituting a different subject of action and arising out of a different transaction, *i.e.*, the infliction of personal injuries; but the causes of action in tort may be properly joined since they arose at the same time out of the same transaction, and further, relate to injuries to the person. G.S. 1-123 (3).

3. Pleadings § 19b—

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. G.S. 1-127 (5), G.S. 1-132.

APPEAL by defendant from *Morris, J.*, at the February Term, 1949, of WILSON.

The complaint states these three causes of action: (1) A cause of action to recover the remainder of the stipulated compensation due plaintiff by defendant for personal services rendered before 18 November, 1947, under an express contract of employment made by the parties in "the early part of the year 1947"; (2) a cause of action to recover damages for an assault committed upon plaintiff by defendant on 18 November, 1947, when plaintiff visited the office of the defendant in Wilson, North Carolina, "for the purpose of discussing the balance of money to be paid to the plaintiff" upon the express contract mentioned in the first cause of action; and (3) a cause of action to recover damages for false imprisonment of plaintiff by defendant accompanying the assault forming the basis of the second cause of action.

The defendant demurred to the complaint in the court below for misjoinder of the causes of action, and the court overruled the demurrer. The defendant appealed, assigning this ruling as error.

Sharpe & Pittman and Robert A. Farris for plaintiff, appellee.

Connor, Gardner & Connor for defendant, appellant.

ERVIN, J. The complaint states three causes of action, and the question arises, Are they improperly united? G.S. 1-127 (5).

The first cause of action arises on a contract, and the second and third causes of action arise in tort. Hence, they could not have been united in the same complaint at common law. McIntosh: North Carolina Practice and Procedure in Civil Cases, section 420. Besides, it is apparent that the joinder of the first cause of action with the second and third causes of action is not even sanctioned by the Code of Civil Procedure unless they fall within the purview of the section providing that "the plaintiff may unite in the same complaint several causes of action, of legal or

equitable nature, or both, where they all arise out of the same transaction, or transactions connected with the same subject of action." G.S. 1-123 (1); *Cedar Works v. Lumber Co.*, 161 N.C. 603, 77 S.E. 770; *Hawk v. Lumber Co.*, 145 N.C. 48, 58 S.E. 603; *Reynolds v. R. R.*, 136 N.C. 345, 48 S.E. 765; *R. R. v. Hardware Co.*, 135 N.C. 73, 47 S.E. 234; *Daniels v. Baxter*, 120 N.C. 14, 26 S.E. 635; *Benton v. Collins*, 118 N.C. 196, 24 S.E. 122; *Hodges v. R. R.*, 105 N.C. 170, 10 S.E. 917.

The word "transaction," as employed in this section, means something which has taken place whereby a cause of action has arisen, and embraces not only contractual relations but also occurrences in the nature of tort. *Stark County v. Mischel*, 33 N.D. 432, 156 N.W. 931. See, also, in this connection: *Cheatham v. Bobbitt*, 118 N.C. 343, 24 S.E. 13, and 1 Am. Jur., Actions, section 85. The term "subject of action," as used in the same statute, denotes "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." *Hancammon v. Carr*, 229 N.C. 52, 47 S.E. 2d 614.

When the complaint is tested by these principles, it is plain that the action *ex contractu* and the two actions *ex delicto* set forth therein did not arise out of the same transaction, or transactions connected with the same subject of action. The plaintiff's first cause of action is asserted in respect to his contract of employment, and arose out of the wrongful breach of such contract by defendant. His second and third causes of action are addressed to a different subject of action, *i.e.*, his violated right of liberty and security of person, and arose out of a different transaction, *i.e.*, personal injuries inflicted upon him by defendant. Thus, it appears that the cause of action based on contract and the two causes of action founded on tort are improperly united. *Pressley v. Tea Co.*, 226 N.C. 518, 39 S.E. 2d 382.

This conclusion does not necessarily compel a dismissal of the action. The judge of the Superior Court is authorized by statute to divide an action on the docket for separate trials in cases where there is a mere misjoinder of causes of action. G.S. 1-132; *Pressley v. Tea Co., supra.*

If this course should be taken by the judge of the Superior Court in this instance, the causes of action for assault and false imprisonment might well be tried together. They arose at the same time out of the same transaction. Moreover, their joinder is permitted by the statutory provision authorizing a plaintiff to unite in the same complaint several causes of action arising out of injuries to the person. G.S. 1-123 (3).

For the reasons given, the judgment overruling the demurrer is

Reversed.

OLLIE B. TYNCH, JAMES A. BRIGGS, HUBERT WILSON, RALEIGH WILSON, HARRY WILSON, DEANNIE W. MIZZELLE, DAISY D. BLUNT, WOODROW WILSON, ELIZABETH B. PARRISH, BERTHA B. HUNTER, THOMAS MUND (WIDOWER OF LULA BRIGGS, DECEASED), MURIEL E. DAVIS, AND MYRTLE FRY JOHNSON, HEIRS AT LAW OF J. R. BRIGGS, DECEASED, v. W. LINWOOD BRIGGS, CURTIS LEIGH BRIGGS (MINOR) AND JAMES HERBERT BRIGGS (MINOR), HEIRS AT LAW OF J. R. BRIGGS, DECEASED.

(Filed 21 September, 1949.)

1. Wills § 33b—

The rule in *Shelley's case* applies when the word "heirs," used in reference to the remainder after a freehold estate to the first taker, refers to heirs general as takers *qua* heirs in an indefinite line of succession, and nothing else appears; but the rule does not apply when "heirs" refers to a restricted class or particular persons of whom the term is merely *descriptio personarum.*

2. Same—Rule in Shelley's Case held inapplicable in this case.

The will in question devised to testator's wife a life estate with remainder over to testator's son for life "in remainder to his lawful heirs," with provision that in the event the son should die without lawful heirs, then to testator's daughter for life with remainder to her heirs, with further provision that if she should die without "heirs of her body lawfully begotten" then the lands to be sold and the proceeds divided *per stirpes* among testator's heirs. *Held:* It is apparent from the will that the words "lawful heirs" used in connection with the devise to testator's son were used to describe a restricted class and not to refer to heirs general of the son, and the rule in *Shelley's case* does not apply.

APPEAL of defendant W. Linwood Briggs from *Carr, J.,* March Term, 1949, GATES Superior Court.

This was a proceeding for the partition of lands described in the petition, was transferred to the Civil Issue Docket for trial on the plea of sole seizin by Linwood Briggs, one of the respondents. Jury trial was waived and by consent the matter was heard by Judge Carr at March Term, 1949, of Gates Superior Court, on stipulated facts.

In the stipulation it was agreed that "the issues raised in this action are limited to and involve only the title of James Briggs . . . to the lands devised under paragraph three of the will of Allen Briggs, Sr."

The third paragraph of the will reads as follows:

> "I give and bequeath to my wife Sarah all the remainder of my real estate including the dwelling and other houses on said remainder for the term of her natural life and after her death to my son James for the period of his natural life in remainder to his lawful heirs and in the event the said James should die without lawful heirs then in remainder to my daughter Sallie Ann for her life and after her

death to the heirs of her body lawfully begotten—and in the event of the death of the said Sallie Ann without heirs of her body lawfully begotten then said lands shall be exposed to public sale by my executor hereinafter mentioned and the proceeds arising from such sale be equally divided between and among all my children then alive and the lawful heirs of any child that may be dead the children of said deceased child to take the parents share."

Linwood Briggs' assertion of title to the lands in controversy is based on the contention that, on a proper construction of the will, the "Rule in Shelley's Case" applies to the devise to James Briggs, vesting in him a title in fee to the item formally devised to him as a remainder after Sarah's life estate, for the period of his natural life in remainder to his lawful heirs." Linwood holds a fee simple deed from James to the land.

The petitioners deny the application of the rule, contending that such construction is inconsistent with the phraseology of the devise.

The court below found with the petitioners, rendered judgment that petitioners and respondents are owners of the lands described in item three (alone involved in controversy), and ordered sale for partition.

The respondent Linwood Briggs excepted and appealed.

Thomas L. Woodward and Godwin & Godwin for plaintiffs, appellees.
W. D. Boone for Defendant W. Linwood Briggs, appellant.

SEAWELL, J. Although a previous life estate is given to Sarah, in considering the application of the Rule to James' devise, he is technically the first taker. It is our first concern to determine who were meant by the testator as "lawful heirs" of James as second takers. If the reference is to heirs general, as takers *qua* heirs in an indefinite line of succession, and nothing else appeared, the application of the Rule is, as said in *Hampton v. Griggs, infra,* inexorable; if it refers to a restricted class or particular persons of whom the term is merely *descriptio personarum,* the rule is completely rejected. "If those who take under the Second devise take the same estate they would take as heirs or as heirs of his body, the rule applies, otherwise not." *Hampton v. Griggs,* 184 N.C. 13, 113 S.E. 501; *Puckett v. Morgan,* 158 N.C. 344, 74 S.E. 15; Minor on Real Property, p. 847.

The single expression "lawful heirs" does not stand alone. The testator uses the same term in further disposition of the item in a connection that makes it clear he was not, in either instance, referring to general heirs—"in the event the said James should die without lawful heirs then in

remainder to my daughter Sallie Ann for life." James could not die without heirs (*in the general sense*) as long as Sallie Ann, his sister, lived.

As we have observed, the first use of the term is not final; nor is its second use in a connection irreconcilable with any reference to general heirs the only significant factor in construction: The mere fact of further and more particular disposition of the subject item in the manner set out should be sufficient to defeat the construction contended for by the respondent.

On a contextual reading we must regard the language employed in the devise not as referring to general heirs, but as *descriptio personarum*, and find it impossible to reconcile its use with the rule in *Shelley's case*. It does not apply. *Hampton v. Griggs, supra; Puckett v. Morgan, supra; Francks v. Whitaker,* 116 N.C. 518, 21 S.E. 175; *Rollins v. Keel,* 115 N.C. 68, 20 S.E. 209; *Bird v. Gilliam,* 121 N.C. 326, 28 S.E. 489; *Williamson v. Cox,* 218 N.C. 177, 10 S.E. 2d 662.

The judgment is

Affirmed.

STATE v. PAUL SHEPHERD.

(Filed 21 September, 1949.)

1. Criminal Law §§ 17c, 60b—Plea of nolo contendere supports sentence for the offense charged.

The record recited that defendant, through his counsel, "enters a plea of *nolo contendere* and permits the court to hear the evidence and find the facts." After hearing evidence the court announced that defendant was guilty of at least two charges on his own testimony, but later stated that the court had "rendered no verdict" but was pronouncing judgment on the plea of *nolo contendere*. *Held:* The court is authorized to render judgment upon a plea of *nolo contendere* and if defendant had intended the plea to be conditional, with the ultimate issue of his guilt or innocence to be determined by the court, he had ample opportunity to request permission to withdraw his plea, and in the absence of such request the judgment is affirmed.

2. Criminal Law § 81b—

The burden is upon appellant to show error against the presumption of regularity.

APPEAL by defendant from *Sink, J.*, at May Term, 1949, of ROCKINGHAM.

Criminal prosecution on indictments charging the defendant with (a) forgery and uttering and (b) embezzlement of public school funds.

The record contains the recital that the defendant, through his counsel, "enters a plea of *nolo contendere,* and permits the court to hear the evidence and find the facts."

There was a hearing before the court, both sides offering evidence, at the conclusion of which the court announced that the defendant was "guilty of at least two of the charges" on his own testimony. The court later stated, however, that he had "rendered no verdict," but was pronouncing judgment on "the defendant's plea of *nolo contendere.*"

Judgment: Imprisonment in the State's Prison for not less than one nor more than two years on each charge, the judgments to run concurrently.

The defendant appeals, assigning errors.

Attorney-General McMullan, Assistant Attorney-General Rhodes, and Forrest H. Shuford, II, Member of Staff, for the State.

P. W. Glidewell, Sr., and R. E. Sentelle for defendant.

STACY, C. J. The question posed is the sufficiency of the record to support the judgment.

It must be conceded that some dubiety arises in respect of the intent, scope and purpose of the hearing before the trial court as the transcript is contradictory on the subject. The defendant contends that his plea of *nolo contendere* was a conditional one with the ultimate issue of his guilt or innocence to be determined by the court. He now concedes that such procedure was ill advised and should be held for naught. *S. v. Camby,* 209 N.C. 50, 182 S.E. 715. The court seems to have had a different understanding of the matter. However, in the absence of a request by the defendant to withdraw his plea of *nolo contendere,* we cannot say reversible error has been made to appear. He had ample opportunity in the trial court to interpose such request, if he there felt aggrieved by any misunderstanding or the turn of events.

It is true the language of the plea and the pronouncement of guilt at the conclusion of the evidence tend to support or at least to lend color to the defendant's view. These are overborne, we think, by the announcement that the court was rendering no verdict, but was pronouncing judgment on the defendant's plea of *nolo contendere,* which later statement appears without challenge or objection on the record. Thus, the case pivots on an interpretation of the record with something to be said on both sides and the defendant required to show error against a presumption of regularity. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *Cole v. R. R.,* 211 N.C. 591, 191 S.E. 353.

For purposes of judgment and disposition, a plea of *nolo contendere* has the same effect as a plea of guilty. *S. v. Ayers,* 226 N.C. 579, 39 S.E. 2d 607; *S. v. Parker.* 220 N.C. 416, 17 S.E. 2d 475; *S. v. Burnett,* 174 N.C. 796, 93 S.E. 473.

Affirmed.

J. P. CASSADA ET AL. v. LUCINDA CASSADA ET AL.

(Filed 21 September, 1949.)

1. Limitations of Actions § 9—

In an action to establish a resulting trust instituted shortly after the guardian's death upon evidence that the lands were conveyed to the guardian personally but were paid for with guardianship funds, it is error to enter nonsuit upon the plea of laches and the statutes of limitation upon evidence that the guardian remained in possession for over forty years and devised same to plaintiffs by will when defendants offer evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there is no evidence of disavowal of the trust or adversary holding during the life of the guardian.

2. Trusts § 4b—

The fact that a guardian, in the sale of guardianship lands for reinvestment, purchased the new lands before the sale of the guardianship lands does not defeat the establishment of a resulting trust in the new lands when it appears from the guardian's annual report that the proceeds from the sale of the guardianship lands were disbursed in making payment on the balance due on the new lands secured by a mortgage or deed of trust.

APPEAL by plaintiffs from *Moore, J.,* at April Term, 1949, of BUNCOMBE.

Civil action to impress a trust on land.

The record discloses that W. J. Cassada, late of Buncombe County, was twice married. The plaintiffs are children of his first wife who died in 1901. They claim through her. The defendants are the children of the second marriage and their mother, the surviving widow. They claim under the will of W. J. Cassada who died on 25 December, 1945.

In 1902 the plaintiffs inherited 78 acres of land in Madison County from their maternal grandfather. During the same year, W. J. Cassada had himself appointed guardian of his six minor children, plaintiffs herein. In August, 1903, the guardian applied for and obtained permission to sell the 78 acres of land belonging to his wards in Madison County and invested the proceeds in the "Judge West Farm" in Buncombe County.

In his annual report as guardian, filed 17 October, 1905, appears the following items: Receipts: . . . "To hand from sale of land $625.00"; Disbursements: . . . "By invested in the Judge West Farm 641.75."

It appears that W. J. Cassada took title individually to the "Judge West Farm" in March, 1903, and immediately executed a mortgage or deed of trust thereon to secure an indebtedness of $1,000, maturing 19 March, 1905. It is contended by the plaintiffs that he paid off this mortgage with moneys derived from the sale of their land, and that this was the guardian's method of investing their funds in the "Judge West Farm" as shown by his annual account filed in 1905.

W. J. Cassada lived on the "Judge West Farm" from the time of its purchase until his death in 1945. He left a will devising the farm to the defendants, so they allege in their answer.

In 1939, T. T. White tried to purchase the "Judge West Farm" from W. J. Cassada. He told him that he could not make a good title because his older children had an interest therein.

The defendants claim title by virtue of W. J. Cassada's "ownering" the land for more than 40 years and devising it to them. They also plead laches, and the three, six, seven, and twenty year statutes of limitation.

At the close of plaintiffs' evidence, there was judgment as in case of nonsuit, from which the plaintiffs appeal, assigning errors.

George M. Pritchard and E. L. Loftin for plaintiffs, appellants.
James E. Rector for defendants, appellees.

STACY, C. J. The question for decision is the sufficiency of the evidence, taken in its most favorable light for the plaintiffs, to survive the demurrer.

The plaintiffs having shown an admission of trust, *Dixon v. Dixon,* 145 N.C. 46, 58 S.E. 604, and no disavowal or adversary holding during the life of W. J. Cassada, *Weeks v. Weeks,* 40 N.C. 111, we think the evidence was such as to require its submission to the jury, or at least to put the defendants to their proof.

The fact that title was taken to the farm in Buncombe County prior to the sale of plaintiffs' land in Madison would not perforce destroy the acknowledgment made by the guardian in his 1905 report that he had invested funds belonging to his wards in the "Judge West Farm." On demurrer the inferences are to be taken in favor of the plaintiffs.

While Webster makes no reference to the verb "ownering" as used by the defendants, its meaning seems quite clear, if not entirely exact and precise. At any rate, it appears worthy of preservation as a bit of mountain lore.

There was error in entering judgment of nonsuit on the record as it now appears.

Reversed.

ANSON G. BETTS AND WIFE, HATTIE BETTS; THE CITIZENS BANK, INC., AND J. C. RAMSEY, TRUSTEE, v. SOUTHERN RAILWAY.

(Filed 21 September, 1949.)

1. Railroads § 7—

Evidence tending to show that defendant railway company permitted the accumulation of dry brush, trash, leaves and grass on its right of way, with testimony of witnesses that fire broke out on the right of way immediately after defendant's engine had passed and within 12 or 15 feet of where the engine had been, and that the fire spread from the right of way to plaintiffs' adjoining land, *is held* sufficient to overrule motion to nonsuit in an action against the railroad company for damages for the fire.

2. Trial § 22c—

Inconsistencies or contradictions in the testimony of one of plaintiffs' witnesses does not justify nonsuit, the credibility of the witnesses and the weight to be given their testimony being in the exclusive province of the jury.

APPEAL by plaintiffs from *Clement, J.*, at March Term, 1949, of MADISON. Reversed.

Carl R. Stuart for plaintiffs.

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

DEVIN, J. Plaintiffs instituted this action to recover damages for the burning over of their land by a fire alleged to have been caused by sparks emitted by one of defendant's locomotives. They alleged that their loss was due to defendant's negligence in that it permitted inflammable and combustible matter to accumulate on its right of way, and that live cinders and sparks emitted from one of its coal burning steam locomotives ignited dry leaves and grass on the defendant's right of way adjoining plaintiffs' land, and that the fire thus caused burned over a large area of their land. It appears that where the fire occurred and plaintiffs' land adjoined the right of way of the defendant, the general direction of the railroad is east and west, and that on one side of the track is the French Broad River, and on the other side mountains.

In the production of evidence to support their allegations, plaintiffs had the aid of two witnesses who testified that on the day the fire burned plaintiffs' land they were on a rock in the river engaged in fishing, and

from this vantage point they saw a heavy freight train drawn by defendant's engine proceeding east "pulling pretty hard around the curve," and that immediately after that train passed—indeed before the rear of the train had passed—they observed fire spring up on the right of way; that it caught in a patch of sage or dried grass, on top of a rock which juts out over the railroad. They testified the fire caught in 12 or 15 feet of where the smokestack of the engine had passed. Evidence was also offered tending to show there was a large accumulation of dry brush, trash, leaves and grass on the right of way, and that the fire which originated on the right of way spread and burned over plaintiffs' land. Defendant offered no evidence.

There was evidence of plaintiffs' title and of a negligently permitted accumulation of combustible matter on the right of way at this point, and we think the testimony of the fishermen, if accepted, was sufficient to raise the reasonable inference that this combustible matter on the right of way was ignited by a spark from defendant's engine. Hence plaintiffs were entitled to have their case submitted to the jury under the rule established by numerous decisions of this Court. *Moore v. R. R.*, 124 N.C. 338, 32 S.E. 710; *Williams v. R. R.*, 140 N.C. 623, 53 S.E. 448; *Knott v. R. R.*, 142 N.C. 238, 55 S.E. 150; *McRainey v. R. R.*, 168 N.C. 570, 84 S.E. 851; *Broadfoot v. R. R.*, 174 N.C. 410, 93 S.E. 932. True, another witness for plaintiffs gave evidence which was susceptible of being understood as supporting the view that the fire started elsewhere and burned down the mountain to the railroad, but inconsistent or even contradictory testimony from a witness will not justify a nonsuit if there be evidence from other witnesses sufficient to make out a case. *Poe v. Tel. Co.*, 160 N.C. 315, 76 S.E. 81; *Hadley v. Tinnin*, 170 N.C. 84, 86 S.E. 1017; *Chestnutt v. Durham*, 224 N.C. 149, 29 S.E. 2d 339. The credibility of the witnesses and the weight to be given their testimony were matters exclusively within the province of the jury.

The judgment of nonsuit will be vacated as having been improvidently entered.

Reversed.

ERNEST LUNSFORD v. GEORGE MARSHALL AND BOBBY HALL, TRADING AND DOING BUSINESS AS THE 138 TAXI COMPANY.

(Filed 21 September, 1949.)

1. Carriers § 21b—

Evidence that a cab driver traversed a sharp turn at 40 miles per hour, and that the violent motion of the cab threw plaintiff, a passenger, against the right rear door, that the door came open, and plaintiff fell from the cab to his injury, *is held* sufficient evidence of negligent operation of the

taxicab to overrule the cab company's motion to nonsuit in the passenger's action for damages.

2. Same—

Plaintiff passenger testified that he was thrown against the rear door of the taxicab by the violent motion of the cab, that the door came open, and that he was thrown from the cab to his injury. Plaintiff testified that he did not know whether the door was securely fastened or not, and the driver testified that as far as he knew the door was in perfect condition. *Held:* It was error for the court to submit to the jury as an element of negligence whether the cab company failed to maintain the door and lock in proper condition.

3. Trial § 31c—

It is error for the court to submit to the jury as evidence of a fact in issue that which merely raises a possibility or conjecture.

APPEAL by defendants from *Shuford, Special Judge,* at February Term, 1949, of BUNCOMBE. New trial.

Cecil C. Jackson for plaintiff, appellee.

Williams & Williams for defendants, appellants.

DEVIN, J. This was an action to recover damages for personal injuries sustained by plaintiff as result of being thrown from defendants' taxicab in or near the City of Asheville.

Plaintiff was a passenger in one of defendants' taxicabs 4 April, 1948, about 9 p.m., and, according to his testimony, the cab was being driven at an excessive and unlawful rate of speed. As it traversed a sharp left turn at the rate of 40 miles per hour, plaintiff was thrown violently against the right rear door, his right shoulder struck the door, the door came open, and he was thrown from the cab to the pavement, and injured. Verdict and judgment were for the plaintiff and defendants appealed.

There was sufficient evidence of negligent operation of the taxicab to carry the case to the jury and defendants' motion for judgment of nonsuit was properly denied. *Garvey v. Greyhound Corp.,* 228 N.C. 166, 45 S.E. 2d 58. Evidence of contributory negligence on the part of the plaintiff, if any, was insufficient to bar recovery.

However, we think there was error in the court's instructions to the jury on the first issue which necessitates a new trial. In charging the jury the court stated that one of the plaintiff's contentions was that defendants were negligent in failing to have and maintain the door and lock of the taxicab in proper condition, and thereafter charged the jury if they should find from the evidence, and by its greater weight, that the door and lock were defective, or the defendants' driver failed to operate the cab at a lawful rate of speed, or failed to exercise due care for the

safe conveyance of plaintiff, and they further found that the failure of defendants "in any of these respects," was the proximate cause of the injury, it would be their duty to answer the first issue yes. Thus the court permitted the jury to consider the question of a defective door and lock as one of the grounds upon which a favorable verdict for the plaintiff might be returned.

There does not appear in the record any evidence that the door or lock on the taxicab were defective. Plaintiff testified he did not touch the door at any time, except when thrown against it by the violent motion of the cab. Nor is there evidence that he observed the door. He said he did not know whether the door was securely fastened or not. Defendants' driver testified so far as he knew the door was in perfect condition.

Circumstances which raise merely a possibility or conjecture should not be left to the jury as evidence of a fact which a party is required to prove. *Sutton v. Madre,* 47 N.C. 320; *Brown v. Kinsey,* 81 N.C. 245; *S. v. Prince,* 182 N.C. 788, 108 S.E. 330; *Kirby v. Reynolds,* 212 N.C. 271 (280), 193 S.E. 412; *Carruthers v. R. R.,* 215 N.C. 675, 2 S.E. 2d 878.

In *Seagroves v. Winston,* 167 N.C. 206, 83 S.E. 251, *Chief Justice Clark* observed, "The submission of any question of fact to a jury without sufficient evidence to warrant a finding is error."

In *Garvey v. Greyhound Corp.,* 228 N.C. 166, 45 S.E. 2d 58, where recovery was had for injuries sustained when the plaintiff in that case was thrown out of the bus as result of improper operation, there was also affirmative evidence of the loosened condition of the door fastening mechanism. No such evidence appears here.

As there must be a new trial for the error pointed out, other exceptions noted by defendants and brought forward in their assignments of error do not require discussion or decision, as they may not arise on another trial.

New trial.

W. W. GRIFFIN v. ADA JONES AND HUSBAND, OSCAR JONES, AND A. E. WILLIAMS.

(Filed 21 September, 1949.)

1. Reference § 2—

Where there is no objection to the court's order of reference it is a reference by consent in legal contemplation.

2. Appeal and Error § 40d—

The referee's findings of fact approved by the trial judge are conclusive on appeal when they are supported by evidence.

3. Reference § 7—

It is discretionary with the referee whether or not he should view the premises in an action involving conflicting claims of title.

APPEAL by plaintiff, W. W. Griffin, from *Burgwyn, Special Judge,* at April Term, 1949, of MARTIN.

This is a civil action involving diverse claims of title to eleven acres of land in Williams Township in Martin County. The cause was heard by B. A. Critcher, Esquire, as referee, pursuant to an order of reference made by the court without objection from any of the parties. The plaintiff and the defendants produced diametrically conflicting evidence before the Referee sufficient to support their respective contentions with respect to the ownership of the *locus in quo.* No good purpose will be served by reciting this testimony in detail. All of it was admitted without objection. The referee filed his report containing findings of fact in conformity to the contentions and evidence of the defendants and making appropriate conclusions of law thereon. The exceptions of plaintiff to the referee's report were overruled by the court, which rendered judgment approving the findings of fact and conclusions of law of the referee and adjudging the defendants to be the owners of the *locus in quo.* The plaintiff excepted and appealed.

Clarence W. Griffin and R. L. Coburn for plaintiff, appellant.

Hugh G. Horton for defendants, appellees.

ERVIN, J. The order of reference was made by the court without objection, and by reason thereof the reference was a reference by consent in legal contemplation. *Grant v. Hughes,* 96 N.C. 177, 2 S.E. 339. The plaintiff's attack upon the validity of the findings of fact of the referee is unavailing. These findings are conclusive and will not be reviewed on appeal because they were supported by evidence at the hearing and have been adopted by the court. McIntosh: North Carolina Practice and Procedure in Civil Cases, Section 586. It was within the discretion of the referee whether or not he should view the premises involved in the action. Thus, no error can be predicated upon his failure to inspect the *locus in quo.* The judgment of the Superior Court must be upheld.

Judgment affirmed.

STATE v. PHILMA CLEMENT.

(Filed 21 September, 1949.)

Bastards § 9: Criminal Law § 68b—

Under the provisions of G.S. 49-7 a defendant in a prosecution for nonsupport of his illegitimate child may appeal from a verdict establishing his paternity of the child notwithstanding that the verdict finds him not guilty of nonsupport.

APPEAL by defendant from *Grady, Emergency Judge,* at May Term, 1949, of NASH.

Criminal prosecution on warrant charging the defendant with the fatherhood and nonsupport of an illegitimate child.

In the Recorder's Court of Nash County, the defendant was adjudged "guilty of paternity of the child, and not guilty of nonsupport."

The defendant appealed to the Superior Court from that part of the verdict which established the paternity of the child. When the case was called in the Superior Court, the following order was entered: "Appeal Dismissed."

The defendant appeals, assigning error.

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

Leon T. Vaughan for defendant.

STACY, C. J. Perhaps the case would be controlled by the decision in *S. v. Hiatt* (1937), 211 N.C. 116, 189 S.E. 124, where an attempted appeal from a similar verdict was dismissed, but for the 1947 amendment to the statute which specifically allows an appeal "from a finding of the issue of paternity against the defendant." Chap. 1014, Session Laws 1947; G.S. 49-7. This amendment seems not to have been called to the judge's attention. Error is confessed.

Reversed.

ETTA S. OWENS v. J. A. WHITE, R. S. MONDS AND JOHN FRANKLIN.

(Filed 21 September, 1949.)

Automobiles § 24½e—

Evidence in this case *held* insufficient to show that defendant employee parked the truck of his codefendant on the highway where it was permitted to stand until after darkness without lights or flares, or that, if he

did so, he was engaged in the scope of his employment, and judgment of nonsuit is upheld.

APPEAL from *Morris, J.*, at February Term, 1949, of PASQUOTANK.

Civil action to recover damages from the defendants, resulting from a collision which occurred on Sunday, 4 February, 1945, between seven and eight o'clock p.m., between an automobile in which the plaintiff was riding and a truck parked on U. S. Highway 17, which belonged to the defendants, White and Monds.

The defendants White and Monds were engaged in the livestock business. Their place of business was located on U. S. Highway 17, about halfway between the home of David Cox, Jr., and the town of Hertford. The other defendant, John Franklin, was employed by them to drive the truck involved in the accident, which caused plaintiff's injuries. Franklin was permitted by his employers to keep the truck at his home when he was not working. It was Franklin's duty to feed his codefendants' livestock. This applied to Sundays as well as week days; and he was permitted to drive the truck from his home to the place where his codefendants kept their livestock, whenever he went there for the purpose of feeding them.

On Sunday, 4 February, 1945, the truck in question was parked on the hard surface of U. S. Highway 17, before dark, near the home of David Cox, Jr., about three-quarters of a mile from the town of Hertford, and remained there without lights or flares until between seven and eight o'clock, when the accident occurred. No one was in the truck at the time of the accident. The plaintiff's husband, who was driving the automobile in which she was riding at the time of the accident, testified he saw a colored man at the scene of the accident who looked like the defendant Franklin.

No evidence was offered tending to show that the defendants, White and Monds, had livestock at their place of business on this particular Sunday, or that Franklin had driven the truck to their place of business that afternoon or evening.

From judgment as of nonsuit entered at the close of plaintiff's evidence, plaintiff appeals and assigns error.

W. H. Oakey, Jr., and John H. Hall for plaintiff.

J. Henry LeRoy for defendants.

PER CURIAM. We think the evidence is insufficient to show that the defendant Franklin parked his codefendants' truck on the highway or that he was engaged in the scope of his employment, if he did so.

The ruling of the trial court will be upheld. *Hinson v. Chemical Co., ante,* 476, 53 S.E. 2d 448.

Affirmed.

ELEANOR COLE v. FLETCHER LUMBER COMPANY, INC.,
and
ROBERT LEE COLE v. FLETCHER LUMBER COMPANY, INC.

(Filed 21 September, 1949.)

1. Automobiles § 8i—

It is negligence *per se* for a motorist to overtake another vehicle traveling in the same direction and pass it at a highway intersection unless given permission to do so by a traffic or police officer. G.S. 20-150 (c).

2. Automobiles § 18h (3)—Passing vehicle at intersection in violation of G.S. 20-150 (c) held contributory negligence as matter of law.

Plaintiffs, husband and wife, were riding in the husband's car, driven by the wife. Plaintiffs' evidence tending to show that the wife overtook a vehicle traveling in the same direction and attempted to pass it at a highway intersection without permission of a traffic or police officer in violation of G.S. 20-150 (c), and that the collision occurred when the driver of the truck turned at the intersection, establishes contributory negligence barring recovery as a matter of law notwithstanding plaintiffs' evidence of the truck driver's failure to observe the requirements of G.S. 20-151 in respect to giving way to overtaking vehicles, and G.S. 20-153 in respect to turning at intersections, and G.S. 20-154 in respect to signals when turning from a direct line.

APPEAL by plaintiffs from *Moore, J.,* at April Civil Term, 1949, of BUNCOMBE.

Two civil actions to recover damages allegedly sustained in, and growing out of a collision between an automobile owned by plaintiff Robert Lee Cole, operated by his wife, the plaintiff Eleanor Cole, and a truck owned by defendant and operated by its employee in the course and scope of its business, which occurred when the automobile attempted to overtake and pass the truck at the intersection of a side road into which the truck was turning,—resulting in personal injury to plaintiff Eleanor Cole, and in property loss and expense to plaintiff Robert Lee Cole,—consolidated by consent for purpose of trial.

In the trial court judgments as of nonsuit were entered upon motions of defendant, made at close of plaintiffs' evidence, and plaintiffs appeal to Supreme Court, and assign error.

N. C. W. Gennett, Jr., and J. Y. Jordan, Jr., for plaintiffs, appellants.
Harkins, Van Winkle & Walton for defendant, appellee.

PER CURIAM. While the plaintiffs allege, and offered evidence tending to show that the driver of the truck of defendant failed to observe the requirements of statute G.S. 20-151, in respect to giving way to overtaking vehicle, and G.S. 20-153 in respect to turning at intersection, and G.S. 20-154 in respect to signals on turning from a direct line, the evidence offered by plaintiffs is equally clear in showing that the collision occurred when plaintiff, Eleanor Cole, was attempting to overtake and pass the truck proceeding in the same direction at an intersection of highway, without permission so to do by a traffic or police officer,—in violation of provisions of G.S. 20-150 (c), limiting the "privilege on overtaking and passing," as averred by defendant. Such violation of the statute is negligence *per se*, *Murray v. R. R. Co.*, 218 N.C. 392, 11 S.E. 2d 326; *Donivant v. Swaim*, 229 N.C. 114, 47 S.E. 2d 707. Defendant pleads it, among other things, as contributory negligence. And on this record it is clear that such negligence on the part of plaintiff contributed to the injury as the proximate cause, or one of the proximate causes of the collision, and its consequences. This is sufficient to bar plaintiffs' right to recover. See *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887.

Thus upon careful consideration thereof, the evidence shown in the record on this appeal indicates that the judgments as of nonsuit were properly entered.

Hence, the judgments are

Affirmed.

BESSIE LOU HENSLEY, A MINOR, REPRESENTED BY HER MOTHER, ANNIE MAE HENSLEY, HER NEXT FRIEND, *v.* SOUTHERN RAILWAY COMPANY, A CORPORATION, AND D. B. BRENDLE.

and

4 OTHER CASES.

(Filed 21 September, 1949.)

Railroads § 4—

Judgments of nonsuit in actions on behalf of occupants of a truck involved in a collision with a locomotive at a railroad grade crossing upheld on authority of *Jeffries v. Powell*, 221 N.C. 415.

APPEAL by plaintiffs from *Moore, J.*, at June Term, 1949, of BUNCOMBE.

Five civil actions to recover damages, four of them for alleged personal injuries, and one for alleged wrongful death, allegedly resulting from actionable negligence of defendants,—consolidated for the purpose of trial.

These actions grew out of a railroad-highway crossing accident "just north of Hendersonville," North Carolina, in late afternoon of 24 December, 1947, when the T-model Ford truck in which five persons, three men and two children, were riding,—all on one seat, came into collision with the side of the engine of a moving passenger train of defendant Railway Company.

Defendants denied negligence on their part, and pleaded, among other things, the sole negligence, and contributory negligence of the driver of the truck involved in the collision.

On the trial in Superior Court motions of defendants made at the close of plaintiffs' evidence, for judgment as in case of nonsuit, were allowed, and from judgments in accordance therewith plaintiffs appeal to Supreme Court and assign error.

W. B. Stone and Claude L. Love for plaintiffs, appellants.

W. T. Joyner and Jones & Ward for defendants, appellees.

PER CURIAM. No new question of law arises on this appeal, and a careful examination of the assignments of error, brought forward by plaintiffs, fails to reveal error. The evidence offered by plaintiffs on the trial in Superior Court, as shown in the case on appeal, when tested by well settled principles of law, fails to make out a case sufficient for consideration by the jury. It may be fairly doubted that plaintiffs show any evidence of negligence on the part of defendants. But on the other hand, the evidence clearly shows the negligence on the part of the operator of the truck here involved was the sole proximate cause of the collision, and comes within the principles applied in the case of *Johnson v. R. R.*, 214 N.C. 484, 199 S.E. 704; and *Jeffries v. Powell*, 221 N.C. 415, 20 S.E. 2d 561, and cases there cited, on the authority of which there is, in the judgments from which appeal is taken,

No error.

JAMES F. ORREN v. IOWA MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 21 September, 1949.)

Insurance § 60—

The findings of the trial court that the diamond ring in question was property pertaining to the business or profession of insured and was also an article carried or held for sale, or for delivery after sale, by insured, *held* sustained by the record and to support judgment that its loss by theft was not covered by a residence and outside theft policy.

KIRBY *v.* BOARD OF EDUCATION.

APPEAL by plaintiff from *Sink, J.*, at May Term, 1949, of ROCKINGHAM. Affirmed.

Civil action to recover on a residence and outside theft policy.

The parties waived trial by jury and agreed that the judge should find the facts and render judgment upon the facts found. They then stipulated all the evidentiary facts, leaving only the ultimate fact or conclusion for the judge to determine. The judge thereupon found and concluded that the diamond ring in question was "property pertaining to the business or profession of the plaintiff and was also an article carried or held for sale or for delivery after sale by the plaintiff" and rendered judgment for defendant. Plaintiff excepted and appealed.

Scurry & McMichael for plaintiff, appellant.
Welch Jordan for defendant, appellee.

PER CURIAM. The determinate question at issue herein is as to whether the diamond ring was possessed by plaintiff or a member of his family for personal use or as a business asset held for sale. If a business asset, its loss by theft was not insured. The findings and conclusion of the judge in respect thereto were adverse to plaintiff. They are fully sustained by the record. Hence the judgment entered must be

Affirmed.

ISLA M. KIRBY v. STOKES COUNTY BOARD OF EDUCATION.

(Filed 28 September, 1949.)

1. State § 3—

Neither the State nor its administrative units may be sued in the absence of waiver or consent.

2. Same: Schools § 8d—

G.S. 115-45 authorizes the maintenance of an action against a county board of education on a teacher's contract.

3. Same: Statutes § 13—

The provisions of G.S. 115-45 authorizing suits against the respective county boards of education is not repealed in this respect by Chap. 562, Public Laws of 1933, or Chap. 358, Public Laws of 1939. The School Machinery Act assigns duties to be performed by the respective county boards of education, particularly in regard to contracts of school teachers, and the intent of the Legislature to authorize actions against county boards of education in order to supply the necessity of mutuality of enforceable obligations is further strengthened by the fact that the original act, authorizing actions against the county boards, was brought forward in almost identical language in the codification. G.S. 164-8.

4. Contracts § 4—

It is necessary to the mutuality of promises that each promise imposed a legal liability upon the promisor so as to give rise to an action for nominal damages at least upon its breach.

5. Public Officers § 5b—

The presumption is in favor of the regularity of acts of public officers with the burden on the party asserting irregularity to prove it.

6. Schools § 8d—

Plaintiff alleged a renewal contract to teach in a particular school of a district and alleged its breach because she was assigned to teach in another school in the district, but the written contract, incorporated in the complaint, disclosed only an agreement to teach in the public schools of the district. *Held:* The demurrer of the county board of education on the ground that the complaint failed to allege a cause of action was properly sustained.

7. Schools §§ 8a, 8d: Contracts § 4—

The county board of education offered plaintiff a contract to teach "in the public schools of the district." Plaintiff's written acceptance was to teach in a particular school of the district. *Held:* In plaintiff's action for breach of the contract for that she was assigned to teach in another school in the district, demurrer was properly sustained in the absence of allegation that the school authorities consented to the variation in the contract, since in such case there was no mutuality of agreement and therefore no contract to constitute the basis of the action.

8. Master and Servant § 2a—

A contract of employment must be definite and certain as to the nature and extent of the services to be performed, the compensation to be paid, and the person to whom and the place where the services are to be rendered.

9. Schools § 8a—

Notice of acceptance of a teacher contract or an extension thereof must be given within the time prescribed by statute. G.S. 115-354.

APPEAL by plaintiff from *Sink, J.*, at April Term, 1949, of STOKES.

Civil action to recover for alleged breach of alleged contract to teach in the Danbury school of the Stokes County Administrative Unit, heard upon demurrer *ore tenus* to the complaint entered by defendant.

The plaintiff's complaint is based upon the following series of events:

1. On 18 April, 1945, R. M. Green, Principal of the Danbury school, nominated plaintiff "for the position of elementary teacher in this school."

2. On 18 April, 1945, the Committee of District 1, through its chairman and secretary notified plaintiff by certificate that "at a meeting of the Committee, held on April 18, 1945," she "was elected to *teacher* in the

public school, for the white race, of this district for the ensuing year." On 11 May, 1945, this was approved by J. C. Carson, Superintendent.

3. On 16 May, 1945, plaintiff, as teacher, entered into a written "Contract for Instructional Service," which reads as follows:

"CONTRACT FOR INSTRUCTIONAL SERVICE

"State of North Carolina
Stokes County

"This agreement entered into between the governing authority of the Stokes County Administrative Unit and Isla M. Kirby, Principal, holding a .....Certificate, No. ....., now in force, in accordance with the provisions of the school law applicable thereto, which are hereby made a part of this contract,

"WITNESSETH:

"That said teacher, having been selected by the Public School Committee of District No. ..... in said administrative unit, agrees to teach in the public schools of said district for the ensuing school term, and to discharge faithfully all the duties imposed on teachers by the Public Laws of North Carolina. In consideration of this agreement, said governing authority promises to pay said person the sum of $ ..... for each month of service. Of this amount the sum of .....dollars per month for a period not exceeding eight months shall be paid from State funds, subject to the conditions that said amount paid from State funds shall not exceed the maximum set in the State Standard Salary Schedule fixed by the State Board of Education and the State School Commission, and within the allotment of funds as made to said administrative unit for instructional service.

"That said governing authority has authorized, in a regular or in a called meeting, its Secretary to execute this contract when such employment is approved in accordance with the provisions of the law.

ISLA M. KIRBY, Teacher
May 16, 1945

"Stokes Administrative Unit
By: J. C. Carson, Secretary"

4. Later plaintiff was designated as principal of Danbury school, a position she held until the end of the school term in May 1947.

5. On 14 May, 1947, in accordance with the general school law of the State of North Carolina, the Superintendent of Public Instruction for Stokes County notified the plaintiff in writing that "in compliance with Section 115-35 A (should be 115-354) of the General Statutes of North

Carolina, as amended . . . your contract for employment in the Stokes Administrative Unit has been extended for another year following the close of the present school term."

6. On 30 May, 1947, plaintiff, in reply to the notice last above set out, gave to "Supt. J. C. Green of the Stokes Administrative Unit," "Notice of Acceptance" reading as follows: "In compliance with the law, Chapter 358, Public Laws of 1939, as amended, I hereby accept employment in the Danbury public school of Stokes Administrative Unit for the year 1947-1948 at a salary in accordance with State Standard Salary Schedule . . . etc."

7. On 26 August, 1947, C. E. Davis, Chairman Local School Committee, sent to plaintiff a written communication reading as follows:

"In view of the fact that we have succeeded in securing a man for Principal of the Danbury school, which is in accord with the request and wishes of the local patrons, it has become necessary, since Danbury is only entitled to five teachers, to assign you to teaching duty in Walnut Cove School . . . etc." The complaint alleges that there was no official authority for this notice.

8. Also on 26 August, 1947, plaintiff, through her husband, in person, notified R. M. Green, then Superintendent of Public Instruction for Stokes County, "that she would not teach in Walnut Cove in accordance with the letter signed by C. E. Davis, but would insist on the terms of her contract to teach in Danbury and that she was ready, able and willing to report for duty in accordance with said contract above set forth if and when they decided to allow her to do so."

9. On 25 August, plaintiff received a notice from R. M. Green, Superintendent of Public Instruction for Stokes County, "that the Stokes County schools will open for classes on Wednesday, September 3," and that she would be expected to report to her school on Tuesday morning, September 2nd, at nine o'clock for a local faculty meeting with her Principal," etc.

10. Thereupon on 2 September, 1947, plaintiff caused a letter to be addressed to R. M. Green, in which, among other things, she stated that she had given notice that she would not teach in Walnut Cove, and reiterated that she stood ready, able and willing to perform her part of the contract to teach in Danbury, etc.

Upon the foregoing, plaintiff alleges "that the failure to allow her to teach in Danbury as provided in her contract and as she has been doing for past three years is a breach on the part of the defendant of the contract above set out and to her great damage . . .," in the amount of salary she would have received had she taught in the Danbury school.

Defendant, Stokes County Board of Education, answered, and also entered in writing demurrer *ore tenus* to the complaint on the grounds:

"1. To the jurisdiction of the court for that it appears on the face of the complaint that this is an action against the State of North Carolina or an administrative agency of the State.

"2. For that the complaint fails to allege a cause of action."

Upon hearing on the demurrer, the Presiding Judge of Superior Court, being of opinion that demurrer should be sustained on both grounds, entered order to this effect on 12 April, 1949.

Plaintiff appeals therefrom to Supreme Court, and assigns error.

Woltz & Barber for plaintiff, appellant.

R. J. Scott for defendant, appellee.

WINBORNE, J. This appeal presents for decision two questions:

1. May a teacher in the public schools of North Carolina maintain an action against a county board of education for alleged breach of her contract to teach in a county administrative unit?

2. If so, does the complaint of plaintiff state a cause of action for breach of contract to teach in a particular school in a district in which there are two or more schools?

I. The first question arises upon the ruling of the court below in sustaining the first ground of the demurrer, that is, that this is an action against the State of North Carolina, or one of its administrative agencies, and therefore is not maintainable. Exception to the ruling is well taken.

It is a well settled principle of law that the sovereign may not be sued, either in its own courts or elsewhere, without its consent, and that "in the absence of consent or waiver, this immunity against suit is absolute and unqualified." See *Schloss v. Highway Comm., ante,* 489, 53 S.E. 2d 517, where decisions of this Court on the subject are assembled in opinion by *Barnhill, J.*

And it may be conceded that a county board of education is an agency of the State in the operation and administration of the uniform public school system at State expense. Chapter 115 of the General Statutes of North Carolina entitled "Education." But as a part of the statute pertaining thereto the General Assembly has declared that "the county board of education shall be a body corporate by the name and style of 'The Board of Education of.....County,' and by that name it shall hold school property belonging to the county, and it shall be capable of purchasing and holding real and personal property, of building and repairing school houses, of selling and transferring the same for school purposes, and *of prosecuting and defending suits for or against* the corporation." (Italics ours.) G.S. 115-45. Thus it appears that the General

Assembly not only has given corporate existence to the county board of education, but has consented that it, as a corporate entity, may sue and be sued.

It is contended, however, by appellee that this statute, G.S. 115-45, was enacted long before the enactment of Chapter 562 of Public Laws of 1933, by which a uniform statewide school system was established, and that under this act the county board of education was shorn of all administrative authority other than that which it gets under the School Machinery Act. P.L. 1939, Chapter 358.

In this connection it is true that an act in wording, substantially the same as that of G.S. 115-45, was enacted in 1901 (P.L. 1901, Ch. 4, Section 13), and re-enacted in 1903 (P.L. 1903, Ch. 435, Section 4), and as so enacted it has been brought forward as a part of the school law in subsequent codifications adopted by the General Assembly as Section 4121 of the Revisal of 1905, as Section 5402 of the Consolidated Statutes of 1919, and as Section 19 of Chapter 136 of Public Laws of 1923.

And while the General Assembly of 1933 in providing for the operation of a uniform system of schools in the whole State for a term of eight months, without the levy of any *ad valorem* tax therefor, declared nonexistent "all school districts, special tax, special charter or otherwise, as now constituted for school administration or for tax levying purposes," and relieved the county board of education of the responsibility for operating and maintaining the public schools of the county, it did not repeal the statute, then C.S. 5402, relating to the corporate existence of the county board of education, or its capability of prosecuting and defending suits for or against the corporation. Rather the General Assembly then imposed upon the board other duties and responsibilities in connection with the operation and maintenance of the uniform system of schools. To like effect are provisions of the School Machinery Act of 1939 (P.L. 1939, Ch. 358).

Moreover, the General Assembly of 1943, in codifying the statutes pertaining to education brought forward as G.S. 115-45 the provisions of the statute relating to corporate existence, and powers of the county boards of education in almost the identical language of the original act (P.L. 1901, Chap. 4, Section 13). And the General Assembly declared that "all provisions, chapters, subdivisions of chapter and sections contained in the General Statutes of North Carolina shall be in force from and after the thirty-first day of December one thousand nine hundred forty three." G.S. 164-8.

Thus it seems clear that the General Assembly intended to continue the existence of the county board of education as a corporate entity with power to prosecute and defend suits for or against the corporation.

Furthermore, the duties imposed upon the county board of education in the statute on "Education" (Chapter 115 of the General Statutes of North Carolina) and the part the county board of education is given in the operation of the school machinery make clear such legislative intent.

It is well here to review pertinent provisions of the school law. It is noted that when the General Assembly, in the Act of 1933 (P.L. 1933, Ch. 562, Section 4), declared all school districts nonexistent, as above stated, it created a State School Commission, and authorized and directed it in making provision for the operation of the schools, to classify each county as an administrative unit, and with the advice of the county boards of education to re-district each county, thereby making provision for such convenient number of school districts as the Commission may deem necessary for the economical administration and operation of the State school system, and to determine whether there shall be operated in such district an elementary or a union school. And these provisions are brought forward in the School Machinery Act of 1939.

Moreover, the school law, as codified and embodied in Chapter 115 of the General Statutes, contains these pertinent provisions:

1. "Each county of the State shall be classified as a county administrative unit, the schools of which, except in city administrative units, shall be under the general supervision and control of a county board of education with a county superintendent as the executive officer . . ." G.S. 115-8.

2. "The term 'district' as used in this chapter is hereby defined to mean any convenient territorial division or sub-division of a county, created for the purpose of maintaining within its boundaries one or more public schools . . ." G.S. 115-9.

3. "The board of education shall be a body corporate by the name and style of 'The Board of Education of.....County,' and by that name . . . it shall be capable . . . of prosecuting and defending suits for or against the corporation." G.S. 115-45.

4. "The county board of education, subject to any paramount powers vested by law in the State board of education or any other authorized agency, shall have general control and supervision of all matters pertaining to the public schools in their respective counties, and they shall execute the school laws in their respective counties . . .,"—city administrative units being excluded from this section. G.S. 115-56.

5. "The county board of education shall elect a county superintendent of schools who shall be the administrative officer of the county administrative unit." G.S. 115-353.

6. "The county board of education shall elect and appoint school committees for each of the several districts in their counties . . . The district committees shall elect the principals for the schools of the districts,

subject to the approval of the county superintendent of schools and the county board of education. The principals of the district shall nominate and the district committees shall elect the teachers for all the schools of the district, subject to the approval of the County Superintendent of Schools and the county board of education. The distribution of the teachers between the several schools of the district shall be subject to the approval of the county board of education. In the event the local school authorities herein provided for are unable to agree upon the nomination and election of teachers, the county board of education shall select the teacher or teachers, which selection shall be final for the ensuing school term. All principals and teachers shall enter into a written contract upon forms to be furnished by the state superintendent of public instruction before becoming eligible to receive any payment from state funds. It shall be the duty of the county board of education in a county administrative unit . . . to cause written contracts on forms to be furnished by the state to be executed by all teachers and principals elected under the provisions of this sub-chapter before any salary vouchers shall be paid . . ." G.S. 115-354.

7. While "the state board of education shall fix and determine a state standard salary schedule for teachers, principals and superintendents, which shall be the maximum standard state salaries to be paid from funds to the teachers, principals and superintendents," . . . "all contracts with teachers and principals shall be made locally by the county board of education . . . Provided, however, that the compensation contracted to be paid out of state funds to any teacher, principal, or superintendent shall be within the maximum salary limit to be fixed by the state board of education as above provided, and within the allotment of funds as made to the administrative unit for the item of instructional salaries . . ." G.S. 115-359.

Thus it is seen that the county board of education is assigned duties to perform in the machinery for the operation of the public schools of a county administrative unit, and is required to make contracts with teachers,—within the salary limits prescribed.

A contract is an agreement between two or more persons or parties on sufficient consideration to do or refrain from doing a particular act. *Belk's Dept. Store v. Ins. Co.*, 208 N.C. 267, 180 S.E. 63.

"One of the essential elements of every contract is mutuality of agreement." *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735. And "mutuality of promises means that the promises to be enforceable must each impose a legal liability upon the promisor. Each promise then becomes a consideration for the other." *Wellington v. Tent Co.*, 196 N.C. 748, 147 S.E. 13.

And generally a cause of action for damages, at least for nominal damages, arises upon the breach of a contract. Nominal damages are recoverable where there is no proof of actual damage. 12 Am. Jur. 965, Contracts, Sec. 388.

In the light of these principles of law applied to the provisions of the school law hereinabove recited, it will be presumed that the General Assembly, in requiring a teacher or principal to execute a written contract "before becoming eligible to receive any payment from state funds," intended to make available to the teacher and the principal a remedy against the county board of education for the enforcement of the contract, or for its breach by the county board of education,—the agency designated and required to make the contract.

II. The assignment of error based upon exception to the ruling of the court below in sustaining the demurrer on the ground that the complaint fails to state a cause of action is untenable for two reasons: The first is that the documents incorporated in the allegations of the complaint fail to show that plaintiff had a contract to teach exclusively in the Danbury school. While she alleges that she had such contract, the notice of her election from the "Committee of District No. 1," made a part of the complaint, shows that in April, 1945, she was "elected to teach in the public school, of the white race, of this district for the ensuing year." And in the contract of 16 May, 1945, which she signed, she agreed "to teach in the public schools of said district for the ensuing school term." And it further appears that in August, 1947, the chairman of the local school committee gave her notice that it had become necessary to assign her to teaching duty in the Walnut Cove school. Thus, since the school committee exercised authority in respect to both the Danbury school and the Walnut Cove school, it may be inferred, in the absence of any allegation to the contrary, that these schools are in the same district. Indeed, defendant avers in its answer that District No. 1 in the Stokes Administrative Unit is composed of the Walnut Cove and Danbury schools.

The presumption of law is in favor of the regularity of the conduct of the authorities, and the burden is upon the plaintiff to show the contrary. *Quinn v. Lattimore,* 120 N.C. 426, 26 S.E. 638; 43 Am. Jur. 254, Public Officers, Sec. 511; 31 C.J.S. 799, Evidence, Sec. 146.

Therefore, while plaintiff alleges she had taught in the Danbury school for three years, her contract obligated her "to teach in the public schools of said district." But plaintiff contends that in response to the notice of 14 May, 1947, that her contract for employment in the Stokes unit had been extended for another year following the close of the then present school term, she notified the Superintendent of the Stokes Administrative Unit on 30 May, 1947, that she accepted employment in the Danbury public school of Stokes Administrative Unit for the year 1947-

1948, etc. But there is no allegation that the school authorities consented to this variation from the terms of the contract of May, 1945, which she alleges was so extended.

In this connection, it is a rule of law that "One of the essential elements of every contract is mutuality of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. A contract for service must be certain and definite as to the nature and extent of the service to be performed, the place where, and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced." *Croom v. Lumber Co., supra.* See also *Dodds v. Trust Co.,* 205 N.C. 153, 170 S.E. 652; *Sides v. Tidwell,* 216 N.C. 480, 5 S.E. 2d 316; *Richardson v. Storage Co.,* 223 N.C. 344, 26 S.E. 2d 897.

The second reason why the complaint fails to state a cause of action is that plaintiff did not give notice of her acceptance of the extension of her contract within the time prescribed by the statute, G.S. 115-354, as amended by Section 5 of Chapter 970 of Laws of 1945,—effective on ratification 20 March, 1945. In this section it is provided that the contract of a teacher or of a principal shall continue from year to year until said teacher or principal is notified as provided in G.S. 115-359, of his or her rejection. This provision is subject to the proviso "that such teacher or principal shall give notice to the superintendent of schools of the administrative unit in which said teacher or principal is employed, within ten days after notice of re-election, of his or her acceptance of employment for the following year." Prior to the amendment of 1945 it was required that the notice be given "within ten days after the close of school." In this connection, the complaint alleges that the Superintendent notified plaintiff on 14 May, 1947, and that her notice of acceptance was dated 30 May, 1947, which was more than ten days after notice of her re-election. By this lapse of time plaintiff lost the benefit of the provision of the statute extending her contract for another school year.

Notice is taken of the allegation in the complaint to the effect that the Chairman of the Local Committee was not authorized to transfer or to give notice of transfer of plaintiff, as a teacher in the Danbury school, to the Walnut Cove school. But this does not avail plaintiff any benefit, since she fails to allege a contract to teach exclusively in the Danbury school.

Hence, the judgment below is

Affirmed.

ARMINDA BALLARD v. ARTHUR BALLARD, SHERMAN BALLARD, CALLIE ROACHESTER, AND LEVI G. BUCKNER.

(Filed 28 September, 1949.)

1. Deeds § 1a—

The word "deed" ordinarily denotes an instrument in writing, signed, sealed and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee.

2. Deeds § 5—

The requisites to the valid delivery of a deed are (1) an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control; and (3) acquiescence by the grantee in such intention.

3. Same—

Manual possession of the instrument by the grantee is not essential to delivery, delivery to some third person for his benefit being sufficient.

4. Same—

The recording of the instrument by the grantor or his leaving it with the proper officer for recording with the intention that it shall thereby pass title to the grantee according to its purport and tenor, if followed by the assent of the grantee, constitutes an effective delivery, and, until the contrary is shown, assent of the grantee in such instance will be presumed if the conveyance be beneficial to him, even though he has no knowledge of the transaction.

5. Evidence § 27½—

A witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it. In the instant case the witness was permitted to testify that the instrument in question did not exist until eleven months after its purported execution and acknowledgment, that contrary to the recital in the instrument no consideration was actually paid, and that it was not delivered, and there were no facts or circumstances adduced indicating that the witness had any personal knowledge of any of these matters.

6. Evidence § 49½: Deeds § 5—

Whether a deed has been delivered presents a mixed question of law and fact, and therefore the conclusion of a witness that a deed "was never delivered" embodies an opinion as to law, and is incompetent.

7. Evidence § 45—

A witness may not give his conclusion as to a matter which involves his opinion of another person's intention in a particular transaction.

8. Appeal and Error § 40i—

The Supreme Court may not ignore incompetent evidence admitted in the trial below in passing upon an exception to the refusal to nonsuit, since

the exception does not present for review errors committed by the trial court in admitting testimony; and the motion will not be allowed on appeal even though the competent evidence, standing alone, is insufficient to carry the case to the jury, since if the incompetent evidence had been excluded, the plaintiff might have followed a different course in the trial court.

9. Appeal and Error § 39b—

Error relating to one issue alone cannot be held harmless because of the answer to another issue when such other issue is not determinative of the rights of the parties.

10. Deeds § 3—

With the exception of certain statutory provisions relating solely to conveyances by married women, acknowledgment is not necessary to the validity of a deed, and a deed without valid acknowledgment is effective as a transfer of title as between the parties and their heirs, the office of an acknowledgment being merely to entitle the deed to registration, and registration being necessary to its validity only as against creditors and purchasers for value. G.S. 47-18.

11. Dower § 2—

An unacknowledged deed bars the claim of dower of the widow of the grantor if the signing, sealing and delivery of the instrument occurs before marriage.

APPEAL by defendant, Levi G. Buckner, from *Moore, J.*, and a jury, at April Term, 1949, of MADISON.

Certain events preceding this judicial contest are not in dispute. They are set forth chronologically in the next four paragraphs.

On 28 January, 1914, J. T. Ballard was a widower with two children: Sherman M. Ballard and Callie Roachester. Prior to that date he acquired title in fee simple to 71 acres of mountain land near his home in Middle Fork Township in Madison County. The tract was in the main heavily timbered, but contained some arable clearings.

Sometime in 1914, J. T. Ballard, who had had experience as a magistrate, drafted, signed, and sealed a certain written instrument, which he dated 28 January, 1914. This document was in form a warranty deed based on a valuable consideration of $100.00 and purported to convey 61 acres out of the 71 acre tract to Sherman M. Ballard in fee, subject, however, to a term of 21 years reserved by J. T. Ballard. It bore a certificate of acknowledgment in the customary form reciting that on January 28, 1914, J. T. Ballard "acknowledged the due execution of the . . . deed" before W. L. Hensley, a justice of the peace of Madison County, and was recorded in the office of the Register of Deeds of Madison County on 16 December, 1914, pursuant to an order of registration which was made on 15 December, 1914, by W. A. West, Clerk of the Superior Court of Madison County, and which adjudged the "certificate

of W. L. Hensley, a justice of the peace of Madison County . . . to be in due form and according to law." The writing expressly stipulated that J. T. Ballard had "the right to pay the taxes" on the 61 acres.

On August 24, 1920, J. T. Ballard contracted a second marriage with the plaintiff, Arminda Ballard, and had by her one child, Arthur Ballard.

In 1930, Sherman M. Ballard fled North Carolina to escape prosecution for willfully abandoning his wife, Matilda Ballard, without providing an adequate support for her and the four small children he had begotten upon her, and since that time his whereabouts have been unknown. J. T. Ballard died intestate 4 February, 1941.

This litigation began on 21 November, 1946, when Arminda Ballard filed a petition against Arthur Ballard, Sherman M. Ballard, Callie Roachester, and Levi G. Buckner in the Superior Court of Madison County, asking that dower be assigned to her in the entire 71 acre tract in her capacity as widow of J. T. Ballard. Personal service was had on all persons designated as defendants except Sherman M. Ballard, and service by publication was ostensibly obtained as to him on the theory that he was a living nonresident.

No pleadings were filed in the names of Arthur Ballard or Sherman M. Ballard. Callie Roachester answered, asserting that she and Arthur Ballard and Sherman M. Ballard owned the entire 71 acre tract as tenants in common, subject, however, to the dower right claimed by plaintiff. The defendant, Levi G. Buckner, who was made a party to the proceeding as a person claiming an estate in the land, filed an answer pleading *sole seizin* of a portion of the 71 acre tract, *i.e.*, the 61 acres described in the written instrument bearing date 28 January, 1914. The proceeding was transferred to the court at term for trial by jury of the issue of title to the 61 acres raised by the plea of the defendant, Levi G. Buckner.

When the case was tried, the defendant, Levi G. Buckner, claimed that he had owned the 61 acres in fee simple since 10 February, 1944, under *mesne* conveyances from Sherman M. Ballard, the person named as grantee in the writing dated 28 January, 1914, and introduced documentary evidence sufficient in form to sustain his position in this respect. Besides, he presented testimony indicating that subsequent to the date of the instrument in controversy J. T. Ballard declared he had transferred the 61 acres to Sherman M. Ballard, and that the latter had manifested his acceptance of the transfer by executing a conveyance of the interest which the instrument purported to vest in him.

The plaintiff attacked the validity of the claim of title advanced by the defendant, Levi G. Buckner, on the theory that there had been no delivery of the alleged deed of 28 January, 1914. The plaintiff offered evidence tending to show that J. T. Ballard had possession of the instru-

ment in question after the date of its registration, and that he cultivated the lands therein described, and paid the taxes thereon until he died. Although it did not appear that the plaintiff had had any opportunity to acquire any personal knowledge of the affairs of J. T. Ballard or Sherman M. Ballard prior to her marriage to the former on 24 August, 1920, she testified in person that the instrument in controversy did not exist until eleven months after the date of its purported execution and acknowledgment; that Sherman M. Ballard did not pay J. T. Ballard $100.00 for the 61 acres as recited in the instrument; that Sherman M. Ballard never saw the instrument; and that the instrument "was never delivered" to Sherman M. Ballard by J. T. Ballard. The defendant, Levi G. Buckner, challenged the admissibility of this evidence by objections and motions to strike, and reserved exceptions to adverse rulings thereon. The plaintiff was also permitted to state that she knew the handwritings of J. T. Ballard and W. L. Hensley, and that the signature on the certificate of acknowledgment purporting to be that of W. L. Hensley was in the handwriting of J. T. Ballard rather than that of W. L. Hensley.

Issues were submitted to and answered by the jury as follows:

1. Is the petitioner, Mrs. Arminda Ballard, the widow of J. T. Ballard? Answer: Yes.

2. Was the alleged deed from J. T. Ballard to Sherman Ballard acknowledged by J. T. Ballard? Answer: No.

3. If so, was said alleged deed delivered by J. T. Ballard to Sherman Ballard? Answer: No.

The court entered judgment on the verdict adjudging that the plaintiff was entitled to dower in all portions of the 71 acre tract, including the 61 acres described in the alleged deed of 28 January, 1914, from J. T. Ballard to Sherman M. Ballard; that such alleged deed was void; and that the 61 acres described therein belonged to Arthur Ballard, Callie Roachester, and the defendant, Levi G. Buckner, in equal shares as tenants in common, subject to the dower of the plaintiff.

The defendant, Levi G. Buckner, excepted to the provisions of the judgment relating to the 61 acres and the alleged deed of 28 January, 1914, and appealed therefrom to this Court, assigning errors.

J. M. Baley, Jr., and W. E. Anglin for the plaintiff, appellee.

C. P. Randolph for the defendant, Callie Roachester, appellee.

Calvin R. Edney and J. W. Haynes for the defendant, Levi G. Buckner, appellant.

ERVIN, J. The word "deed" ordinarily denotes an instrument in writing, signed, sealed, and delivered by the grantor, whereby an interest

in realty is transferred from the grantor to the grantee. *Strain v. Fitzgerald,* 128 N.C. 396, 38 S.E. 929; *Fisher v. Pender,* 52 N.C. 483. The requisites to the valid delivery of a deed are threefold. They are: (1) An intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control, though not necessarily beyond his physical control; and (3) acquiescence by the grantee in such intention. *Blades v. Trust Co.,* 207 N.C. 771, 178 S.E. 565; *Burton v. Peace,* 206 N.C. 99, 173 S.E. 4; *Gulley v. Smith,* 203 N.C. 274, 165 S.E. 710; *Gillespie v. Gillespie,* 187 N.C. 40, 120 S.E. 822; *Rogers v. Jones,* 172 N.C. 156, 90 S.E. 117; *Lynch v. Johnson,* 171 N.C. 611, 89 S.E. 61; *Lee v. Parker,* 171 N.C. 144, 88 S.E. 217; *Butler v. Butler,* 169 N.C. 584, 86 S.E. 507; *Huddleston v. Hardy,* 164 N.C. 210, 80 S.E. 158; *Gaylord v. Gaylord,* 150 N.C. 222, 63 S.E. 1028; *Fortune v. Hunt,* 149 N.C. 358, 63 S.E. 82; *Smith v. Moore,* 149 N.C. 185, 62 S.E. 892, rehearing denied 150 N.C. 158, 63 S.E. 735; *Tarlton v. Griggs,* 131 N.C. 216, 42 S.E. 591; *Bailey v. Bailey,* 52 N.C. 44; *Gibson v. Partee,* 19 N.C. 530; *Kirk v. Turner,* 16 N.C. 14; *Moore v. Collins,* 15 N.C. 384; *Morrow v. Williams,* 14 N.C. 263; *Ward's Executors v. Ward,* 3 N.C. 226. But manual possession of the instrument by the grantee is not essential to delivery. It is sufficient if the grantor delivers the writing to some third person for the grantee's benefit. *McMahan v. Hensley,* 178 N.C. 587, 101 S.E. 210; *Buchanan v. Clark,* 164 N.C. 56, 80 S.E. 424; *Barnett v. Barnett,* 54 N.C. 221; *Wesson v. Stephens,* 37 N.C. 559; *Gaskill v. King,* 34 N.C. 211; *Morrow v. Alexander,* 24 N.C. 388. Thus, there is an effective delivery where the grantor causes the written instrument to be recorded, or leaves it with the proper officer for recording with the intention that it thereby shall pass title to the grantee according to its purport and tenor, and the act of the grantor is accompanied or followed by the assent of the grantee. *Robbins v. Rascoe,* 120 N.C. 79, 26 S.E. 807, 38 L.R.A. 238, 58 Am. St. Rep. 774; *Phillips v. Houston,* 50 N.C. 302; *Ellington v. Currie,* 40 N.C. 21; *Snider v. Lackenour,* 37 N.C. 360. In such cases, assent on the part of the grantee is presumed until the contrary is shown if the conveyance be beneficial to him. This is so although the transaction occurs without the grantee's knowledge. *Buchanan v. Clark, supra; Tate v. Tate,* 21 N.C. 22; 16 Am. Jur., Deeds, section 389.

The legal battle at the trial was waged around the crucial question of whether the alleged deed of 28 January, 1914, had been delivered to Sherman M. Ballard or to some third person for his benefit by J. T. Ballard. There was testimony for the defendant, Levi G. Buckner, tending to show such delivery even apart from the rebuttable presumption of delivery arising from the probate and registration of the instrument.

Cannon v. Blair, 229 N.C. 606, 50 S.E. 2d 732; *Johnson v. Johnson,* 229 N.C. 541, 50 S.E. 2d 569.

The plaintiff took the stand in her own behalf for the avowed purpose of establishing the non-delivery of the alleged deed. The defendant, Levi G. Buckner, reserved exceptions to the rulings of the trial court permitting plaintiff to testify that the instrument in controversy did not exist until eleven months after the time of its purported execution and acknowledgment; that Sherman M. Ballard did not pay J. T. Ballard $100.00 for the 61 acres as recited in the instrument; that Sherman M. Ballard never saw the instrument; and that the instrument "was not delivered" to Sherman M. Ballard by J. T. Ballard. No facts or circumstances were adduced at the trial indicating that plaintiff had any personal knowledge of any of these matters. This being so, the testimony ought to have been excluded on the ground that a witness cannot be allowed to testify to the nonexistence of a fact, where his situation with respect to the matter is such that the fact might well have existed without his being aware of it. *Byrd v. State,* 17 Ala. App. 301, 84 So. 777; *Compton v. Pender,* 132 Ga. 483, 64 S.E. 475; *McCosker v. Banks,* 84 Md. 292, 35 A. 925; *Buxton v. Alton-Dawson Mercantile Co.,* 18 Okla. 287, 90 P. 19.

Other considerations also demanded the exclusion of the plaintiff's statement that the deed in controversy "was never delivered" to Sherman M. Ballard by J. T. Ballard. An issue of whether a deed has been delivered presents a mixed question of law and fact. *Henry v. Heggie,* 163 N.C. 523, 79 S.E. 982; *Smith v. Moore, supra.* Hence, the admission of the plaintiff's conclusion violated the evidential principle that a witness may not give testimony which embodies his opinion as to law. *Hart v. Gregory,* 218 N.C. 184, 10 S.E. 2d 644; *Denton v. Milling Co.,* 205 N.C. 77, 170 S.E. 107; *Trust Co. v. Store Co.,* 193 N.C. 122, 136 S.E. 289; *Parker v. Brown,* 131 N.C. 264, 42 S.E. 605; *Wolf v. Arthur,* 112 N.C. 691, 16 S.E. 843. Furthermore, the conclusion of the plaintiff that there had been no delivery of the deed necessarily involved upon the record presently presented either a negation of an intent on the part of J. T. Ballard to pass title to Sherman M. Ballard, or the negation of a purpose on the part of Sherman M. Ballard to accept title. Thus, the evidence under consideration was also inadmissible under the rule of evidence which precludes a witness from expressing his opinion of another person's intention in a particular transaction. Stansbury: North Carolina Evidence, section 129; *Fenner v. Tucker,* 213 N.C. 419, 196 S.E. 357; *Minton v. Ferguson,* 208 N.C. 541, 181 S.E. 553; *Wolf v. Arthur, supra; S. v. Vines,* 93 N.C. 493.

The admission of this evidence constituted prejudicial error under the circumstances disclosed by the record, entitling the defendant, Levi G. Buckner, to a new trial on his plea of *sole seizin*.

The defendant, Levi G. Buckner, contends, however, that we should proceed further, and sustain in this Court his motion for a compulsory nonsuit, which was denied in the court below.

He asserts upon this phase of the case that the recorded deed of 28 January, 1914, was a lion in plaintiff's path, barring her claim to dower in the 61 acres, and that the only competent testimony presented by plaintiff at the trial was that relating to the custody of the deed and the possession of the land after the date of registration of the deed. He insists that the testimony adduced in plaintiff's behalf indicating that J. T. Ballard had custody of the deed and exercised acts of ownership over the land therein described subsequent to the recordation of the instrument had no legitimate or logical tendency to show non-delivery because it was consonant with the rights which J. T. Ballard expressly reserved in the property by the instrument itself, and the relationship which he bore to Sherman M. Ballard. *Cannon v. Blair, supra;* 26 C.J.S., Deeds, section 184.

This argument would exert a very persuasive force on the present record if we were at liberty to ignore the incompetent evidence given by the plaintiff in person. But this we cannot do.

A motion for a compulsory nonsuit under G.S. 1-183 is designed simply to test the legal sufficiency of the evidence to take the case to the jury and support a verdict in plaintiff's favor. It does not present for review errors committed by the court in admitting testimony. Upon a motion for a compulsory nonsuit under the statute, all relevant evidence admitted by the court must be accorded its full probative force, irrespective of whether it has been erroneously received. 64 C.J., Trial, section 398.

Here the incompetent evidence tended to support the plaintiff's claim of non-delivery, and was considered by the trial court when it ruled against the motion. In conformity to the accepted practice, there must be a new trial for error in receiving the incompetent testimony. But the motion for nonsuit cannot be sustained in this Court, even if it be taken for granted that the competent testimony, standing alone, was insufficient to carry plaintiff's case to the jury. "Though the court below, in denying the motion, acted upon evidence which we now hold to be incompetent, yet, if this evidence had not been admitted, the plaintiff might have followed a different course." *Midgett v. Nelson,* 212 N.C. 41, 192 S.E. 854.

We are unable to accept the suggestion that the negative answer of the jury to the second issue supports the judgment and renders the admission of the incompetent evidence harmless error. This is true because

this finding of the jury is not determinative of the controversy between the parties. Indeed, it is evident that the submission of the second issue arose out of a misapprehension as to the true function of an acknowledgment.

With the exception of certain statutory provisions relating solely to conveyances by married women and having no application to the instrument in suit, there is no statute making an acknowledgment essential to the validity of a deed. The office of an acknowledgment is merely to entitle a deed to registration. Under our statute, the recording of a deed is essential to its validity only as against creditors and purchasers for a valuable consideration. G.S. 47-18; *Hargrove v. Adcock,* 111 N.C. 166, 16 S.E. 16. It necessarily follows that a deed becomes effective as a transfer of title as between the parties to it immediately upon its execution and delivery notwithstanding the lack of an acknowledgment, and binds not only the parties but also their heirs. *Norwood v. Totten,* 166 N.C. 649, 82 S.E. 951; 1 C.J.S., Acknowledgments, section 12. Moreover, an unacknowledged deed bars the claim of dower of the widow of the grantor if the signing, sealing, and delivering of the instrument occurred before marriage. *Haire v. Haire,* 141 N.C. 88, 53 S.E. 340.

It is noted, in closing, that it has not been necessary to express any opinion as to the applicability of G.S. 8-51 to any of the testimony at the trial.

For the reasons stated, the verdict and judgment are set aside in so far as they relate to the alleged deed of 28 January, 1914, and the 61 acres therein described to the end that a new trial may be had in respect to the plea of *sole seizin* interposed by the defendant, Levi G. Buckner.

New trial.

ZACO CLEMENT v. ZALPH CLEMENT.

(Filed 28 September, 1949.)

1. Waiver § 1—

A person *sui juris* may waive practically any right he has unless forbidden by law or public policy, and therefore a waiver may relate to procedure and remedy as well as to substantive rights.

2. Same—

A waiver sometimes partakes of the nature of estoppel and sometimes of contract.

3. Waiver § 3—

Whether a waiver must be supported by consideration in order to be enforceable depends upon the nature and the occasion of the particular waiver.

4. Same—

A waiver of interest on a note, which waiver is made subsequent to execution and prior to maturity or suit and before any negotiation between the parties after demand for payment, requires consideration to support it in the same manner as any other contract.

5. Same: Bills and Notes § 3—

Consideration for a promise to forego interest on a note, which promise is made subsequent to the execution of the note and before maturity, cannot be supplied by the mutual considerations in the execution of the note.

6. Contracts § 15—

The burden of establishing an alteration of a contract by valid waiver is upon the party asserting the defense of such alteration.

7. Trial § 31c—

An instruction which submits to the jury a mixed question of law and of fact when there is no evidence in support thereof must be held for reversible error.

PLAINTIFF'S appeal from *Nettles, J.*, June Term, 1949, RUTHERFORD Superior Court.

The plaintiff sued the defendant for recovery of a balance alleged to be due on three notes, all under seal: One made March 3, 1930, in the sum of $100; another made June 25, 1931, in the sum of $200; and another made January 16, 1930, in the sum of $1,900. All of these were made to the plaintiff. In his complaint he admits various payments made upon them, reducing the total indebtedness, as he alleges, to a balance of $2,229.76, principal and interest. The defendant admits the execution of the notes, claims that they have been discharged by various payments made thereupon and are no longer owing; and pleads as a further defense that the plaintiff, some time after the execution of the notes, agreed not to charge any interest upon them, in view of the fact that the defendant had lost a large part of the proceeds in the failure and closure of the banks. This was denied in plaintiff's reply.

On the trial the evidence as to the exact sum due upon the notes, if any, was for the jury and need not be gone into in detail. The interest, however, which plaintiff claimed constituted a substantial amount since the loans had run over a considerable period before suit was brought. The controversy is principally over this interest which, it is contended, under the instructions of the court, plaintiff was allowed to recover.

The question here posed is whether under the facts relating to this item, recovery was proper.

The language of the answer in setting up the defense is as follows:

"1. That the note in the sum of $1900.00 referred to in paragraph 4 of the complaint was executed by the defendant just prior to the closing of the banks in Rutherford County in 1930 and the proceeds of said loan or a greater part thereof was lost in the closed banks; that the plaintiff and the defendant some few months after the closing of the banks entered into a supplemental agreement whereby the plaintiff agreed that in view of the loss of the money in the bank by the defendant that the plaintiff would not charge any interest on the said note."

The evidence admitted in support of it is substantially as follows:

"Me and him got to talking, and I lost so much money in the bank that I said to him if he had had his money in the bank he would have lost it; that mine was gone and that he ought not to charge me interest on this money anyway, and he said I am not going to charge you any interest."

Defendant introduced in evidence the following writing:

"No interest to be charged to Zalph Clements on notes $1900.00 and $100.00 since the banks has closed. (s) by Zaco C."

There was evidence tending to show that this writing was signed by the plaintiff.

Plaintiff objected to the introduction of the evidence concerning this document or transaction on the ground that it was not contemporaneous with the execution of the notes and was without consideration. The court charged the jury with respect to consideration as follows:

"So we come down to what is known as consideration. A contract between parties without consideration ordinarily would be null and void and would not be of any force and effect. That is the contention of the plaintiff in this case. He says that even though he did not make such a contract, but even though you find there was a contract of foregoing the interest, that it was not made on consideration, and therefore it would be null and void, and that the defendant gave him nothing for such a new promise or agreement to forego the interest, and therefore it would be null and void. Consideration in the sense in which it is used in legal matters is a contract conditioned on some right, gain, advantage or profit flowing from one party, usually the promissor, or some disadvantage, act or service given, offered or undertaken by the promissee. It is usually suffi-

> cient to define it as an advantage for the promissor, or a detriment to the promissee. Consideration means not so much one party profiting, but it is when the other party abandons some legal right or . . . his action in the future as an inducement for making the promise. The courts will not ask whether the things forming the consideration will benefit a third party or be of substantial value to anyone. It is enough that something is promised, foregone or offered to one to whom the promise is given in consideration for the promise made to him. There is consideration if the promissee does anything which he is not legally bound to do or refrains from doing anything which he had a right to do whether there is a loss or detriment to him or a loss to the promissor. In general a withdrawal of any legal right at the request of the other party is sufficient. The agreement to do the usual things stipulated on one side or on the other is sufficient consideration for the contract."

The jury, answering the issue as to the amount due plaintiff, found a sum much less than that demanded, and, from the ensuing judgment, plaintiff appealed.

Hamrick & Hamrick for plaintiff, appellant.

J. S. Dockery and C. O. Ridings for defendant, appellee.

SEAWELL, J. The promise, if it may be so construed, made by the plaintiff to the defendant to refrain from exacting interest on the notes, was admittedly made some time subsequent to their execution and delivery,* and so was not a part of that transaction. It was made, too, if at all, long prior to the suit for enforcement and was, therefore, not in the course of that proceeding. It is difficult, then, to consider the act as a *waiver,* such as might be effectual without the support of a consideration. 56 Am. Jur. 100 n. 5. "Waiver," has been defined as "an intentional relinquishment of a known right." *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019; *Re Yelverton,* 198 N.C. 746, 153 S.E. 319; *Hardin v. Liverpool & L. & G. Ins. Co.,* 189 N.C. 423, 127 S.E. 353. A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts. Sometimes they partake of the nature of estoppel and sometimes of contract. They occur

*The defendant's counsel, in their brief, admit that the transaction relating to the waiver of interest took place subsequent to the execution of the notes; conceding that otherwise the admission of parol evidence over plaintiff's objection was error.

in the course of a judicial proceeding and sometimes, if we may use the term, are extra-judicial. No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the *nature* and *occasion* of the particular waiver must lie the answer as to whether or not it requires such consideration.

In *Porter v. Commissioner of Internal Revenue,* 60 Fed. 2d 673, *Judge Learned Hand* observed, "Promissory estoppel is now recognized as a species of consideration," but however atypical in other respects, this kind of estoppel is analogous to the principle on which the more classical or ordinary estoppel is based in that it is required to make it effectual that the promisee in reliance upon the promise has been placed in a changed condition or position where detriment could only be avoided by enforcement of the promise. Restatement, Contracts, sec. 90. It must have induced definite and substantial action on the part of the promisee which can only thus be equitably avoided. Williston on Contracts, sec. 140.

But it is safe to say that an extra-judicial waiver of a right to recover a stated sum of money on a promissory note does need a consideration to support it and is not to be compared with the waiver of a mere right relating to procedure or remedy, or even substance in the course of a trial or occurring in the course of dealing with executory performances.

For a waiver of a legal right, which right is to be, or may be asserted in the future, where the waiver for want of essential elements of that principle, cannot operate as an estoppel, requires a consideration as much as an agreement by any other name. 56 Am. Jur. 116, sec. 16; *Bank of U. S. v. Bank of Georgia,* 10 Wheat. (U.S.) 333, 6 L. Ed. 334; *Aron v. Rialto Realty Co.,* 100 N. J. Eq. 513, 136 A. 339, 102 J. J. Eq. 331, 140 A. 918. Generally speaking the requirement of consideration is the same as in any other contract.

Since the waiver in the instant case is only a unilateral concession on the part of the payee, it cannot be referred to the mutual considerations of the original contracts,—*i.e.,* the making of the notes.

On the whole the transaction benevolent in its nature, moved down a one-way street and took nothing of value from the beneficiary and added no detriment.

The burden of establishing his further defense,—that is, alteration of the contract by valid waiver, was upon the defendant; and in the absence of any evidence of consideration he failed to carry it.

The instruction to the jury on this point, challenged by the plaintiff, is abstract, does not hug the subject too closely. Its main defect, however, is that it definitely leads the jury to understand that they might find from the evidence that there was a legally sufficient consideration for the

promise, whereas no evidence thereof existed. The Court cannot say that this did not enter into the consideration of the jury in their answer to the single issue presented to them and reduce the amount of the award.

The plaintiff is entitled to a new trial. It is so ordered.

New trial.

STATE v. ROY TRANTHAM.

(Filed 28 September, 1949.)

1. Constitutional Law § 14—

It is within the police power of the State to enact laws prohibiting secular pursuits on Sunday.

2. Same: Municipal Corporations § 38—

The power to enact Sunday ordinances has been delegated to the municipalities of the State. G.S. 160-52, G.S. 160-200 (6) (7) (10).

3. Constitutional Law § 18—

Legislative bodies may make classifications for the application of regulations provided the classifications are practical and apply equally to all persons within a class, since the constitutional mandate proscribing discrimination requires only that there be no inequality among those within a particular group or class. Fifth Amendment to the Federal Constitution; Art. I, Sec. 17, of the N. C. Constitution.

4. Appeal and Error § 40l—

Courts never anticipate a question of constitutional law before the necessity of deciding it arises.

5. Municipal Corporations § 40—

A defendant in a prosecution for violation of a municipal ordinance may not attack the constitutionality of the ordinance on the ground of discrimination unless he makes it appear that the alleged discriminatory provisions operate to his hurt or adversely affect his rights or put him to a disadvantage, and when there is no discrimination within the class to which defendant belongs he may not raise the objection that it discriminates against another class or denies other persons equal protection of the law.

6. Same—In absence of showing that ordinance discriminated against him, defendant has no standing to attack its constitutionality on this ground.

The ordinance in suit prohibited enumerated secular pursuits on Sunday, and by proviso excluded from its operation certain shops, stores and businesses which it permitted to stay open on Sunday for the sale of enumerated articles. Defendant operated a business coming within one of the classes proscribed. Defendant did not make it appear that he kept in stock for sale any one of the articles enumerated in the proviso. *Held:* Defendant has no standing to attack the constitutionality of the ordinance

on the ground of discrimination in the operation of the proviso, since he does not belong to a class to which the alleged discrimination applies, and the ordinance does not accord a privilege to any competitor of defendant which is denied to him, nor may defendant's evidence of the violation of the conditions of the proviso form any basis for an attack upon the constitutionality of the ordinance.

APPEAL by defendant from *Moore, J.*, at June Term, 1949, of BUNCOMBE. No error.

Criminal prosecution on warrant charging the violation of a city ordinance.

Section 199 of the Code of the City of Asheville is in the following language, to wit:

"RESTRICTION OF BUSINESS ON SUNDAYS. It shall be unlawful for any merchant, trader, dealer, firm, corporation, partnership, person or persons, to keep open any shop or business establishment, tonsorial parlor or barber shop, in the City of Asheville on Sunday for the purpose of buying, selling or engaging in the business generally conducted in such shop, store or similar business establishment, tonsorial parlor or barber shop, in the City of Asheville during week days. Provided this shall not apply to garages and filling stations, drug stores, cigar stores, confectionery stores, shops, stands and bakeries which shall be allowed to operate on Sunday for the sale of gas and oil, drugs, medicines, druggist sundries, cigars, tobaccos, fruits, ice, ice cream, confections, nuts, soda and mineral waters, breads, pies, cakes, newspapers, periodicals, and for no other purpose."

Defendant operates a general grocery store in the City of Asheville. On Sunday, 1 May 1949, one Harold Brownlee purchased from him in his place of business a certain quantity of groceries. Defendant's place of business was then open and he stated to Brownlee that he operated and kept his store open seven days a week and that anything he had for sale could be purchased on a Sunday the same as any other day.

The witness stated further that he knows that practically all garages and filling stations, drug stores, cigar stores, confectionery stores, shops, stands and bakeries which stay open on Sunday in Asheville sell anything carried in such places on Sunday the same as they do during the week days, and that such drug stores, cigar stores, confectionery stores, shops, stands and bakeries which stay open on Sunday sell on Sunday other articles of merchandise besides the articles enumerated in the proviso of the ordinance.

There was a verdict of guilty. From judgment on the verdict the defendant appealed.

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

Sale, Pennell & Pennell for defendant appellant.

BARNHILL, J. The defendant concedes that the warrant properly charges the alleged offense and that there was sufficient evidence to support the verdict. He preserves and brings forward only those exceptions which are directed to his contention that the ordinance is unconstitutional and void for that it is arbitrary, unreasonable, and discriminatory, and unlawfully deprives him of his rights, liberties, and freedoms guaranteed by the due process clause of the U. S. Constitution and by N. C. Constitution, Art. I, sec. 17.

The Attorney-General challenges the right of this defendant to assail the constitutionality of the ordinance. This brings us in the first instance to this question: On this record is the defendant in position to assert the alleged unconstitutionality of the ordinance under which he stands indicted? If this be answered in the negative, any other question sought to be presented becomes moot.

Counsel for defendant informs us that the validity of Sunday closing ordinances has been the subject of discussion in at least 1,590 cases decided in the various jurisdictions of the United States. Needless to say, we have not undertaken to examine all of them. A more limited number establish well-recognized principles of law which are controlling here. Reference to some of these will suffice.

It is within the police power of the State to enact laws prohibiting secular pursuits on Sunday. *S. v. Burbage,* 172 N.C. 876, 89 S.E. 795; *Hennington v. Ga.,* 163 U.S. 299, 41 L. Ed. 166; *Petit v. Minn.,* 177 U.S. 164, 44 L. Ed. 716; Anno. 29 A.L.R. 402.

The power to enact Sunday ordinances has been delegated to the municipalities of the State, G.S., 160-52, G.S. 160-200 (6) (7) (10); *S. v. Burbage, supra; S. v. Davis,* 171 N.C. 809, 89 S.E. 40; 50 A.J. 808, and is expressly conferred on the City of Asheville in its charter. This is conceded.

Legislative bodies may distinguish, select, and classify objects of legislation. It suffices if the classification is practical. *Magoin v. Bank,* 170 U.S. 283, 42 L. Ed. 1037; *S. v. Davis, supra.* They may prescribe different regulations for different classes, and discrimination as between classes is not such as to invalidate the legislative enactment. *Smith v. Wilkins,* 164 N.C. 135, 80 S.E. 168.

The very idea of classification is inequality, so that inequality in no manner determines the matter of constitutionality. *Bickett v. Tax Commission,* 177 N.C. 433, 99 S.E. 415; *R. R. v. Matthews,* 174 U.S. 96, 43 L. Ed. 909. The one requirement is that the ordinance must affect all

persons similarly situated or engaged in the same business without discrimination. *City of Springfield v. Smith,* 322 Mo. 1129.

Only those ordinances which discriminate between those of a particular group or class who are similarly situated with reference to the subject matter of the legislation come within the constitutional inhibitions.

"Courts never anticipate a question of constitutional law before the necessity of deciding it arises." *Chemical Co. v. Turner,* 190 N.C. 471, 130 S.E. 154. They will not listen to an objection made to the constitutionality of an ordinance by a party whose rights it does not affect and who therefore has no interest in defeating it. *St. George v. Hardie,* 147 N.C. 88; *Monamotor Oil Co. v. Johnson,* 292 U.S. 86, 78 L. Ed. 1141; 11 A.J. 750.

It is not sufficient to show discrimination. It must appear that the alleged discriminatory provisions operate to the hurt of the defendant or adversely affect his rights or put him to a disadvantage. *Yarborough v. Park Comm.,* 196 N.C. 284, 145 S.E. 563; *Linen Service Corp. v. Crisp,* 207 N.C. 633, 178 S.E. 93; *Sprunt v. Comrs. of New Hanover,* 208 N.C. 695, 182 S.E. 655; *S. v. Sims,* 213 N.C. 590, 197 S.E. 176; *Sprout v. South Bend,* 227 U.S. 163, 72 L. Ed. 833; *Gorieb v. Fox,* 274 U.S. 603, 71 L. Ed. 1228.

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against. *St. George v. Hardie, supra; First Nat. Bank v. Louisiana Tax Comm.,* 289 U.S. 60, 77 L. Ed. 1030; *S. ex rel. Powell v. State Bank,* 4 P. 2d 717, 80 A.L.R. 1494; *People v. Perry,* 298 P. 19, 76 A.L.R. 1331; *Gorieb v. Fox, supra;* 11 A.J. 749, 759.

When we consider the ordinance under attack in the light of these principles, it is made to appear that the defendant has no standing in court for the purpose of attacking its validity on constitutional grounds.

The enactment of the body of the ordinance was clearly within the legislative authority of the city. It applies to shops, stores, and similar business establishments, tonsorial parlors and barber shops. Defendant's business comes within one of the classes named. Hospitals, hotels, restaurants, and other businesses usually classified as works of necessity are not included. *Expressio unius est exclusio alterius.*

The discrimination, if discrimination it be—and this we do not decide—is to be found in the conditions and limitations set forth in the proviso. They relate to garages and filling stations and other specified businesses which are permitted to remain open on Sunday for the limited purpose of selling certain specified articles of merchandise. Grocery stores are not

included and it is not made to appear that defendant keeps in stock for sale any one of the enumerated articles. No competitor of his has been accorded a privilege which is denied to him. *Linen Service Corp. v. Crisp, supra.*

While the evidence tending to show that the conditions of the proviso are not enforced may serve to indict the police officers of the municipality, it forms no basis for an attack upon the constitutionality of the ordinance.

As the defendant's business is not one of the classes of business affected by the proviso, he is not injuriously affected by the terms thereof. Hence he cannot challenge the constitutionality or validity of the ordinance. *Chicago v. Rhine,* 2 N.E. 2d 905, 105 A.L.R. 1045.

In the trial below we find

No error.

LULA R. DAVIS v. H. A. MOSELEY, W. H. BOYD, ALPHEUS JONES, SCHOOL COMMITTEEMEN; J. EDWARD ALLEN, SUPERINTENDENT OF SCHOOLS, AND THE BOARD OF EDUCATION.

(Filed 28 September, 1949.)

1. Schools § 8d—

The school committee and the county board of education may be sued for a breach of a teacher's contract.

2. Schools § 8a—

Where a letter containing notification of the rejection of a teacher is registered and mailed to her prior to the close of the school term during which she was employed, there is a compliance with G.S. 115-359 and it is sufficient to terminate the contract even though not received by the teacher until after the expiration of the school term. G.S. 115-354.

APPEAL by plaintiff from *Bone, J.,* at May Term, 1949, of WARREN.

Civil action to recover for alleged breach of contract to teach in the Liberia School, of the Warren County Administrative Unit.

The plaintiff alleges in her complaint, briefly stated, these pertinent facts:

1. That for sixteen years prior to and including 24 May, 1946, she had been teaching in the Liberia School, at Macon, in Warren County, North Carolina.

2. That the Liberia School closed the year 1945-46 on 24 May, 1946.

3. That up to and including the date of the closing of the Liberia School for the school year 1945-46, she had not been given any notice by the defendants or any of them, or on their behalf, that her contract of employment under which she had been teaching would be terminated at

the close of the school year 1945-46, and be ineffective for the school year 1946-47, and for succeeding years, and, hence, under the school law her contract was continued.

4. That she has held herself in readiness, and has offered her services as a teacher in keeping with the provisions of her contract, for the school years 1946-47 and 1947-48, but that defendants have refused to accept her services as such teacher,—to her great damage in the amount of salary that would have accumulated to her as a teacher during said school years.

Defendants, in answers filed, admit that on 24 May, 1946, plaintiff completed the school year 1945-46 in the Liberia School, and that she had taught in the school prior thereto. They deny other material allegations of the complaint, particularly the allegation that notice of the termination of plaintiff's employment was not given to her prior to the close of the school year 1945-46. And they aver (1) that the plaintiff was duly and legally notified, by registered letter, of her rejection prior to the close of the school term, and (2) that had plaintiff been so employed, she failed to give notice of her acceptance as required by law.

Upon the trial in Superior Court the parties agreed that the Liberia School closed 24 May, 1946. And plaintiff offered evidence tending to show: That she did not receive notice prior to 24 May, 1946, of her rejection as a teacher in the Liberia School for the ensuing year; but that on 27 May, 1946, she did receive by mail in an envelope properly addressed to her at Macon, North Carolina, and postmarked "Warrenton, May 23, 1946 ..... ered," a registered letter, dated May 16, 1946, from the Superintendent of the Warren County school system, notifying her "that in accordance with the provisions of Section 12 of the North Carolina School Machinery Act as amended, the District Committee in charge of the District in which you have been employed during the session 1945-1946 has instructed me to notify you that your contract as teacher or principal will not be continued for the session 1946-1947, this action being pursuant to said section of the School Machinery Act as well as pursuant to Section 7 thereof as amended."

At the close of the evidence offered by plaintiff, defendants moved for judgment as of nonsuit. After discussion as to whether plaintiff could maintain an action against the State or any of its subdivisions on the matters alleged in her complaint, the judge, not limiting his decision to the matters discussed, ruled that plaintiff's evidence failed to make out any legal cause of action, and allowed the motion of defendant for judgment as of nonsuit.

From judgment in accordance therewith, plaintiff appeals to Supreme Court and assigns error.

Herman L. Taylor for plaintiff, appellant.

Banzet & Banzet and Kerr & Kerr for defendants, appellees.

WINBORNE, J. The sole assignment of error presented on this appeal challenges the correctness of the ruling of the trial judge in granting defendants' motion for judgment as of nonsuit at the close of evidence offered by plaintiff.

It appears from the record that this ruling was based upon two grounds: The first is that this action is in effect an action against the State, and may not be maintained by the plaintiff. This subject was fully considered by this Court in the case of *Kirby v. Board of Education, ante,* 619. It was there held that such an action as this may be maintained against the county board of education. What is said there is applicable here, and on the authority of that case this ground for sustaining the nonsuit is untenable.

However, the second ground for the nonsuit, that is, that the evidence fails to make out a case, is sound.

In this connection, it is provided in G.S. 115-354 that a contract of a teacher or a principal shall continue from year to year until the teacher or principal is notified as provided in G.S. 115-359; Provided, such teacher or principal give notice of acceptance of the employment as there required. *Kirby v. Board of Education, supra.* And the notice required by G.S. 115-359 is that "it shall be the duty of such county superintendent . . . to notify all teachers and/or principals now or hereafter employed, by registered letter, of his or her rejection prior to the close of the school term . . ."

Thus it appears that, by force of this statute, the notification is complete when the letter containing it is both mailed and registered. 39 Am. Jur. 250, Section 28. Hence, the evidence indicating the mailing of such letter prior to the close of the school term shows a compliance with the statute.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA v. CHARLIE MOORE AND SURETY TAR HEEL BOND COMPANY.

(Filed 28 September, 1949.)

1. Process § 12—

It is the service of process and not the return of the officer which confers jurisdiction on the court, G.S. 1-101, and the return merely perfects the record and furnishes proof of service for the guidance of the court, G.S. 1-102.

2. Same—

While it is a better practice for officers to make their returns of process show with particularity upon whom and in what manner the process was served, their endorsement "served" implies service as the law requires and such return signed by the officer in his official capacity is sufficient to show *prima facie* service at least, and error in the date of service is immaterial.

3. Process § 14—

The court has discretionary power to permit an officer to amend his return by adding certain specifications as to the manner of service or the acts done in compliance with the statute, by including the names of the persons served and the capacity in which they were served, by adding or correcting the signature of the officer, or in any other manner to disclose full compliance with the law.

4. Process § 7—

Service of the *sci. fa.* on the local agent of a bonding company who had executed the bond in behalf of the corporate surety is service upon the corporation. G.S. 1-97.

APPEAL by defendant bonding company from *Nettles, J.*, April Term, 1949, TRANSYLVANIA. Affirmed.

Criminal prosecution heard on motion of defendant bonding company to vacate judgment absolute on defendant's appearance bond for want of service of *sci. fa.*

Defendant bonding company became surety on the appearance bond of defendant Moore. Judgment *nisi* was entered on the bond. *Sci. fa.* was issued 3 July 1945. The sheriff returned the *sci. fa.* endorsed: "Served on Tar Heel Bonding Co. 7-1-45. B. H. Freeman, Sheriff." Thereafter, at the December Term, 1945, judgment absolute was entered.

At the April Term, 1949, appellant filed motion to vacate the judgment alleging that the *sci. fa.* was not properly served on it for that it was not served on any officer of the corporation and that its officials learned of the judgment for the first time at the December Term, 1948.

When the motion came on to be heard, the court below permitted the sheriff to amend his writ by adding thereto the following:

"By delivering a copy to T. S. Wood, Local Agent of Tar Heel Bonding Company. B. H. Freeman, Sheriff."

It thereupon denied the motion to vacate and defendant bonding company appealed.

Ramsey & Hill for plaintiff appellee.

Charles O. P. Trexler and C. P. Barringer for Tar Heel Bond Company, appellant.

BARNHILL, J. The appellant, in the affidavit filed in support of its motion, does not assert that T. S. Wood was not its local agent at the time of the service of the *sci. fa.* Nor does it deny that the *sci. fa.* was served on him. It excepts to the action of the court in allowing the sheriff to amend his return and to the findings that (1) the return of the sheriff as amended cures the defect in the service, and (2) the *sci. fa.* was, in law, served on it. These exceptions are without substantial merit.

It is the service of summons and not the return of the officer that confers jurisdiction. G.S. 1-101. The return merely perfects the record and furnishes proof of service for the guidance of the court. G.S. 1-102.

An officer having process in hand for service must note on the process the date received by him, G.S. 1-94, and make due return thereof. G.S. 162-14. These are the affirmative requirements of the statutes.

The officer's return is his answer touching what he is commanded to do by the writ. "It is the bringing of a process into court with such endorsements as the law requires, whether they in fact be true or false." *Watson v. Mitchell,* 108 N.C. 364; *Waugh v. Brittain,* 49 N.C. 470; *Person v. Newsom,* 87 N.C. 142; *Lee v. Hoff,* 221 N.C. 233, 19 S.E. 2d 858.

While it is the better practice for officers to make their returns with that degree of particularity necessary to show exactly upon whom and in what manner the process was served, failure to do so does not invalidate the service. "Served" implies service as by law required. *Strayhorn v. Blalock,* 92 N.C. 293; *McDonald v. Carson,* 94 N.C. 498; *Isley v. Boon,* 113 N.C. 249. So then the return "served," or as here, "served on Tar Heel Bond Company. 7-1-45," signed by the officer in his official capacity is sufficient—at least *prima facie*—to show service. *Strayhorn v. Blalock, supra.* The error in the date is immaterial.

The court in its discretion may permit an officer to amend his return by adding further specifications as to the manner of service or the acts done in compliance with the statute, by including the names of the persons served and the capacity in which they were served, by adding or correcting the signature of the officer, or in any other manner deemed

necessary to disclose full compliance with the law. *Calmes v. Lambert,* 153 N.C. 248, 69 S.E. 138; *Grady v. R. R.,* 116 N.C. 952; *Lee v. Hoff, supra.* Therefore, even if the original return was deficient—and this we do not concede—the court below was acting within its authority in permitting the amendment.

The *sci. fa.* was served on a local agent of appellant—the agent who executed the bond in its behalf. This was service upon the corporation. G.S. 1-97; *Grady v. R. R., supra; Clements v. R. R.,* 179 N.C. 225, 102 S.E. 399.

It follows that the judgment absolute is not subject to attack upon the grounds set forth in appellant's motion and supporting affidavit. Hence the refusal of the court to vacate the same may not be held for error.

The judgment below is

Affirmed.

STATE OF NORTH CAROLINA v. CLAUDE McCONNELL AND SURETY TAR HEEL BOND COMPANY.

(Filed 28 September, 1949.)

APPEAL by defendant bonding company from *Nettles, J.,* April Term, 1949, TRANSYLVANIA. Affirmed.

Criminal prosecution heard on motion of defendant bonding company to vacate judgment absolute on defendant's appearance bond for want of service of *sci. fa.*

The motion to vacate and set aside judgment absolute was overruled and defendant bonding company appealed.

Ramsey & Hill for plaintiff appellee.

Charles O. P. Trexler for defendant Tar Heel Bond Co. and C. P. Barringer for defendant.

PER CURIAM. This is a companion case to *S. v. Moore, ante,* p. 648. In all material essentials the facts are the same. The judgment is affirmed on authority of the opinion in that case.

Affirmed.

DALLAS RAY GREEN, BY HIS NEXT FRIEND, CLARENCE W. GRIFFIN, v. ROY BOWERS.

(Filed 28 September, 1949.)

1. Automobiles § 18i: Negligence § 20—Charge held for error as omitting question of proximate cause.

Plaintiff was a four year old boy, and thus too young to be chargeable with contributory negligence. *Held:* An instruction that if plaintiff's acts were the sole proximate cause of his injury the jury should answer the issue of negligence in the negative, but further charging that the jury would have to further find that there was no negligence on the part of the defendant in the operation of his motor vehicle, must be held for reversible error as omitting the element of proximate cause, even though in other parts of the charge the court correctly instructed the jury that negligence on the part of defendant must have been the proximate cause of the injury to render defendant liable therefor.

2. Appeal and Error § 39f—

Conflicting instructions upon a material aspect of the case must be held for prejudicial error.

APPEAL by defendant from *Burgwyn, Special Judge,* at April Term, 1949, of MARTIN. New trial.

This was an action for damages for a personal injury alleged to have been caused by the negligence of the defendant in the operation of a motor truck.

Plaintiff's evidence tended to show that an automobile containing several passengers, including the plaintiff, a child of four years of age, was standing on a road or street in Parmele. The automobile was headed east and was nearer the south side of the road, leaving space on the north side for vehicles to pass. Defendant's truck approached from the opposite direction—that is, from the east, moving west—and passed on the south side of the automobile or to the truck driver's left. No signal was given. Just before the truck came opposite, two adult persons from the automobile attempted to cross to the south side of the road in front of the truck. One got safely across, the other jumped back in time to avoid being hit, but the plaintiff, the little boy, jumped out of the automobile and was struck by the truck and injured.

According to the defendant's evidence, the automobile was standing on the north side of the road and the truck had to pass on the left. The defendant testified the horn was sounded, and that just as the truck got opposite, the plaintiff suddenly jumped out of the automobile and into the side of the truck.

There was verdict for plaintiff, and from judgment thereon defendant appealed.

Charles H. Manning and R. L. Coburn for plaintiff, appellee.
Peel & Peel for defendant, appellant.

DEVIN, J. The court properly ruled that the plaintiff was not of sufficient age nor possessed of that degree of intelligence which would make him chargeable with contributory negligence, but, in response to request from defendant, charged the jury that "If they found from the evidence that as the defendant was passing the car in which plaintiff had been riding, the plaintiff jumped from the car and into defendant's truck, and that this action on the part of plaintiff was the sole proximate cause of his injury, they should answer the first issue no." To this the court added, "I give you this instruction at the request of the defendant, charging you that you would have to find that there was no negligence on the part of the defendant in passing the car, either in the way or manner in which he operated his truck, or in the failure to give signals as he approached the car, or his failure to keep a proper lookout—if you find from the testimony and by its greater weight, the burden being upon the plaintiff to so satisfy you, that he did so."

The effect of this instruction was to convey to the minds of the jurors that they could not answer the first issue no unless they found that defendant was in no respect negligent, thus omitting the element of proximate cause. Notwithstanding the defendant may have failed to exercise due care in the manner in which he drove his truck, or may have failed to give a signal, if his negligence was not the proximate cause of the injury, he could not in law be held liable therefor, and he was entitled to have the jury so instructed.

True, the trial judge subsequently stated the rule correctly, but we think his modification of, or addition to, the defendant's prayer, in the way in which it was stated, was confusing to the jury and harmful to the defendant. Nor was the error cured by the later statement. "When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted." *S. v. Overcash*, 226 N.C. 632, 39 S.E. 2d 810; *Dixon v. Brockwell*, 227 N.C. 567 (571), 42 S.E. 2d 680; *Templeton v. Kelley*, 217 N.C. 164 (166), 7 S.E. 2d 380.

New trial.

DENNIS F. JOHNSON AND WIFE, ANN JOHNSON; MIRIAM L. HUMPLETT AND HUSBAND, J. BARTON HUMPLETT; ROSA J. HARRELL AND HUSBAND, W. B. HARRELL; AND ROSA J. HARRELL, GUARDIAN OF FRANCES IRENE JOHNSON AND FRANKFORD MILAND JOHNSON, v. C. T. GAINES AND J. C. KIRKMAN, TRADING AS GAINES AND KIRKMAN.

(Filed 28 September, 1949.)

Wills § 33i—

Where a will devises the fee in lands and by later item expresses testator's intent that all the real estate be kept intact for a period of 35 years and then equally divided between the beneficiaries, and that no part of the lands should be sold or encumbered during that period, *held*, the attempted restraint on alienation, annexed to the devise in fee, is void.

APPEAL by defendants from *Carr, J.*, at Chambers in Burlington, N. C., 20 July, 1949. From MARTIN.

Controversy without action submitted on an agreed statement of facts.

Dennis F. Johnson and wife, Ann Johnson, contracted to convey to the defendants a certain tract of land, and duly executed and tendered a deed therefor, sufficient in form to vest the defendants with a fee simple title thereto, and demanded the contract price, but the defendants declined to accept the deed or pay the purchase price on the grounds that the title is defective.

It appears of record, that F. M. Johnson, who died in 1936, devised his two-thirds undivided interest in the property involved herein to his wife, Rosa J. Johnson, for life, she being the owner in fee simple of a one-third undivided interest in the land. He then devised the remainder of his interest in the land to his children, naming them, share and share alike. In later Items of his will, he expresses it to be his will and desire that all his real estate be kept intact for a period of thirty-five years from the date of his death, and then to be equally divided between his children, and that during the thirty-five year period no part of the land shall be sold or the interest of his minor children encumbered by their guardian.

All the other beneficiaries under the last will and testament of F. M. Johnson have conveyed to Dennis F. Johnson, one of the beneficiaries under the will, all their right, title and interest in and to the property in question, including Rosa J. Johnson, now Rosa J. Harrell, who has conveyed to him her life estate as well as her one-third interest in the property.

It was agreed that if, in the opinion of the court, under the facts submitted, the deed tendered by the plaintiffs Dennis F. Johnson and wife, Ann Johnson, is sufficient to convey a good and indefeasible fee simple title to the land in question, the judgment should be rendered in favor of the plaintiffs, otherwise for the defendants.

The court being of the opinion that the deed tendered was sufficient to convey a fee simple title to the lands in question, gave judgment for the plaintiffs, and the defendants appeal and assign error.

J. W. H. Roberts for plaintiffs.
Peel & Peel for defendants.

DENNY, J. It is conceded that the tendered conveyance is valid unless the immediate power of alienation is affected by the expressed desire of the testator that no part of the property be sold for a period of thirty-five years after his death.

It has been uniformly held by this Court that an absolute restraint on alienation, for any length of time, annexed to a grant or devise in fee, is void. A condition subsequent attempting to limit the right of a devisee to sell or mortgage such devised premises will be regarded as inoperative and void. *Douglass v. Stevens,* 214 N.C. 688, 200 S.E. 366; *Barco v. Owens,* 212 N.C. 30, 192 S.E. 862; *Williams v. Sealy,* 201 N.C. 372, 160 S.E. 452; *Combs v. Paul,* 191 N.C. 789, 133 S.E. 93; *Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730; *Schwren v. Falls,* 170 N.C. 251, 87 S.E. 49; *Holloway v. Green,* 167 N.C. 91, 83 S.E. 243; *Trust Co. v. Nicholson,* 162 N.C. 257, 78 S.E. 152; *Christmas v. Winston,* 152 N.C. 48, 67 S.E. 58.

The judgment of the court below is
Affirmed.

UNIVERSAL C. I. T. CREDIT CORPORATION v. BERTHA E. ROBERTS.

(Filed 28 September, 1949.)

1. Pleadings § 10—

A counterclaim may not be founded upon damages arising subsequent to the institution of the suit, and when it is so founded demurrer to the counterclaim is proper.

2. Chattel Mortgages § 17: Bills and Notes § 24b—Subsequent agreement held to defeat payee's right to invoke acceleration clause.

Defendant executed note secured by chattel mortgage on an automobile payable in monthly installments and containing an acceleration clause in case of default in any monthly payment. Defendant alleged that the car was involved in a wreck, that she reported same to the manager of one of plaintiff's offices in accordance with the agreement, that the manager advised her to withhold further payments until the repairs to her car could be adjusted with the insurance company, and that in violation of this agreement plaintiff instructed the repair shop not to release the car until the entire balance due on the purchase price was paid and instituted this

action to recover the entire amount due. *Held:* The allegations are sufficient to defeat plaintiff's right to invoke the acceleration clause, and judgment on the pleadings in plaintiff's favor was error.

3. Appeal and Error § 40a—

An appeal from judgment on the pleadings presents the question whether the judgment is supported by the record.

APPEAL by defendant from *Morris, J.*, at April Term, 1949, of NASH.

Civil action to recover on conditional sales contract with ancillary remedy of claim and delivery.

It is alleged that on 18 September, 1948, the defendant executed to the Attleboro Motor Sales of Attleboro, Mass., conditional sales contract or title-retained note and chattel mortgage on one Chevrolet Business Coupe, 1947 Model, for $2,176.96, payable in monthly installments of $71.54, and containing acceleration clause in case of default in any monthly payment; that on the same day this conditional sales contract was duly assigned to the plaintiff.

It is further alleged that except for one monthly payment, the defendant has made no further payment on her note and mortgage. Wherefore, the plaintiff demands judgment for the total balance due and for possession of the mortgaged property.

The defendant admitted the execution of the conditional sales contract, or note and mortgage, but denied that there had been any breach of its terms on her part.

On the other hand, she alleged by way of counterclaim, that on 2 November, 1948, she was involved in a wreck with a truck on Highway No. 301 in Nash County, N. C., and that in conformity with the provisions of the "Nationwide Travel Emergency Certificate" issued to her by the plaintiff at the time of purchase of the car, she reported the wreck to the manager of plaintiff's Raleigh, N. C., office who advised her, in response to her specific inquiry, to withhold further payments on the purchase contract until the repairs to her car could be adjusted with the insurance company; that in violation of these instructions, the plaintiff instructed the repair shop not to release defendant's car until the entire balance due on the purchase price of the car was paid, and instituted this action, which has resulted in great loss and damage to the defendant, wherefore, damages both actual and punitive were demanded.

The plaintiff demurred to the counterclaim on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment was entered on the pleadings for the plaintiff.

From these rulings, the defendant appeals, assigning errors.

James W. Keel, Jr., and L. L. Davenport for plaintiff, appellee.
Wilkinson & King for defendant, appellant.

STACY, C. J. The damages alleged in defendant's answer, of which she may properly complain, do not appear to have accrued prior to the institution of the present action, hence it would seem that the demurrer to the counterclaim was properly sustained. *Finance Corp. v. Lane,* 221 N.C. 189, 19 S.E. 2d 849.

However, the answer does contain allegations, which, if true, would defeat the plaintiff's present right to invoke the acceleration clause of the contract. Thus, judgment on the pleadings should have been withheld. It is true, the defendant has not pressed this position in her brief, but she appeals from the judgment and it appears to be erroneous on the face of the record.

Error and remanded.

FRANK M. PARKER, ADMR., v. DUKE UNIVERSITY, ET AL.

(Filed 28 September, 1949.)

1. Appeal and Error § 40a—

A single assignment of error to the signing of the judgment presents only whether error appears on the face of the record.

2. Appeal and Error § 40f—

The denial of a motion to strike certain allegations from the pleadings will ordinarily be affirmed on appeal when the matter can best be presented by exceptions to the evidence.

APPEAL by defendants from *Moore, J.,* at June Term, 1949, of BUNCOMBE.

Civil action to recover damages for death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendants.

Plaintiff's intestate was a patient in Highland Hospital, Asheville, N. C., occupying a room in Central Building, on the night of 10-11 March, 1948, when said building was destroyed by fire and plaintiff's intestate suffocated.

Plaintiff sets up a common-law action for negligence, and then in paragraph 9 of the complaint, adds seven specific allegations of negligence in violation of a city ordinance and under the General Statutes of North

Carolina relating to "Fire Prevention" for "Hotels and other buildings of like occupancy." G.S. 69-27, *et seq.*

In apt time, the defendants moved to strike these specific allegations of ordinance and statutory violations from the complaint as being inapplicable, improper and prejudicial.

The motion was overruled, and the defendants appeal, assigning error "in the signing of the judgment as appears in the record."

W. R. McGuire, Jones & Ward, George Pennell, and Jesse A. Jones for plaintiff, appellee.

Harkins, Van Winkle & Walton and E. C. Bryson for defendants, appellants.

STACY, C. J. The single imputed error "in the signing of the judgment," presents only the question whether error appears on the face of the record. *Query v. Ins. Co.*, 218 N.C. 386, 11 S.E. 2d 139; *Wilson v. Charlotte*, 206 N.C. 856, 175 S.E. 306; *Smith v. Smith*, 223 N.C. 433, 27 S.E. 2d 137; *King v. Rudd*, 226 N.C. 156, 37 S.E. 2d 116; *Rader v. Coach Co.*, 225 N.C. 537, 35 S.E. 2d 609.

We are not prepared to say that such has been revealed or made manifest. Nor is it according to precedent to chart the course of the trial on close or attenuate motions to strike portions of the pleadings. *Pemberton v. Greensboro*, 205 N.C. 599, 172 S.E. 196; *Hardy v. Dahl*, 209 N.C. 746, 184 S.E. 480; *Scott v. Bryan*, 210 N.C. 478, 187 S.E. 756; *Ludwick v. Ry. Co.*, 212 N.C. 664, 194 S.E. 282; *Hill v. Stansbury*, 221 N.C. 339, 20 S.E. 2d 308; *Penny v. Stone*, 228 N.C. 295, 45 S.E. 2d 362.

The same matters will be presented when the evidence is offered and they can then be readily determined by the rulings thereon. Of course, the judgment here appealed from would have no bearing on the competency of any evidence which may be offered on the hearing. But the defendants say they will be prejudiced by the reading of these challenged allegations to the jury. No more so, we apprehend, than the reading of the general allegations of negligence. The jury's verdict is to be rendered on evidence—not on controverted allegations of the complaint. *Hosiery Mill v. Hosiery Mills*, 198 N.C. 596, 152 S.E. 794. It follows, therefore, that on the record as presented, no disturbance of the ruling is indicated or required.

Affirmed.

OSCAR GRANT v. JAMES E. BARTLETT.

(Filed 28 September, 1949.)

1. Negligence § 19b (1), 19c—Evidence held for jury in action for negligent injury inflicted with an axe.

Plaintiff and defendant were engaged in clearing land, and plaintiff's hand was injured when struck by the axe wielded by defendant. Plaintiff's evidence was to the effect that he was pulling ivy off a stump and that as his hand came back with the pull, defendant carelessly and without noting plaintiff's proximity, struck down with the axe causing the injury. Defendant's evidence was to the effect that plaintiff suddenly stumbled backward and downward and fell under the axe as it was descending, too late for defendant to arrest the stroke. *Held:* Defendant's motion to nonsuit on the ground of absence of evidence of actionable negligence and on the ground of contributory negligence was properly denied.

2. Trial § 31b—

The failure of the court to give instructions on subordinate features of the case will not be held for error in the absence of request for instructions.

3. Trial § 32—

Where the trial court substantially complies with plaintiff's oral request for instructions in respect to evidence of previous statements made by plaintiff tending to contradict plaintiff's evidence on the stand, the failure to give more particular instructions on this aspect will not be held for error. G.S. 1-180 as amended by Chap. 107, Session Laws of 1949.

APPEAL by defendant from *Pless, J.*, at July Term, 1949, of McDOWELL. No error.

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

Plaintiff and defendant were engaged in clearing land for a pasture, the defendant using an axe. Plaintiff's allegations and testimony were to the effect that as plaintiff was pulling ivy off a stump his right hand came back with the pull, and the defendant, who was behind him, carelessly and without noting plaintiff's proximity, struck down with his axe and cut plaintiff's hand, severing his little finger and permanently injuring the nerves in his hand.

Defendant denied negligence on his part and pleaded the contributory negligence of the plaintiff. His evidence tended to show that the place of the injury was on a steep grade, and that plaintiff was cutting a pine tree, and that plaintiff in pulling bushes suddenly stumbled backward and downward, and fell under the axe just as it was descending, too late for defendant to arrest the stroke.

Issues of negligence, contributory negligence and damage were submitted to the jury and answered in favor of plaintiff. From judgment on the verdict defendant appealed.

Roy W. Davis for plaintiff, appellee.
William C. Chambers for defendant, appellant.

DEVIN, J. Defendant assigns error in the denial of his motion for judgment of nonsuit. He presents the view that the evidence was insufficient to show negligence on his part, or, if so, that the contributory negligence of plaintiff as a proximate cause of the injury was made out by the plaintiff's evidence. However, considering the evidence in the light most favorable for the plaintiff on this motion, we think the case was properly submitted to the jury. *Fitzgerald v. R. R.*, 141 N.C. 530, 54 S.E. 391; *Cashwell v. Bottling Works*, 174 N.C. 324, 93 S.E. 901; *Wyrick v. Ballard Co., Inc.*, 224 N.C. 301, 29 S.E. 2d 900.

Defendant noted exceptions to the judge's charge to the jury, and assigns error for that the court failed therein to give instructions to the jury as to certain subordinate matters of evidence, but, as there was no request for instruction, these exceptions cannot be sustained. *School District v. Alamance County*, 211 N.C. 213 (226), 189 S.E. 873.

Defendant also assigns error in the failure of the court to review the evidence of witnesses as to statements previously made by plaintiff which defendant contended served to contradict plaintiff's evidence on the stand. It appears from the record that the court substantially complied with plaintiff's oral request in this respect and no prejudicial effect is perceived. In this connection it may be noted that by Chap. 107, Session Laws 1949, the language of G.S. 1-180 was amended by striking out the previous requirement that the judge in giving a charge to a petit jury "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising on the evidence," and providing merely that "he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of plaintiff and defendant in civil action."

The trial seems to have been free from substantial error, and the result will not be disturbed.

No error.

MARY ELLEN WILLIAMS v. JESSE THOMAS WILLIAMS.

(Filed 28 September, 1949.)

Divorce and Alimony § 12—

In a wife's action for alimony without divorce in which defendant's answer sets up the defense of adultery, it is error for the court to order temporary alimony to plaintiff without finding the facts with respect to the plea of adultery. G.S. 50-16.

APPEAL by defendant, Jesse Thomas Williams, from *Shuford, Special Judge,* at February Term, 1949, of BUNCOMBE.

The plaintiff, Mary Ellen Williams, sued her husband, the defendant, for alimony without divorce under G.S. 50-16. Her complaint stated with particularity a good cause of action under the statute for subsistence and counsel fees. The defendant answered, denying all of the essential allegations of the complaint except the fact of marriage and pleading adultery on the part of plaintiff in bar of her claim to alimony.

The plaintiff made application for an allowance of counsel fees and temporary alimony from the earnings of defendant pending the trial and final determination of the issues involved in the action. When the application came on for hearing before Judge Shuford, the plaintiff and the defendant offered conflicting testimony by affidavits and witnesses with respect to the plea that the plaintiff had been guilty of adultery. Judge Shuford entered an order awarding plaintiff counsel fees and alimony pending the action without finding the facts upon this plea, and the defendant excepted to the order and appealed, assigning errors.

H. Kenneth Lee for plaintiff, appellee.

Don C. Young for defendant, appellant.

ERVIN, J. The defendant expressly pleaded the adultery of the plaintiff in bar of her claim to alimony and offered testimony in support of his plea. In consequence, the order of the court awarding temporary alimony to the plaintiff without finding the facts with respect to this plea ignores the provision of the statute regulating independent suits for alimony without divorce, which was adopted in 1923 and which reads as follows: "In all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees." G.S. 50-16. The action of the court in awarding temporary alimony to plaintiff without making any determination as to the

validity of the defendant's plea constitutes error entitling defendant to a rehearing upon the application. *Phillips v. Phillips,* 223 N.C. 276, 25 S.E. 2d 848; *Holloway v. Holloway,* 214 N.C. 662, 200 S.E. 436; *Price v. Price,* 188 N.C. 640, 125 S.E. 264.

Error.

MRS. ELIZABETH MACCLURE, ADMINISTRATRIX OF THE ESTATE OF DOUGLAS MACCLURE, DECEASED, v. ACCIDENT & CASUALTY INSURANCE COMPANY OF WINTERTHUR, SWITZERLAND, A CORPORATION.

(Filed 28 September, 1949.)

Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

SEAWELL, J., took no part in the consideration or decision of this case.

DEFENDANT'S appeal from *Moore, J.,* Regular April Term, 1949, of BUNCOMBE Superior Court.

Williams & Williams for plaintiff, appellee.

Harkins, Van Winkle & Walton for defendant, appellant.

PER CURIAM. This is an action brought by the plaintiff to enforce the alleged liability of the defendant upon an insurance policy which plaintiff contends covers the accident or collision which resulted in the death of her intestate, and damages caused thereby.

The Court being evenly divided in opinion, *Seawell, J.,* taking no part in the consideration or decision of the case, the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent. *Parsons v. Board of Education,* 200 N.C. 795, 156 S.E. 163; *Gooch v. Western Union Telegraph Co.,* 196 N.C. 823, 146 S.E. 803.

Affirmed.

MILLARD GUNTER v. B. G. GUNTER AND ELMER GUNTER AND WIFE, VINA GUNTER.

(Filed 28 September, 1949.)

Mortgages § 40—

An alleged parol agreement entered into by the parties just prior to foreclosure sale, which amounts to nothing more than an oral option to the mortgagor to repurchase, is insufficient to charge the purchaser at the sale as trustee or to impress a trust upon his title.

APPEAL by plaintiff from *Moore, J.*, April Term, 1949, MADISON.

Civil action to impress a trust upon defendant's title to the real property described in the complaint.

From judgment of nonsuit plaintiff appealed.

Calvin R. Edney and James E. Rector for plaintiff appellant.

Carl R. Stuart for defendant appellees.

PER CURIAM. A mortgage on the *locus*, executed by plaintiff, was foreclosed. Defendant became the purchaser at the sale. Plaintiff now seeks to have defendant declared trustee for his use and benefit by reason of a parol agreement entered into by them just prior to the sale. A careful examination of the testimony discloses that the contract of the parties, if made, constitutes nothing more than an oral option to repurchase. It is insufficient to charge defendant as trustee or to impress a trust upon his title. Hence the judgment entered must be

Affirmed.

LOTTIE A. PRIVETTE v. MOSES B. ALLEN.

(Filed 28 September, 1949.)

Trial § 48½—

Where the court sets aside the verdict in defendant's favor in the exercise of its discretion, plaintiff's appeal from the refusal of the court to set aside the verdict as a matter of law will be dismissed.

APPEAL by plaintiff from *Morris, J.*, at April Term, 1949, of NASH.

Appeal dismissed.

L. L. Davenport and Hobart Brantley for plaintiff, appellant.

O. B. Moss for defendant, appellee.

PER CURIAM. This was an action to recover the possession of land. Defendant alleged plaintiff held the legal title in trust for the defendant. To the issue, "Is the plaintiff the owner of the legal title to the land," the jury answered "No," and the court in its discretion set aside the verdict. Plaintiff excepted to the ruling of the court in declining to set aside the verdict as a matter of law and appealed. Plaintiff's motion for judgment *non obstante veredicto* was properly denied.

Appeal dismissed.

ROBERT O. ALEXANDER v. G. H. LINDSEY, LAWRENCE E. BROWN, AND CARL W. SMITH.

(Filed 12 October, 1949.)

1. False Imprisonment § 1—

Ordinarily an officer is protected in serving a warrant for the arrest of an accused named therein even though the warrant is defective, but he may be held liable for a forcible arrest when it appears on the face of the warrant that the offense is beyond the jurisdiction of the magistrate issuing the warrant or that the charge does not constitute a criminal offense.

2. Same—

A warrant charging that the person therein named "did unlawfully and willfully trespass against the form of the statute," etc., while defective, is not void, and is insufficient to constitute a basis for an action for false imprisonment against either the officers executing the writ or the person swearing out the warrant.

3. Arrest § 1 (b)—

An officer may not make an arrest without a warrant for a misdemeanor not committed in his presence unless expressly authorized to do so by statute, and it is required that the warrant be in the possession of the officer purporting to act thereunder or in the possession of a person acting in conjunction with him.

4. False Imprisonment § 2—

The evidence disclosed that a municipal policeman arrested plaintiff at the request of the sheriff of the county, and that the warrant remained in the possession of the sheriff at the time the officer made the arrest some fourteen miles away. *Held:* Nonsuit was improperly entered in plaintiff's action for false arrest and false imprisonment as to the sheriff and the officer making the arrest, but was properly granted as to the person who swore out the warrant.

5. Same—

Good faith of the officers in making the arrest cannot be considered on the question of the lawfulness or unlawfulness of the arrest, but only on the question of damages.

6. Same—

Defendant was arrested by an officer not having the warrant in his possession, and was turned over to the sheriff who had possession of the warrant. *Held:* Plaintiff in his action for false arrest and false imprisonment is entitled to recover only such actual or compensatory damages as he sustained from the time of his arrest until he was placed in custody of the sheriff.

7. Malicious Prosecution § 1a—

The elements of a cause of action for malicious prosecution are (1) the institution of the criminal prosecution, (2) want of probable cause, (3) malice, and (4) termination of the prosecution in favor of the plaintiff.

8. Malicious Prosecution § 5—

Withdrawal of criminal prosecution by compromise brought about by the defendant in the criminal prosecution is not such termination of the prose cution as will support an action by him for malicious prosecution.

9. Malicious Prosecution § 9d—

In an action for malicious prosecution against complainant who swore out the warrant, the policeman who made the arrest and the sheriff at whose request the arrest was made, evidence as to the withdrawal of the prosecution upon payment of the costs by the complainant, is competent as against all three defendants, and it was error to strike out such evidence as against the sheriff and the policeman.

10. Appeal and Error § 40i—

In passing upon plaintiff's exceptions to judgment as of nonsuit, the Supreme Court will not pass upon the credibility or weight the jury should give the evidence, but will consider the evidence in the light most favorable to plaintiff.

11. Malicious Prosecution § 10—

Plaintiff's evidence tended to show that he was arrested for trespass when he visited the estranged wife of complainant, that the arrest made by a police officer without the warrant, that the sheriff refused to allow plaintiff bond because of personal animosity, and that the warrant was withdrawn by consent of the issuing magistrate upon the payment of costs by complainant. *Held:* In plaintiff's action for malicious prosecution, the evidence was sufficient to overrule nonsuit as against the sheriff and complainant, but was insufficient as against the officer making the arrest, there being no evidence that the officer had anything to do with the case except to make the arrest at the request of the sheriff.

APPEAL by plaintiff from *Shuford, Special Judge,* at March Term, 1949, of BUNCOMBE.

This is a civil action in which the plaintiff seeks to recover damages for false arrest, false imprisonment and for malicious prosecution.

The defendant G. H. Lindsey and his wife, Eleanor Lindsey, were living separate and apart, having entered into a separation agreement,

12 February, 1947. In May, 1947, Mrs. Lindsey was living in Black Mountain with her two children, a girl 14 and a boy 9, in a house rented by her. The plaintiff had been taking his evening meals with Mrs. Lindsey and on occasions would remain in the house until a late hour. Mrs. Lindsey testified the plaintiff had been paying her $10.00 a week for his evening meals. She also testified that she had never forbidden the plaintiff to come on the premises, but that her husband had protested to her about his presence there; that on one occasion he brought the defendant, Sheriff Lawrence E. Brown, to her home and the sheriff informed her that he would have her and the plaintiff arrested if he (Alexander) did not stay away from her.

The plaintiff testified that on 16 May, 1947, he had gone to the home of Mrs. Lindsey for supper and shortly after his arrival the defendant, Carl W. Smith, came to the Lindsey home and requested him to come outside the house. "Smith said something about a little trouble and I said 'What's the matter, am I under arrest?' and he said 'Let's go,' and I got in the car with him and then I asked 'Where's the warrant?' and he said, 'The Sheriff has got it.'" He was then informed upon his inquiry that he was being arrested for trespassing and that the bond was $200.00. After making some effort to secure a bondsman, he was informed by the defendant Smith that he was not authorized to accept a bond. Whereupon Alexander was turned over to two deputies of the defendant, Sheriff Lawrence E. Brown, and lodged in the Buncombe County jail. It further appears from plaintiff's testimony that prior to his arrest the sheriff had said to him, "Bob if I catch you down at Lindsey's any more I'm going to lock you up, and her too," and when he was asked what for, he replied, "I'll investigate that on the 15th floor of the jail house." And on the morning of 17 May, 1947, the defendant Brown took the plaintiff in his office and said to him, "Oh, yes, I told you I would get you on the 15th floor. . . . I don't have any use for you and you don't have any use for me."

John Brittain testified that while the plaintiff was in jail in Black Mountain he offered to post bond for him, but that the defendant Smith called the defendant Brown over the phone and after having a conversation with him he refused to accept a bond, stating he had no authority to do so; that he would have to contact Sheriff Brown; that on the following day in Asheville, when he did sign the plaintiff's bond, the defendant Brown told him that the trouble between him and the plaintiff was caused by the plaintiff's failure to pay for his board when he had boarded with Brown's mother two or three weeks several years before and his refusal thereafter to support him in a primary campaign.

The warrant introduced in evidence is as follows:

"Grayson H. Lindsey, being duly sworn, complains and says, that at and in said County, on or about the 4th day of May, 1947, Robert Alexander did unlawfully and willfully Trespass against the form of the statute in such case made and provided, and contrary to the law and against the peace and dignity of the State.

"Subscribed and sworn to before me, the 5th day of May, 1947.

(s) GRAYSON H. LINDSEY.

"E. E. WHITE, J.P.

"State of North Carolina—Buncombe County.

"To Any Constable or other lawful Officer of Buncombe County—Greetings:

"You are forthwith commanded to arrest Robert Alexander, and him safely keep, so that you have him before me, the undersigned Justice of the Peace, at his office in Black Mountain Township, in said County, immediately to answer the above complaint and be dealt with as the law directs.

"Given under my hand and seal, this the 5th day of May, 1947.

(s) E. E. WHITE, J. P. (Seal)."

On the back of the warrant there is this return: "Received 17th day of May, 1947, executed and returned for trial on the 17th day of May, 1947, L. E. Brown, Sheriff, by Roy Alexander, Deputy Sheriff."

E. E. White, the Justice of the Peace who issued the warrant, testified that the defendant Robert O. Alexander (the plaintiff herein) was never tried, and that the warrant was withdrawn thereafter "on condition the defendant (the plaintiff herein) refrain from trespassing upon premises occupied by complainant's children"; that two of the brothers of the defendant (the plaintiff herein) assured the Court that Robert O. Alexander would cause no more trouble, whereupon the Court consented to the warrant being withdrawn, and the complainant, G. H. Lindsey, paid the costs and the bondsman was released.

At the close of plaintiff's evidence, the defendants made a motion for judgment as of nonsuit. The motion was allowed as to all defendants on the action based upon false arrest and false imprisonment, and as to the defendants Lawrence E. Brown and Carl W. Smith on the cause of action for malicious prosecution, and judgment signed accordingly. The plaintiff appeals and assigns error.

Guy Weaver for plaintiff.

W. K. McLean, Don C. Young, and Oscar Stanton for defendants.

DENNY, J. In order for us to determine the correctness of the ruling below granting the motion for judgment as of nonsuit, on the cause of action for false arrest and false imprisonment, it is necessary to consider certain preliminary questions. (1) Was the purported warrant, copy of which appears in the record, sufficient to authorize a constable or other lawful officer in Buncombe County to arrest the plaintiff? (2) Conceding such warrant to be valid, was the arrest made by defendant Carl W. Smith, a policeman of the town of Black Mountain, by direction of Sheriff Brown, illegal, when the sheriff retained the possession of the warrant in Asheville?

Ordinarily an officer is protected in serving a warrant, for the arrest of an accused named therein even though the warrant is defective. *S. v. Curtis,* 2 N.C. 471; *Welch v. Scott,* 27 N.C. 72; *S. v. Furguson,* 76 N.C. 197; *S. v. James,* 80 N.C. 370; *S. v. Jones,* 88 N.C. 671; *S. v. Dula,* 100 N.C. 423, 6 S.E. 89; *S. v. Gupton,* 166 N.C. 257, 80 S.E. 989; Clark's Criminal Procedure, Section 9, p. 41. *Ruffin, J.,* said in *Welch v. Scott, supra:* "When the warrant purports to be for a matter within the jurisdiction of the justice (magistrate) the ministerial officer is obliged to execute it, and of course must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded, or whether he committed an error or irregularity in his decision . . ., the constable has nothing to look to but the warrant as his guide, it follows, that he is justified by the warrant, though not purporting to have been, nor in fact issued on a sworn charge."

In the case of *S. v. Gupton, supra,* the defendant, an officer, was on trial for murder of Charles Snyder, having killed Snyder while attempting to arrest him. The State contended the warrant under which the officer was purporting to act was void, but this Court held otherwise. It was pointed out that it is contemplated in the law, that magistrates, not learned in the law, may sometimes issue papers defective in form, and even in substance, but the method of correction is provided by statute. Rev. 1467, now G.S. 7-149, Rule 12. *S. v. Pool,* 106 N.C. 698, 10 S.E. 1033; *S. v. Smith,* 103 N.C. 410, 9 S.E. 200; *S. v. Smith,* 98 N.C. 747; *S. v. Vaughan,* 91 N.C. 532. The complaint or accusation in the warrant was held to be but a defective statement, being too general, but the nature of the crime charged sufficiently appeared for the purpose of arrest and to justify the officer in making it.

On the other hand, it has been held that an officer cannot justify an arrest, by force of a warrant issued by a justice of the peace, when it appears on the face of the warrant to be for an offense of which he has no jurisdiction. *S. v. McDonald,* 14 N.C. 469. And an action for false arrest will lie for the arrest of a party on a charge which does not con-

stitute a criminal offense. *Rhodes v. Collins,* 198 N.C. 23, 150 S.E. 492; Wharton's Criminal Procedure, Vol. 1, Sec. 31, p. 64.

The warrant under consideration is defective, but not void. It was sufficient to show that the complainant intended to charge a trespass which is a misdemeanor, an offense within the jurisdiction of the magistrate who issued the precept; and when it was executed the detention thereafter was legal, and the defendants cannot be held for false imprisonment after such service or execution.

The second question is more difficult. The overwhelming weight of authority, however, seems to be to the effect that in making an arrest without a warrant for a misdemeanor not committed in the presence of the officer, unless expressly authorized to do so by statute, the officer making the arrest or someone assisting him, must have the warrant in his possession.

In 6 C.J.S. 576, *et seq.,* we find the general rule stated as follows: "The warrant must at the time of the arrest be in the possession of and with the person purporting to act thereunder or of one with whom he is acting in conjunction. . . . Accordingly, when the warrant is at the officer's home some distance from the scene of the arrest (citing *S. v. Beal,* 170 N.C. 764, 87 S.E. 416), or in the hands of another officer who is not at the scene of the arrest, or in the central office of a city detective bureau, the arrest is unlawful." Likewise, in 4 Am. Jur., 19, *et seq.,* it is said: "Under the common law a conservator of the peace has authority to make an arrest without a warrant for a misdemeanor involving a breach of the peace committed in his presence, but not for one not committed in his presence. At common law the right to arrest for a misdemeanor committed in the presence of the officer is confined to those offenses which amount to a breach of the peace, but the distinction is of slight importance today. Statutes in many, if not all, states have enlarged the right of arrest without a warrant, so that arrests may be made by police officers, town marshals, etc., for any offense committed in their presence, including breaches of ordinances and offenses not amounting to a breach of the peace. *In any case, if the offense, though involving a breach of the peace, is not committed in the officer's presence, he cannot arrest without a warrant.*" (Italics ours.)

There is a distinct difference in the right to arrest for the commission of a felony without a warrant, and the right to arrest for the commission of a misdemeanor. In this jurisdiction any person "in whose presence a felony has been committed may arrest the person whom he knows or has reasonable grounds to believe to be guilty of such offense," without a warrant, and it is the "duty of any sheriff, coroner, constable or officer of the police, upon information, to assist in such arrest." G.S. 15-40. And G.S. 15-41 reads as follows: "Every sheriff, coroner, constable, offi-

cer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest." It is further provided in G.S. 15-42: "When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deupty or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State."

But arrests for misdemeanors without a warrant are limited strictly to certain misdemeanors committed in the presence of the party making the arrest. And unless expressly authorized by law, such arrests can only be made for a breach of the peace as defined in G.S. 15-39, which provides: "Every person present at any riot, rout, affray, or other breach of the peace, shall endeavor to suppress and prevent the same, and, if necessary for that purpose, shall arrest the offenders."

Special laws have been enacted from time to time extending the power to arrest without a warrant. The police officers in many of our towns and cities are authorized to arrest a person *violating any town ordinance in his presence, even when it does not amount to a breach of the peace.* See 15 N.C. Law Rev. 101, where many of the local statutes are cited. A bank examiner is authorized to make arrests without a warrant under certain circumstances. G.S. 53-121. State forest wardens may arrest certain violators without a warrant. G.S. 113-49. Arrests may be made without a warrant when an officer has evidence that liquor is being illegally transported. G.S. 18-6. *S. v. Campbell,* 182 N.C. 911, 110 S.E. 86; *S. v. Simmons,* 183 N.C. 684, 110 S.E. 591; *S. v. Godette,* 188 N.C. 497, 125 S.E. 24; *S. v. Jenkins,* 195 N.C. 747, 143 S.E. 538. And we have a number of other statutes authorizing arrests without a warrant, under certain circumstances, but we know of no modification of the common law rule which would authorize the arrest of this plaintiff on a charge of simple trespass, without a warrant. *S. v. Rogers,* 166 N.C. 388, 81 S.E. 999; *S. v. Campbell,* 107 N.C. 948, 12 S.E. 441. See also 6 C.J.S. 593, and the numerous authorities cited therein. Furthermore, it was held in the case of *Wilson v. Mooresville,* 222 N.C. 283, 22 S.E. 2d 907, that where a misdemeanor is committed in the presence of a police officer, such officer is not authorized to pursue and arrest the offender beyond the territorial limits in which he is authorized by law to make arrests.

Naturally the question arises as to whether or not these defendants are aided by the existence of a warrant in the hands of one of the defendants in Asheville, while the arrest took place in Black Mountain. The defendant Carl W. Smith, acted at the request of one of his codefendants who was the Sheriff of Buncombe County, and the Sheriff could not legally do by another what he could not do himself. He was not authorized to make the arrest without a warrant, and therefore could not authorize another to do so. And the existence of the warrant in the possession of the Sheriff in Asheville would not authorize a policeman in the town of Black Mountain, about fourteen miles away, to arrest the plaintiff for a misdemeanor without a warrant. *McCullough v. Greenfield,* 133 Mich. 463, 95 N.W. 532, 62 A.L.R. 906; *Kratzer v. Matthews,* 233 Mich. 452, 206 N.W. 982; *Giddens v. State,* 154 Ga. 54, 113 S.E. 386; *Hunter v. Laurent,* 158 La. 874, 104 So. 747. This Court held in *Meeds v. Carver,* 30 N.C. 298, that where a defendant was in jail under one process and the sheriff requested that he be detained until he could see the jailer who was his deputy, that a detention after he was entitled to his release under the original process, was not unlawful, since the sheriff had another process, authorizing his detention, although the jailer nor the prisoner knew of the existence of the additional process at the time of his detention.

Likewise, it has been held that when a known officer has two warrants in his hands, the one legal and the other illegal, and he declares that the arrest is made by virtue of the illegal warrant, he cannot be held for false arrest or imprisonment, for the lawfulness of the arrest depends not on what he declared, but on the sufficiency of the authority which he actually had. *S. v. Kirby,* 24 N.C. 201.

But in the case of *S. v. Beal,* 170 N.C. 764, 87 S.E. 416, where the warrant was at the home of the deputy sheriff about one-half mile from where the arrest was made, and the party arrested made no point of the fact that the officer did not have the warrant, a third party, a brother of the arrested man, demanded the warrant and assaulted the officer: *Held,* he had no right to demand the warrant. However, *Walker, J.,* in speaking for the Court, said: "We must not be understood as justifying this or any other officer in arresting without a warrant, except where allowed by law. An officer should obey the law as well as other persons, and, when he does so, the law will protect him while in the execution of its process."

We think the arrest of the plaintiff was unlawful. Even so, he did not demand the production of the warrant, but merely inquired as to where it was and upon being advised that it was in the possession of the Sheriff in Asheville, he made no request for his release, other than to be given the opportunity to post bond. The good faith of these appellees cannot be

considered on the question of the lawfulness or unlawfulness of the arrest, but may be considered on the question of damages. *Rhodes v. Collins, supra; Caudle v. Benbow,* 228 N.C. 282, 45 S.E. 2d 361. Therefore, plaintiff would be entitled to recover only such actual or compensatory damages as he sustained from the time of his arrest until he was placed in the custody of the Sheriff of Buncombe County, who had possession of the warrant, which did authorize his arrest.

We think his Honor committed error in allowing the motion for judgment as of nonsuit as to the defendants Brown and Smith, but not as to the defendant Lindsey, on the cause of action for false arrest and false imprisonment.

We now consider the cause of action for malicious prosecution. To establish such cause of action the plaintiff must prove: (1) That the defendants instituted or procured the institution of the criminal prosecution against him; (2) that the prosecution was without probable cause; (3) that it was with malice; and (4) that it was terminated in favor of the plaintiff herein. *Mooney v. Mull,* 216 N.C. 410, 5 S.E. 2d 122; *Perry v. Hurdle,* 229 N.C. 216, 49 S.E. 2d 400. But where the criminal action is withdrawn or terminated by compromise brought about by the defendant, an action for malicious prosecution based thereon, will not lie. *Welch v. Cheek,* 125 N.C. 353, 34 S.E. 531.

The plaintiff excepts and assigns as error the ruling of the trial judge in striking out the evidence as to how the criminal proceedings terminated, as against the defendants Brown and Smith. *Perry v. Hurdle, supra.* The exception was well taken and will be sustained.

We do not pass upon the credibility or weight the jury should give to the evidence in any case; but on a motion for judgment as of nonsuit, it is well settled that we must consider such evidence in the light most favorable to the plaintiff. *Garrett v. Garrett,* 229 N.C. 290, 49 S.E. 2d 643; *Pascal v. Transit Co.,* 229 N.C. 435, 50 S.E. 2d 538; *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. And when the plaintiff's evidence is so considered, we think it is sufficient to carry the case to the jury as against the defendants Lawrence E. Brown and G. H. Lindsey, but not sufficient to do so as against the defendant Carl W. Smith. There is no evidence in this record that the defendant Smith had anything to do with this case except to arrest the plaintiff at the request of his codefendant, Lawrence E. Brown, and to turn him over to the Sheriff's deputies.

Therefore, the ruling of the trial judge in granting the motions for judgment as of nonsuit as to all the defendants on the first cause of action, that is for false arrest and false imprisonment, is reversed as to the defendants Lawrence E. Brown and Carl W. Smith, and affirmed as to G. H. Lindsey. On the second cause of action for malicious prosecution, the ruling of his Honor in granting a nonsuit as to the defendants Brown

and Smith, is reversed as to the defendant Brown and affirmed as to the defendant Smith.

Affirmed in part.

Reversed in part.

FRANCES GRIER, ADMINISTRATRIX OF THE ESTATE OF MISSOURI GILMORE, DECEASED, v. RENA C. PHILLIPS.

(Filed 12 October, 1949.)

1. Trial § 22a—

On motion to nonsuit, the evidence will be considered in the light most favorable to plaintiff, and plaintiff is entitled to every reasonable intendment thereon and every reasonable inference therefrom. G.S. 1-183.

2. Physicians and Surgeons § 20—

In an action for malpractice, the burden is upon plaintiff to show not only negligence but that such negligence was the proximate cause or one of the proximate causes of the injury or death.

3. Trial § 23a—

Evidence which raises a mere surmise or conjecture as to the existence of a fact essential to the cause of action is insufficient to be submitted to the jury.

4. Physicians and Surgeons § 14—

In an action for malpractice, the fact that defendant practiced dentistry without a license is immaterial upon the question of due care. G.S. 90-29, G.S. 90-40.

5. Physicians and Surgeons § 15—

A person practicing dentistry without a license is required to exercise the care and skill of a licensed dentist.

6. Physicians and Surgeons § 14—

Dentists, in their particular fields, are subject to the same rules of liability as physicians and surgeons.

7. Physicians and Surgeons § 20—

Plaintiff's evidence was to the effect that her intestate went to the office of a licensed dentist, that the dentist was out and that the dentist's wife, who had no license, extracted three of intestate's teeth, that thereafter intestate's gums became swollen and inflamed and that intestate died some ten days later of advanced nephritis. *Held:* There was no sufficient evidence to be submitted to the jury of negligence in the way or manner in which the teeth were extracted.

8. Same—Evidence held insufficient to show causal connection between extraction of teeth and death of intestate.

Plaintiff's evidence tended to show that her intestate went to the office of a licensed dentist, that he was out, and that the dentist's wife, the

defendant, who had no license, extracted three of intestate's teeth, and that intestate died some ten days thereafter of advanced nephritis. There was evidence that there is danger in pulling teeth in the presence of Vincent's disease and that intestate had this disease some four days after the extraction, but plaintiff's expert testimony raised only a surmise as to whether intestate had this disease at the time of the extraction. *Held:* Defendant's motion to nonsuit was properly allowed.

APPEAL by plaintiff from *Morris, J.*, at May Term, 1949, of WILSON.

Civil action to recover (1) for alleged wrongful death, and (2) for pain and suffering sustained by intestate of plaintiff between date of the alleged wrong, and date of her death.

Plaintiff alleges in her complaint as a first cause of action:

That on morning of 18 August, 1947, her intestate went to the house and office of Dr. W. H. Phillips, a dentist duly licensed and practicing his profession, in Wilson, North Carolina, for the purpose of having a tooth extracted; that Dr. Phillips was not there, but his wife, the defendant, who is not a dentist, nor trained and educated in dental science, licensed and qualified to practice dentistry in the State of North Carolina, or elsewhere, was in his office; that at invitation and request of defendant intestate occupied the dentist's chair in the office for the purpose of allowing defendant to pull her tooth; that intestate did not then know what defendant was about to do, and was ignorant of the danger, and trusted defendant to do her no harm; that while intestate was in said dentist's chair, defendant wrongfully, willfully, and negligently proceeded to pull all the teeth of intestate, notwithstanding the fact that the condition of her mouth, gums and general physical condition at the time showed that such an act was hazardous to her life and well-being; that defendant, in pulling the said teeth, willfully violated her duty to intestate and was negligent in that the proper methods and safeguards for the health, protection, and well-being of intestate were not used; that defendant knew or should have known (1) that she was not qualified or competent to act as a dentist, and (2) that the pulling of the teeth of intestate would be dangerous to intestate's life; and that immediately after her teeth were pulled, and as a result thereof the intestate became seriously ill and died 28 August, 1947, of an infection proximately caused by and resulting from the said wrongful conduct of defendant to the great damage of plaintiff.

And for a second cause of action, plaintiff reiterates the allegations of the first cause of action, and alleges that on 18 August, 1947, immediately after defendant had pulled the teeth of intestate, she became seriously ill and all during the ten days of her illness immediately preceding her death, she suffered intense and severe physical pain resulting from and proximately caused by defendant's wrongful conduct, to her damage, etc.

Defendant, answering the allegations of the complaint, admits (1) that she is not a dentist and is not licensed to practice dentistry in the State of North Carolina or elsewhere; and (2) that on or about 18 August, 1947, plaintiff's intestate came to the office of Dr. W. H. Phillips for the purpose of having three teeth pulled; that defendant at request of plaintiff's intestate caused her to be seated in a dental chair and she, the defendant, examined the mouth and teeth of the plaintiff's intestate, and found that the three teeth remaining in the intestate's mouth were loose and easy of extraction, and were of no service to intestate; and that defendant complied with the request and importunity of intestate and pulled the said three teeth. Defendant denied in material aspect other allegations of the two causes of action set forth in the complaint.

Plaintiff offered on the trial in Superior Court the above admissions of defendant and the testimony of six witnesses, which may be summarized as follows:

(1) L. W. Morris, of Wilson, North Carolina, by whom Missouri Gilmore, plaintiff's intestate, had been employed for twenty years, testified: That after an absence of a few weeks she came to him Monday morning, 18 August, 1947, to get $3.00 to have three teeth pulled; that at that time "she was thinner and weaker" than he had ever seen her; that about an hour later she came back for $2.00,—saying it would take that much more; that she told him she had only three teeth, and, as he thinks, they were located in the front upper gums; that he next saw her Tuesday night; that at that time she couldn't eat anything, her gums were so sore; that he next saw her in her room on Thursday; and that she could not speak, but he observed nothing to indicate she was suffering pain.

(2) Julia Barefoot, at whose home Missouri Gilmore had had a room for three years, testified: That on the morning Missouri Gilmore had her teeth pulled, she, the witness, saw her going and waved her hand to her, but she had her hand over her mouth and said nothing; that, after her teeth were pulled, she saw her at home the same day; that she was sick; that her mouth looked raw "where they had pulled out her teeth"; that she didn't look right,—looked like she was going crazy—describing her actions; that she did not go to bed all night,—but sat on a trunk by her door in her room,—and was in pain—groaning; that she stayed in bed the third night; that other than her mouth being swollen witness noticed nothing unusual about her; and that while she said she was 63 years old, "she was a heap older than me, and I am 65."

(3) Frances Grier, administratrix of the estate of Missouri Gilmore, plaintiff in the action, testified: That Missouri Gilmore was her great-aunt; that she, the witness, lives in Raleigh; that when she saw her aunt

on the 26th of August, she smelled an odor at her mouth when close to her; that on the morning of 27th she was weak and could not eat or drink anything; that she, the witness, called Dr. Barnes, and saw him examine her mouth; that "both gums, up and down, looked like it had been plowed up," —her gums were "like dark blood," and bad odors came from her mouth; that her aunt had eight or nine old snags,—three solid teeth,—the rest kind of snags.

(4) Dr. Boise Barnes, a medical expert, testified: "I knew Missouri Gilmore . . . I had occasion to see her in August 1947. The first time I saw her was on August 22nd, at her room where she was living . . . she was in what we call a semicose condition . . . unable to speak . . . just looking off in space . . . I just looked in the mouth and the gums were swollen and the mouth inflamed and the odor was of the character of a Vincent's infection, that is, the same as trench mouth . . . I felt that she should be put in a hospital since she could not take anything by mouth. The next day when I called I was unable to see her as the front door of the house was locked and I didn't see her until 2 or 3 days . . . I went again through the back and saw her then. She was in a weaker condition. Her mouth was generally inflamed. I suggested that they put her in the hospital. I think that was the 27th and she was brought to the hospital. I didn't notice that she was in pain. She didn't react, didn't respond. I had to use a spoon to get her mouth open and she did not respond at that time, did not make any sound. She was unable to take anything by mouth. She was in a general toxic condition of the body. Also, the gums could have interfered as her inability to take nourishment caused the body perhaps to fail to eliminate certain poisons the body accumulated. I found infection. The gums were swollen, and were red, and there were some patches there, white patches, suggestive as the odor was too, of Vincent's disease and I made that diagnosis . . . I later confirmed that I was right in the first place. I would say that I saw the usual amount of infection. From my observation and treatment of her on August 22nd, I have no opinion satisfactory to myself as to whether or not that infection was present on August 18, 1947. As to that, I am unable to say. I have no opinion satisfactory to myself whether it is characteristic of Vincent's disease to develop and become present to the infection stage in 4 days' time . . . In my opinion, the cause of her death was a chronic condition of the kidneys, uremia, and that with Vincent's infection would be my diagnosis. I signed the death certificate reading 'Death due to Adv. nephritis—Vincent infection of throat and gums.' "

The doctor continued on cross-examination: "When I said that I found her in a semicose condition that means she was unconscious which might have been from the kidneys or any other cause. That condition is

symptomatic of uremia. The diagnosis I gave was the immediate cause of death. The urethra failure, failure of the function of the kidneys is the cause of uremia. I also stated that the uremia was induced by chronic nephritis, inflammation of the kidneys, that is a pre-existing or recurring of nephritis, this disease of the kidneys. This uremia was induced by a condition of the kidneys for some time and grew worse . . . I said I had no opinion as to whether or not she would have died as quickly whether her teeth were extracted or not." Then, on re-direct examination, Dr. Barnes said: "I am stating that the condition of her kidneys accelerated her death." Then on re-cross-examination, he continued: "She was an old woman and in a weakened condition . . . She had snags in her head a number of years, as Frances said. Usually it is a common condition of infection when there are broken-off teeth. It can affect one's health adversely."

(A copy of the death certificate was introduced only to be considered as corroborative evidence, "tending to bear out the witness Barnes" and not as substantive evidence.)

(5) Dr. E. A. Rasberry, a qualified medical expert, testified in pertinent part: "I am familiar with the disease known as Vincent's. It is commonly known as trench mouth caused by two organisms working together which seem to harbor in the mouth. . . . When a smear from trench mouth is spread on a slide, you can see two distinct organisms. . . . I heard Dr. Barnes testify this morning. Vincent's disease is known as a chronic disease. . . . Assuming it to be true and that the jury finds by the greater weight of the evidence that the condition in plaintiff's intestate's mouth were as testified to by Dr. Barnes on August 22nd, when he first saw her, I have an opinion satisfactory to myself as to whether or not the plaintiff's intestate had Vincent's disease on August 18, 1947. My opinion is that there was Vincent's disease four days previous."

And on cross-examination the doctor in summary testified: "When I gave to the court and the jury my sworn opinion that she had trench mouth on August 18, it was because I thought Dr. Barnes had said she had general infection, ulcerations and white caps, and called it trench mouth . . . I have told you that there are one, two and three things necessary to diagnose it as Vincent's disease; general mouth infection, ulcers in the mouth, white caps in the ulcers; and if Dr. Barnes observed those three things, I am of the opinion that the plaintiff's intestate had it four days before. If from Dr. Barnes' testimony, it was found that she had only general infection and ulcers, she could have had some other infection."

Then, in answer to this question: "If he (Dr. Barnes) found only two-infection and the ulcers, are you now willing to swear that if he found those two things on the 22nd of August, are you willing to swear she had

Vincent's disease on the 18th?", the doctor answered: "No, I am not. Even if Dr. Barnes testified all three conditions existed, I would not make a diagnosis without a smear."

This witness, Dr. Rasberry, also testified that: "Nephritis is defined as an infection of the kidneys . . . We call it inflammation of the kidney . . . it is a condition which has an infection at the root of the trouble of the throat, of the ear, or scarlet fever, all that affects the kidneys. In my opinion there is danger in pulling teeth in the presence of any infection in the mouth. Assuming it to be true and the jury should find by the greater weight of the evidence that the plaintiff's intestate had nephritis at the time she had her teeth extracted by the defendant and if the jury should find that she then had Vincent's disease, in my opinion if this woman had chronic nephritis with Vincent's disease and if she had her teeth pulled, it would have a deleterious effect on her condition. By deleterious effect on the patient, I mean if she had Vincent's disease it would be hazardous. She would have less chance. Her general condition would be affected adversely. Assuming it to be true and that the jury should find by the greater weight of the evidence that the plaintiff's intestate had an advanced case of nephritis on the 22nd day of August, 1947, as testified to by Dr. Barnes, in my opinion the plaintiff's intestate would have had nephritis four days previously, on August 18, 1947."

(6) Dr. Dewey Boseman, a dental expert, testified: "A course of dental education includes the course of oral pathology. That is the science that treats of the diseases of the mouth or adjoining tissues. It includes the recognition, diagnosis and treatment of Vincent's disease. There is danger in pulling teeth in the presence of Vincent's disease."

Motion of defendant for judgment as of nonsuit at close of plaintiff's evidence was granted. And from judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

Connor, Gardner & Connor for plaintiff, appellant.

Lucas & Rand and Z. Hardy Rose for defendant, appellee.

WINBORNE, J. Did the trial court err in rendering judgment as of nonsuit from which this appeal is taken? This is the only question here presented. And taking the evidence offered by plaintiff, as shown in the case on appeal, in the light most favorable to plaintiff, and giving to plaintiff the benefits of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom, as must be done in considering a motion for judgment as of nonsuit, G.S. 1-183, we are of opinion and hold that the evidence is insufficient to carry the case to the jury.

The burden was on plaintiff to show by evidence not only that defendant was negligent as alleged in the complaint, but that her negligence was the proximate cause, or one of the proximate causes of the intestate's death. The proof should have been of such character as reasonably to warrant the inference required to be established, and not merely sufficient to raise a surmise or conjecture as to the existence of the essential fact. *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12.

The plaintiff contends that there is error in the judgment below in several respects: First: It is contended that the defendant, in extracting the teeth of intestate, was practicing dentistry without a license so to do, in violation of the statute, G.S. 90-29, enacted for the protection of the public, and in the interest of public safety, for which a penalty is prescribed by the provisions of G.S. 90-40; that, hence, she was guilty of negligence *per se;* and that the evidence tends to show that such negligence was the proximate cause, or one of the proximate causes of the pain the intestate suffered, and of her subsequent death.

As to this first contention: the mere want of a license to practice dentistry does not raise any inference of negligence. If an unlicensed dentist exercises the requisite skill and care in administering treatment to a patient, he is not liable in damages for injury to the patient, merely because of his want of a license. 41 Am. Jur. 202. *Brown v. Shyne,* 242 N.Y. 176, 151 N.E. 197, 44 A.L.R. 1407; *Hardy v. Dahl,* 210 N.C. 530, 187 S.E. 788.

In the *Hardy case,* in which the plaintiff sought to hold defendant, an unlicensed naturopathist, liable for alleged wrongful death, it is said in opinion by *Devin, J.:* "The fact that the defendant was engaged in treating patients without having obtained license so to do, in violation of C.S. 6708, was not evidence of negligence in the treatment of plaintiff's intestate . . . The question was not whether he was licensed, or not, but whether he exercised proper care in the treatment of a patient. As was said in *Brown v. Shyne* . . . 'Unless the plaintiff's injury was caused by carelessness or lack of skill, the defendant's failure to obtain a license was not connected with the injury.'" And the opinion there concludes that "if defendant has been engaged in treating diseases in violation of the statute, he is liable to indictment, and, upon conviction, to suffer the prescribed penalty, but in a civil action, bottomed upon the law of negligence, the failure to possess a State certificate is immaterial on the question of due care."

And in keeping with the ruling in the *Hardy case,* while it is provided by statute, in this State, that the practice of dentistry without a license is forbidden, G.S. 90-29, for violation of which, upon conviction, a punishment is prescribed, G.S. 90-40, the failure to possess such license is immaterial on the question of due care.

Second: It is contended that defendant, in practicing dentistry, without a license so to do, was required to exercise the care and skill of a licensed dentist. This appears to be the law. See *Hardy v. Dahl, supra.* And "dentists, in their particular fields, are subject to the same rules of liability as physicians and surgeons." *Smith v. McClung,* 201 N.C. 648, 161 S.E. 91, citing *McCracken v. Smathers,* 122 N.C. 799, 29 S.E. 354, and *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

In *Nash v. Royster,* it is stated that the law holds a physician or surgeon "answerable for any injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case."

And in the case of *McCracken v. Smathers, supra,* the Court held that the degree of care and skill required of a dentist to his patient is that possessed and exercised by the ordinary members of his profession.

In the light of these principles, plaintiff in the present case contends, in the first place that there is evidence from which a jury might reasonably find that defendant, in extracting the teeth of intestate, failed to use reasonable care, that is, was negligent in the way and manner she performed the operation, and that such negligence was the proximate, or one of the proximate causes of the wrongs of which complaint is made. As to this contention, evidence is lacking as to how defendant extracted the teeth, whether she did or did not perform the operation in keeping with the care required of a licensed dentist. The evidence on which plaintiff relies is purely conjectural and speculative. Such evidence is insufficient to support a finding that defendant extracted the teeth in a negligent manner, that is, failed to exercise due care in extracting them.

In the next place, plaintiff contends that all the evidence shows that defendant lacked the knowledge and skill ordinarily possessed by members of the dental profession; that a dentist possessing such knowledge and skill, upon examination of intestate's mouth, would have detected the symptoms of Vincent's disease, or trench mouth, with which intestate was suffering, and would have so diagnosed her condition, and, upon such diagnosis, would have known that it would be dangerous to extract teeth in the presence of such disease; and that, hence, in extracting the teeth of intestate under such circumstances and conditions defendant negligently violated the duty she owed to the intestate, which negligence proximately caused or contributed to wrongs of which complaint is made.

As to this contention, it is conceded on this record that defendant lacked the knowledge and skill of a licensed dentist.

But the evidence offered by plaintiff fails to show that defendant's lack of knowledge and skill in dentistry was the proximate cause or one of the

proximate causes of the wrongs alleged by plaintiff. And in this connection, there is evidence that in the study of dentistry there is a course in oral pathology, the science that treats of diseases of the mouth, including Vincent's disease, and that there is danger in pulling teeth in the presence of this disease. There is no evidence as to what was the condition of the mouth of intestate on 18 August, 1947, the day the teeth were extracted. While Dr. Barnes, in examining intestate on 22 August, found her gums swollen and her mouth inflamed, and detected odors characteristic of Vincent's disease, he was unwilling to give an opinion as to whether these conditions existed on 18 August, 1947. And Dr. Rasberry testified that he predicated his opinion upon the impression that Dr. Barnes had testified that in examining intestate on 22 August he found the "one, two and three things necessary to diagnose it as Vincent's disease, general mouth infection, ulcers in the mouth, white caps in the ulcers." And the record fails to show that Dr. Barnes so testified. Moreover, Dr. Rasberry says that if only two of these essentials were present, he would not give it as his opinion that intestate had Vincent's disease on 18 August, and, furthermore, if all three conditions existed, he would not make a diagnosis without a smear test. Thus the evidence is insufficient to support a finding by the jury that intestate had Vincent's disease at the time her teeth were extracted by defendant. Hence, no causal relationship is shown.

The judgment below is

Affirmed.

BROOKS EQUIPMENT AND MANUFACTURING COMPANY v. FRED TAYLOR.

(Filed 12 October, 1949.)

1. Pleadings § 15—

Plaintiff demurred to defendant's counterclaim. The court reserved ruling thereon, heard evidence in the absence of the jury, and granted motion for nonsuit on the counterclaim. *Held:* The peculiar form of the proceeding taken under the supervision of the court does not forfeit defendant's right to be heard on any aspect of his pleading which, by liberal construction, presents a cause of action upon which he may be entitled to relief.

2. Fraud § 9—

While the constituent facts constituting fraud must be pleaded, no set formula nor precise technical language is required, but the pleading is sufficient if, upon a liberal construction, proof of the constitutive facts alleged would entitle the pleader to relief.

3. Same—

Plaintiff instituted action on a note. Defendant alleged that the note was given for balance due on the purchase price of a tractor, that prior to the sale defendant paid plaintiff to make an inspection of the tractor and report its condition, and that plaintiff's sales agent made false and fraudulent statements as to the condition of the tractor which induced defendant to make installment payments on the machine, and that when delivered the machine had basic defects amounting to a total failure of consideration. *Held:* The answer sufficiently alleges a counterclaim for fraud as against demurrer.

4. Sales § 6—

Where the circumstances are such that it is the duty of the seller to apprise the buyer of defects in the subject matter of the sale, known to the seller but not to the buyer, the doctrine of *caveat emptor* does not apply, and in such instance *suppressio veri* is as much fraud as *suggestio falsi*.

5. Sales § 28—

Where the seller for a fee makes an inspection of the article at the buyer's request and thereafter represents that the condition of the article is "o.k.," it is immaterial whether the seller consciously misrepresents its condition or was merely recklessly reporting something to be true of which he had no knowledge.

6. Same—Whether buyer was entitled to rely upon seller's representations as to condition of machine held for jury.

Defendant's evidence on his counterclaim was to the effect that he watched a tractor at work, advised plaintiff's sales agent that he knew nothing about tractors but would buy the tractor if plaintiff would take the machine back to its plant and check its condition, that this was done upon the payment of a fee by defendant, that upon inquiry by defendant, plaintiff's sales agent represented the condition of the tractor to be good, and that when delivered the block of the engine was bursted and the piston rods of the cylinders operating the hoist had pulled out. *Held:* Whether defendant might reasonably rely upon the representations as to the tractor's condition under the circumstances was a question for the jury, there being a reasonable inference that such defects existed at the time the machine left the plaintiff's plant.

DEFENDANT'S appeal from *Pless, J.*, April Term, 1949, AVERY Superior Court.

The plaintiff brought action on an installment promissory note in the sum of $4,342.61, subject to a credit of $1,809.40, leaving a balance of $2,513.55, with interest, and filed complaint in the usual form without revealing the consideration or detailed reference to the security it mentions.

The defendant, answering, admitted the execution of the note, but averred that it was procured through fraud and sets up the circumstances he denominates as fraud in a further defense,—"cross-action and counter-

claim." He alleges, in substance, that the note represented the purchase price of a Caterpillar tractor purchased from plaintiff corporation under the inducement of false and fraudulent statement of the sales agent as to its condition, which plaintiff undertook to investigate and report, and that he was induced to make installment payments on the machine after discovery of its defective condition on the promise that plaintiff would remedy the same and put it in good condition.

He alleges a total failure of consideration by reason of the defective condition of the tractor and says that plaintiff should not recover any sum on its claim. He alleges that he has been compelled to spend approximately $2,800 in an effort to get the tractor to do his work, upon which he concedes a credit of $500, the total amount earned by the tractor while in his possession, and asks judgment for $6,257.41 due on his counterclaim.

In reply the plaintiff sets up in detail the circumstances as it contends attended the purchase of the tractor. It is alleged that the defendant had an opportunity to inspect the tractor while in operation and did so inspect it; denies that plaintiff sold the machine to defendant and avers that it was sold to defendant by one Lee Lambert, "who has no connection with the plaintiff except as a customer, and that by reason of his indebtedness to plaintiff he caused the note sued on to be made payable to plaintiff." It denies any liability in the matter; denies that it undertook to recondition the tractor or check its condition, but avers that it was employed to make certain alterations and to do so at the expense of the defendant.

On the trial plaintiff introduced the note sued upon and also a conditional sales or title retention contract given in security for the note, in which contract the plaintiff appears as the original owner and seller, to whom the purchaser was solely obligated.

J. J. Lannon, assistant sales manager, testified that defendant came to see him about buying a Caterpillar tractor, and that the company at the time did not have one in its possession. Over objection the witness was permitted to testify (a) that the plaintiff had a customer who had one, (b) that this customer, Lee Lambert, was indebted to plaintiff.

Mr. Taylor and Mr. Davis went out from Knoxville and saw the tractor in operation, "working on the stockpile on Lambert Brothers' job, feeding the feeder of a black top plant." After watching the feeder about 15 minutes, Mr. Davis operated the tractor, or tried to do so, and after it was tried out Mr. Taylor bought the machine.

On cross-examination: "We watched Mr. Davis operate, or try to operate the machine for 10 or 15 minutes," and witness then took the machine to Knoxville. Mr. Taylor wanted the blades extended—it was not repairs; also lights were put on.

G. R. Marshall, with whom the note had been discounted, testified as to payments made on this note, giving dates and amounts.

W. B. Helsley, member of plaintiff's company, testified that on failure of Taylor to satisfy the note he paid the balance at the bank and took it up. He exhibited paid check in the sum of $2,513.55, as used in the exchange. Mr. Taylor made no further payments on the "repurchased" note. Plaintiff rested.

The defendant demurred to the evidence and moved for judgment of nonsuit, which was declined. Defendant excepted.

At this point plaintiff demurred *ore tenus* to defendant's counterclaim and cross-action on the ground that fraud had not been sufficiently alleged. The court withheld its ruling; and stated that the jury would be excused and the defendant permitted, in its absence, to introduce evidence in support of his contentions. Thereupon the jury retired and the defendant presented substantially the following evidence in support of his claim:

Fred Taylor, the defendant, testified that he had a conversation with Mr. Lannon, plaintiff's sales agent, at Knoxville in 1947. He told Mr. Lannon of his need for a tractor and of the work it was intended to do. At Lannon's suggestion he went out some distance from Knoxville and looked at a tractor in operation which seemed to be pushing up gravel through the shovel, loading up trucks at a gravel pile. "We looked the tractor over and I told Mr. Lannon I knew nothing about a tractor but I would buy it if he would take it back to Knoxville and check it and see in what condition it was. The price was to be $6,244.11. Mr. Lannon said it was a great distance from Knoxville and would cost money to take it back and check it and see what condition the machine was in. Defendant told him he was willing to pay to find out what condition the tractor was in and that he also wanted the blades made wider. He paid Lannon $100 at the time and Lannon agreed to take it back and check it. About three days later Charlie Hughes called defendant and told him he had some papers from the Brooks Equipment Company for him to sign. Defendant told Mr. Hughes he did not want to sign the papers at the time because they had promised to take the tractor into the shop and check its condition. While they were talking about the tractor Mr. Davis had said there was something wrong about the hoist, the cutting clutch and some other part. This was called to Mr. Lannon's attention. Mr. Hughes got the papers the second or third day and defendant instructed him to hold them until he could ascertain whether or not the equipment company had checked the tractor as they had promised to do. Defendant called up later and inquired of Lannon if they had checked the tractor and was informed they had. He asked him what condition it was in and Lannon said it was "o.k." Defendant asked him about the hoist. Lannon

said it was "o.k.; needed a little oil." Defendant then went back to Hughes' office and signed the papers.

The equipment company still lacked a little work in widening the blades. Defendant was told he could have the tractor on a certain day. Defendant sent a "float" (motor carrier) for the tractor which Lannon said was ready to go. Then defendant again called Lannon and inquired what condition the tractor was in, was it all shaped up and ready to go, and was told that it was. This statement was confirmed by the head mechanic at Lannon's request.

The defendant then let Davis take charge of the tractor and sent to the plaintiff a down payment of $2,148.01. The tractor was sent to Virginia where Taylor was to have it employed on a rental basis and an attempt made to put it into service. When the tractor was delivered in Virginia it had to be "dragged off the float" or carrier there, "because they couldn't get the blades up." When the engine would start up "it would shoot surplus water out of the exhaust pipe about the size of your arm, throw it up in the air. This was a diesel engine and the water was thrown up to the air because of the block being bursted."

Examination by the court: Defendant testified that he offered the machine back to the Brooks Company, notified them 10 or 15 days after the trade the machine was not what he wanted. He tried to get the machine to work before he said anything to them; had the hoist and the side cylinders taken off and sent them to the Marion Machine Shop and had the cylinder honed out and new pistons made for it. The piston rods had pulled out. He finally found that it couldn't be used; and the contractor who had rented it ordered it off the job. He notified the plaintiff and received a letter from it to the effect that the tractor belonged to Mr. Lambert and that the equipment company could do nothing about it; that he would have to go back on Mr. Lambert.

Defendant testified that while attempting to use the tractor he did not succeed in getting more than one day's work out of it. He did receive, however, $500 which he said the contractor gave him more out of sympathy than in payment of rental.

Defendant further testified as to sums spent in trying to put the tractor in condition to be used.

The plaintiff having introduced admissions in the answer as to the execution of the note and installment payments made by defendant and having omitted the context, defendant presented in evidence portions of the answer alleging that the execution of the note and the payment of installments were induced by the false representations of plaintiff.

The following appears in the record:

> "Upon being advised by counsel for defendant that this evidence constituted the grounds for the alleged fraud, the Court stated:

'The defendant then offered other evidence which was corroborative and accumulative in support of the evidence testified by the defendant himself, but upon intimation of the Court that this would not, in the opinion of the Court, be sufficient to withstand plaintiff's counterclaim, deferred to said intimation and offers no further evidence.' "

Thereupon the judge entered the order: "Upon the statement of the defendant that he has no further evidence, the plaintiff's motion for judgment as of nonsuit on the counterclaim is allowed." To this the defendant excepted.

The court thereupon gave a peremptory instruction to the jury that "if you believe all the evidence of the case, and find that to be the truth in the matter, you will answer the issue (as to the amount due plaintiff) in the sum of $2,513.55, with interest." To this defendant excepted. The jury answered as directed. Defendant moved to set aside the verdict and the motion was denied, and defendant excepted. To the ensuing judgment defendant excepted and appealed.

R. W. Wall and Fouts & Watson for defendant, appellant.
Charles Hughes and Folger Townsend for plaintiff, appellee.

SEAWELL, J. When the plaintiff had completed its evidence counsel demurred to defendant's pleading which set up his further defense and counterclaim, on the *ground that fraud was not sufficiently alleged.* The court reserved its judgment on the demurrer pending further proceedings. These consisted of a preview in the absence of the jury of the evidence the defendant intended to offer in support of his defense and counterclaim. It can readily be seen that the defendant's evidence had no relevancy to the demurrer, which was to the pleading. At the conclusion of this hearing defendant was advised by the court that it would not, in the court's opinion, be sufficient "to withstand plaintiff's counterclaim,"—no doubt meaning the claim plaintiff had asserted in the action. The defendant, in deference to the intimation given by the court, "offered no further evidence." Thereupon the court allowed plaintiff's "motion for nonsuit on the counterclaim." This may have referred to the demurrer to the pleading, or it may have taken in consideration the evidence just heard in the absence of the jury.

The part played by the defendant in establishing the theory of the trial in the lower court, and the procedure adopted, seems subordinate to that of the court, and ought not to forfeit his right to be heard on any aspect of his pleading which, by liberal construction, presents a cause of action upon which he may be entitled to relief.

The pleading, notwithstanding any defect of mere form, and regardless of its allegation of fraud, sufficiently sets up a cause of action for breach of implied warranty; and we have no doubt that if presented in that aspect alone, without accompanying diversions, the jury might have so found.

But our immediate concern is with the sufficiency of the defendant's plea of fraud and the support afforded it in the evidence he desired to be submitted to the jury.

It is true that the party charged with fraud must be informed of the constituent facts because he has to answer; and the judge passing upon the pleading, also, because he must judge of their character as *prima facie* fraudulent; but the pleading need not observe any set formula or be in precise technical language to be good on demurrer. It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts. However informal, the defendant's pleading fulfills this condition.

Ordinarily the rule *caveat emptor* applies to sales of personalty, but there are so many exceptions that we must look to the particular circumstances surrounding the transaction to determine the respective duties of buyer and seller with respect to discovering defects shown to have existed in the subject of the sale at the time it is made.

It is a practically universal rule, and it is the law in this State, that under circumstances which make it the duty of the seller to apprise the buyer of defects in the subject matter of the sale known to the seller but not to the buyer, *suppressio veri* is as much fraud as *suggestio falsi*. 46 Am. Jur., Sales, sections 94, 96, 98; Williston on Sales, sections 631 (a), 632, 634; Restatement, Sales, 471 (b); *Brown v. Gray*, 51 N.C. 103, 76 Am. Dec. 563; *Southern Iron & Equipment Co. v. Bamberg, E. & W. Ry. Co.*, 149 S.E. 271, 151 S.C. 506. To the defendant the serious defects existing at the time of the sale were unknown. The casual inspection made by him in Tennessee and the opportunity afforded him were not sufficient to discover them. To him they were latent. He could not reasonably be supposed to have gone into the complicated interior of the tractor at that time and discover the defects in the engine block and the cylinders which operated the hoist. He explained to the selling agent that he knew nothing about tractors; and in fact must rely on the plaintiff as to the condition of the machine and its ability to perform the work intended. Plaintiff, the seller, introduced a new element in the relation between the parties when its agent, at the request of the defendant, undertook to take the tractor to its shops in Knoxville and there investigate its condition and report thereon as a condition precedent to the sale. The duty then rested upon him, in the exercise of good faith, to make the

examination which he had promised, and for which he had been paid, and report the condition to the prospective buyer.

It may be inferred from the evidence that the crack in the engine block which caused the exhaust to spout water as soon as it was put to work in Virginia, existed before it left plaintiff's possession; and that the defect in the cylinders through which the hoist was operated did not suddenly develop en route from plaintiff's machine shops in Knoxville to Virginia. There is a reasonable inference that they existed as material facts at the time of plaintiff's examination in its shops at Knoxville, and that plaintiff's agent knew of this condition when he advised the defendant that the tractor was "o.k." and ready to go; and, therefore, it was his duty to disclose these defects to the defendant buyer.

But it will be observed that if these defects did exist, the selling agent added his positive declaration to the contrary in reporting that the machine was "o.k."; and it makes no difference whether he was consciously misrepresenting the fact, or was merely recklessly reporting something to be true of which he had no knowledge. 46 Am. Jur., sec. 98; Anno. 61 A.L.R. 492, 509 (c); Williston on Sales, 634.

The main point is whether the defendant might reasonably rely on the plaintiff with respect to the condition of the tractor without undertaking an examination beyond the limits of his skill and experience and his opportunity, and which the plaintiff had specifically agreed to make for him. Under the circumstances we have outlined that became distinctly a jury matter. 46 Am. Jur., p. 288, 598; 24 Am. Jur., Fraud and Deceit, sec. 143.

We cannot find from the record that the defendant at any time surrendered his rights by reason of the peculiar form of the proceeding in which he became involved. And we think that his Honor was in error in holding that fraud was not sufficiently pleaded and nonsuiting the defendant on his cross-action and counterclaim, and in instructing the verdict for the plaintiff.

The defendant is entitled to a trial *de novo*. It is so ordered.

New trial.

MRS. ALDA PROCTOR v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 12 October, 1949.)

1. Eminent Domain § 6—

The State has delegated to the State Highway and Public Works Commission the right to condemn private property for the establishment and maintenance of highways. G.S. 136-19.

2. Eminent Domain § 26—

Where private property is taken for a highway under the power of eminent domain, the fee remains in the owner, who may subject the land to any use not inconsistent with the easement appropriated, but the Highway and Public Works Commission acquires the right to use the entire right of way for highway purposes whenever it deems such action conducive to the interest of the public, including the right to remove from the right of way any obstructions to the free passage of the traveling public.

3. Eminent Domain § 2—

Upon the taking of private property for a public use, the owner is entitled to just compensation for the property appropriated, measured by the loss occasioned to him by the taking.

4. Eminent Domain § 14—

If the owner and the State Highway and Public Works Commission are unable to agree as to the amount of compensation for taking of property under eminent domain, either party may institute proceedings to have the matter determined. G.S. Chap. 40, G.S. 136-19.

5. Eminent Domain § 8—

The measure of damages for the taking of a part of a tract of land for highway purposes is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the portion left immediately after the taking, which difference embraces compensation for the part taken and compensation for injury to the remaining portion, less general and special benefits resulting to the landowner by the utilization of the property for a highway. G.S. 136-19.

6. Same—

If the State Highway and Public Works Commission elects to condemn a part of a tract of land upon which are located buildings, such buildings are a part of the real estate upon which they stand and must be taken into account in determining the amount of compensation in so far as they add to the market value of the land.

7. Same: Eminent Domain § 19—

In the absence of an agreement between the parties, the condemnor has no right to compel the owner to remove buildings standing on the part of the tract condemned to the remaining lands of the owner, and the court properly refuses to coerce the owner to remove the buildings by impounding a part of the recovery, but commits error in adjudging that the recovery includes the cost of removing the buildings.

8. Appeal and Error § 38—

Where there are no exceptions to any matters preceding the return of the verdict, it will be presumed that the trial up to that point was in accord with the applicable principles of law.

9. Eminent Domain § 18a—

Upon appeal from the award of the appraisers in condemnation proceedings the trial in the Superior Court is *de novo*, and must proceed so far

as the question of damages is concerned as though no commissioners of appraisal had ever been appointed, and therefore the court properly enters judgment upon the verdict of the jury regardless of whether it is greater or smaller than the award of the commissioners and regardless of which party took the appeal. G.S. 40-20.

APPEALS by both petitioner and respondent from *Pless, J.*, and a jury, at the July Term, 1949, of McDOWELL.

Prior to 19 October, 1947, the petitioner, Mrs. Alda Proctor, acquired title in fee simple to lands in Marion Township in McDowell County, containing her frame dwelling and a brick store building. On the day stated, the respondent, State Highway and Public Works Commission, entered the land of the petitioner and appropriated a portion of the same to public use as a right of way for a highway. Parts of the residence and store stand on the right of way taken by respondent, and the remainders of these buildings are on the residue of the petitioner's land.

The appropriation was made by respondent without payment of compensation to petitioner, and without bringing any proceeding for condemnation against her. In consequence, the petitioner instituted this proceeding against respondent, alleging that it had taken a portion of her land in the exercise of its power of eminent domain and praying the appointment of commissioners of appraisal to assess the damages sustained by her by reason of the taking. The respondent answered, admitting the appropriation and stating that it did not resist the prayer of the petitioner, and the clerk of the Superior Court made an order appointing commissioners of appraisal.

The commissioners assessed petitioner's damages at $7,150.00, and filed their report accordingly. The petitioner did not challenge this report in any way, but the respondent excepted thereto within the twenty days allowed by G.S. 40-19 upon the ground that the amount of damages awarded by the commissioners was "grossly excessive." The Clerk entered his judgment overruling the respondent's exception and confirming the report of the commissioners. The petitioner did not question the Clerk's judgment in any way. But the respondent excepted thereto, and appealed therefrom to the court at term, demanding "a trial by jury of the issue of fact involved in these exceptions and this appeal."

The proceeding was tried before a jury at term upon the single issue: "What amount is petitioner entitled to recover of respondent?" The jury answered "$7,508.00."

There was neither allegation nor evidence at the trial of any agreement between the parties for the removal of petitioner's frame dwelling and brick store building from the right of way to the residue of the petitioner's land.

All the exceptions are addressed to matters occurring subsequent to the return of the verdict.

Respondent then advanced the proposition that petitioner's recovery could not exceed the amount assessed by the commissioners of appraisal because she had not excepted to the report of such commissioners and had not appealed to the court at term from the judgment of the Clerk confirming such report. In consequence, respondent moved the court to set aside the verdict, and to sign a judgment as tendered by it fixing the petitioner's compensation at $7,150.00. Exceptions were noted by respondent to adverse rulings on these motions.

Respondent further insisted that the petitioner should be required to effect the complete removal of her dwelling and store from the right of way to the residue of her land, and prayed the court to sign a proposed judgment tendered by it providing, in substance, that a portion of the compensation due petitioner, *i.e.*, $4,000.00 or such other amount as the court might specify, should be impounded in the office of the Clerk of the court until the desired removal should be accomplished. The respondent reserved exceptions to the refusal of the court to enter such judgment.

The court thereupon entered judgment awarding the petitioner the amount fixed by the jury, *i.e.*, $7,508.00, as compensation "for the easements of right of way" taken by respondent over the lands of petitioner, and adjudging such recovery included the cost of clearing the right of way of petitioner's residence and store.

The parties took separate appeals from this judgment to this Court. The petitioner assigns as error the incorporation in the judgment of the adjudication that the compensation awarded her embraced the cost of removing the buildings from the right of way, and the respondent assigns as error the rulings of the court set forth above to which it saved exceptions.

Paul J. Story for petitioner, appellant and appellee.

R. Brookes Peters and Proctor & Dameron for respondent, appellant and appellee.

ERVIN, J. Both appeals present this question: In the absence of an agreement so providing, can the State Highway and Public Works Commission require a landowner to remove buildings of a permanent character from the portion of his realty taken for highway purposes to his remaining land?

The State has delegated to the State Highway and Public Works Commission the right to condemn private property for the establishment and maintenance of public highways. G.S. 136-19. When land is appropriated under this power of eminent domain for the right of way for a

road, the general public acquires an easement only in the land so taken, and the fee to the property remains in the landowner, who may subject the land to any use which is not inconsistent with its use for the purpose for which it is taken. But the easement confers upon the State Highway and Public Works Commission complete authority to occupy and use the entire right of way for highway purposes whenever it deems such action conducive to the interests of the public. *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 14 S.E. 2d 252. This necessarily implies that the State Highway and Public Works Commission may remove from the right of way any obstructions to the free passage of the traveling public.

It is a fundamental principle in this jurisdiction that the taking of private property for public use imposes upon the condemnor a correlative duty to make just compensation to the owner of the property appropriated. *Hildebrand v. Telegraph Co., supra; Sanders v. R. R.*, 216 N.C. 312, 4 S.E. 2d 902; *Reed v. Highway Commission*, 209 N.C. 648, 184 S.E. 513; *Highway Commission v. Young*, 200 N.C. 603, 158 S.E. 91. Such compensation is to be measured by the loss occasioned to the owner by the taking. *S. v. Lumber Co.*, 199 N.C. 199, 154 S.E. 72.

If the State Highway and Public Works Commission and a landowner are unable to agree upon the compensation justly accruing to the latter from the taking of property by the former, the matter is to be determined once for all in a condemnation proceeding instituted by either party under the provisions of Chapter 40 of the General Statutes. G.S. 136-19. Where only a part of a tract of land is appropriated by the State Highway and Public Works Commission for highway purposes, the measure of damages in such proceeding is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of what is left immediately after the taking. The items going to make up this difference embrace compensation for the part taken and compensation for injury to the remaining portion, which is to be offset under the terms of the controlling statute by any general and special benefits resulting to the landowner from the utilization of the property taken for a highway. G.S. 136-19; *Highway Commission v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314.

The answer to the question raised by both appeals is not to be found in any of the statutes relating to the State Highway and Public Works Commission. For this reason, recourse must be had to the general principles of the law of eminent domain for the solution of the problem.

Buildings must be regarded as a part of the real estate upon which they stand. Indeed, they are ordinarily without value or utility apart from such realty. When a public agency or a private enterprise possessing the power of eminent domain cannot acquire land upon which buildings have been erected without resorting to condemnation, it must either

take the land with the buildings thereon or reject it altogether. If it elects to condemn in such case, it takes the buildings with the land, and they must be taken into account in determining the compensation to be awarded the owner in so far as they add to the market value of the land to which they are affixed. The condemnor cannot obviate the necessity for considering the value of the buildings in fixing the owner's compensation by an offer to pay for the land without the buildings coupled with a proposal that the owner remove them from the premises condemned to other land belonging to him. *Goldsboro v. Holmes,* 180 N.C. 99, 104 S.E. 140; Lewis on Eminent Domain (3rd Ed.), section 726; 29 C.J.S., Eminent Domain, section 175; 18 Am. Jur., Eminent Domain, section 253.

The reasons underlying these rules are stated with clarity and vigor by the Court of Civil Appeals of Texas in *State v. Miller,* 92 S.W. 2d 1073.

"In the beginning, it should be noted that we are not here concerned with the rights of the parties to arrange for the removal of the improvements from the condemned land by mutual agreement. Those were matters that lay entirely within the discretion of the parties prior to and independent of the judgment of the court; but when the parties exhausted their efforts for an amicable settlement and invoked the aid of the court to adjust their differences, they came into court, not as contracting parties, but as antagonists, standing at arm's length, and each was entitled to stand on his legal rights, and neither could be compelled to make a settlement contrary to established legal principles. The remedy of eminent domain, by which the government through one of its agencies or a *quasi*-public corporation is authorized to take the property of a private citizen because of the supposed urgent public need, is a harsh one and must be exercised in accord with the strict principles appertaining thereto. Such proceeding is in the nature of an enforced sale in which the agency so appropriating the land stands in the position of a buyer. Consequently, it must either take the land with the permanent improvements thereon as it stands and pay for it accordingly, or reject it *in toto.* It cannot strip the improvements therefrom and compel the owner to provide other land to receive the salvage, and then rightfully insist that the owner is fully compensated by the payment of the value of the naked land so appropriated. If the rule here contended for is applicable to rural property, it is likewise applicable to urban property. Its general application might often permit the State, a railway corporation, or other agency with authority to condemn land, to move the buildings off of the condemned land onto vacant lots that had been acquired by the owner for use for an entirely different purpose, and in this way the owner's plan for the improvement of his private property, not directly involved in the condemnation proceedings, might be entirely upset. Such a rule would be

intolerable. The law will not sanction such unnecessary meddling with a citizen's rights."

Since there are no exceptions to any matters preceding the return of the verdict, we must indulge in the reasonable presumption that trial was had down to that point in accordance with the principles set out above. *Crisp v. Thread Mills,* 189 N.C. 89, 126 S.E. 110; *Stevens v. R. R.,* 187 N.C. 528, 122 S.E. 295.

Whether the presence of parts of the dwelling and store on the right of way interfered with the free exercise of the easement condemned was for the determination of the respondent. Whether she should accept the proposal of the respondent that she remove these parts of the buildings from the right of way to her remaining lands at her own expense was for the decision of the petitioner. These things were not concerns of the court. Hence, the court rightly refused to coerce removal by the petitioner by means of a judgment impounding a portion of the recovery. But it transgressed its province in decreeing that the compensation awarded petitioner included the cost of removal of the buildings, and the judgment will be modified so as to eliminate such adjudication.

This brings us to the contention of the respondent that the recovery of the petitioner cannot exceed the award of the commissioners of appraisal, *i.e.,* $7,150.00, because she did not except to their report and appeal to the court at term from the order of the Clerk confirming it, and that by reason thereof the court erred in rendering judgment for the petitioner for the higher damages, *i.e.,* $7,508.00, found by the jury on the trial in term. This position is necessarily predicated upon the assumption that where the question of the amount of compensation justly accruing to a landowner on account of the taking of his property for public use is submitted to a jury of the Superior Court in term upon an appeal in a condemnation proceeding, the verdict of the jury is nugatory if it be favorable to the appellee rather than to the appellant.

We are unable to accept the suggestion of the respondent that it could lessen the award of compensation because it appealed, but that petitioner could not have it increased because she had not done so.

It is true that *R. R. v. Church,* 104 N.C. 525, 10 S.E. 761, which was handed down in 1889 and which involved the construction of the statute then governing appeals in condemnation proceedings, lends color of support to the respondent's position. Subsequent to the decision in that case, however, Chapter 148 of the Public Laws of 1893 was enacted "to secure the right of trial by jury in certain cases." This statute is now codified as G.S. 40-20 and specifies that any party to a condemnation proceeding "shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury

of the superior court in term, if upon the hearing of such appeal a trial by a jury be demanded."

G.S. 40-20 clearly contemplates that the trial of the issue of damages before a jury of the Superior Court at term shall be *de novo*. *Light Co. v. Reeves,* 198 N.C. 404, 151 S.E. 871; *Ayden v. Lancaster,* 195 N.C. 297, 142 S.E. 18. By this it is meant that when either party to a condemnation proceeding appeals to the Superior Court in term and demands that the damages be determined by a jury, the trial must proceed in the Superior Court in so far as the question of damages is concerned as though no commissioners of appraisal had ever been appointed. This being true, it necessarily follows that the Superior Court at term is vested with authority to enter judgment for the landowner for the amount of damages fixed by the verdict of the jury, regardless of whether the same be greater or smaller than the sum originally awarded by the commissioners of appraisal, and regardless of whether the landowner or the condemnor took the appeal. Hence, the court below properly rendered judgment in behalf of the petitioner for the larger amount found by the jury.

It is observed, in closing, that the petitioner does not raise any question as to the applicability of G.S. 40-10 to any of the property involved in this proceeding. In consequence, we express no opinion as to that.

Upon petitioner's appeal: Judgment modified and affirmed.

Upon respondent's appeal: No error.

MRS. NOLA H. FANELTY v. ROGERS JEWELERS, INC.

(Filed 12 October, 1949.)

1. Appeal and Error § 39e—

The exclusion of evidence cannot be held prejudicial when substantially the same evidence is subsequently admitted.

2. Evidence § 42d—

In order for an admission of the agent to be competent against the principal, the admission must be relevant to the issue, the agent must have been acting within the scope of his authority in making the admission, and the admission must relate to a transaction pending at the time it was made.

3. Same—

An admission by the manager of a store as to the conditions of its entrance, made some thirty days after plaintiff's fall at the store entrance, is incompetent in the absence of evidence that the agent had any independent authority to speak for the defendant store as to the subject of the declaration.

4. Evidence § 45—

Testimony of a statement by the manager of defendant store that the store had "a very dangerous front" is incompetent as an expression of opinion rather than a statement of fact.

5. Negligence § 4f (2)—

The fact that, subsequent to the fall of a patron on the entrance of defendant's store, defendant covered the entryway with rubber matting, is not an implied admission of negligence and is incompetent.

6. Same: Evidence § 26—

Testimony of a witness as to the slippery condition of defendant's store some six months prior to the injury in suit is incompetent to show the condition of the floor at the time of the injury, since such condition is of temporary character and could raise no inference as to the floor's condition at the subsequent date.

7. Negligence § 4f (2)—

It is the legal duty of a store proprietor to exercise ordinary care to keep the entryway to its shop in a reasonably safe condition for the use of customers entering or leaving the premises, and to warn them of hidden perils in the entryway known to it or ascertainable by it through reasonable inspection and supervision.

8. Same—

No inference of actionable negligence on the part of a store proprietor arises from mere fact that a patron suffers personal injury from a fall occasioned by stepping on some slippery substance on the premises.

9. Same—

Evidence that plaintiff stepped in some substance of an oily, greasy or slippery nature upon the entryway to defendant's store, without evidence as to the size or dangerous character of such substance, or that defendant placed or permitted it to be in the entryway, and without evidence as to the length of time it had been there prior to plaintiff's injury, is insufficient to overrule defendant's motion to nonsuit.

10. Same—

The fact that a recessed entryway to a store is floored with terrazzo, sloping from the entrance door to the sidewalk at a rate not exceeding one-half inch per foot, is insufficient of itself to show negligent construction of the entryway.

APPEAL by plaintiff from *Edmundson, Special Judge,* and a jury, at the May Term, 1949, of WAYNE.

The plaintiff sued the defendant in the court below to recover damages for personal injuries suffered by her from falling in the entryway to the defendant's jewelery store on South Center Street in Goldsboro, North Carolina. In her complaint, the plaintiff charged that her fall was the proximate result of negligence of the defendant in one or more of these

respects: (1) In paving the entryway with a "hard, slippery, smooth and marble-like" material, which sloped downwards from the door to the inner edge of the sidewalk; (2) in causing or permitting some substance of "an oily, greasy, or slippery nature" to be put upon the floor of the entryway and to remain thereon in such an excess quantity as to endanger customers entering or leaving the store; and (3) in failing to inspect the entryway and to discover such "unsafe and dangerous condition" of the floor of the entryway in time to remove the danger or to give warning of its presence to customers. The defendant answered, denying actionable negligence and pleading contributory negligence.

Evidence adduced by the plaintiff tended to establish the matters set out below.

The defendant sells jewelry and other merchandise at a store situated on the western side of South Center Street in Goldsboro. The entrance door of the store is set back from the inner edge of the sidewalk about ten feet, and is connected with the sidewalk by a recessed entryway flanked on each side by display windows. The floor of the entryway is terrazzo, which consists of small chips of marble set irregularly in cement and polished. It is smooth and slops downward from the entrance door to the sidewalk at a rate not exceeding one-half inch per foot.

At 1:00 o'clock p.m. on 5 December, 1947, the plaintiff went to the defendant's store "looking for Christmas gifts." She had visited the establishment "every day or two . . . for six months or a year," and was familiar with the character and condition of the entryway. As she entered the store, she "did not see any wax" on the terrazzo flooring.

Plaintiff tarried in the store for some fifteen minutes. As she was leaving, she slipped and fell on the floor of the entryway, sustaining substantial personal injuries.

The only witness giving any direct evidence concerning the fall was the plaintiff, who testified on this aspect of the case as follows: "When I came out of the store on this day going toward the sidewalk my feet were not wet. When I got about the middle of the walkway I stepped on a slick place and began sliding. I tried to brace myself, and fell. I had not felt any slick place before I hit that spot where I fell. . . . I could not see the slick place where I slipped as I approached it. I did not find out about the place being slick until I stepped on it . . . I really don't know what I stepped on, but it felt like a slick place; that's all . . . In my opinion the place where I slipped was waxed. I didn't find another waxed spot in that entrance except the one on which I fell."

The only other witness professing any personal knowledge of the state of the entryway at the time in controversy was the plaintiff's witness, Wayne Broadhurst, who was then serving the defendant in the capacity of janitor. He testified that he employed a floor dressing called "zip"

inside the store, but that he never used anything except a mop and water on the floor of the entryway.

When the plaintiff rested her case, the court adjudged her evidence insufficient to support a verdict in her favor, and dismissed the action by a compulsory judgment of nonsuit. G.S. 1-183. The plaintiff excepted and appealed, assigning the granting of the nonsuit and the exclusion of certain evidence as errors.

W. Jack Hooks and Scott B. Berkeley for plaintiff, appellant.

Langston, Allen & Taylor for defendant, appellee.

ERVIN, J. First consideration will be given to the assignments of error relating to the exclusion of testimony.

The plaintiff was not hurt by the rulings covered by her first and second exceptions because substantially the same evidence was subsequently admitted. *Metcalf v. Ratcliff,* 216 N.C. 216, 4 S.E. 2d 515; *Bryant v. Reedy,* 214 N.C. 748, 200 S.E. 896; *Keith v. Kennedy,* 194 N.C. 784, 140 S.E. 721.

The third exception challenges the ruling of the court excluding testimony tending to show that at least one month after the plaintiff's fall Bill Avery, the manager of the defendant's store, stated to plaintiff's counsel in a casual conversation that the store had "a very dangerous front." There was no fact or circumstance indicating that Avery had any independent authority to speak for the defendant as to the subject of the declaration. Stansbury: North Carolina Evidence, section 169. This being so, the propriety of the ruling in question is to be determined by recourse to the general rule that an admission of an agent is not competent against his principal unless it meets this threefold test: (1) The admission must be relevant to the issue; (2) the agent must have been acting within the scope of his authority in making the admission; and (3) the transaction to which the admission relates must have been pending at the time when it was made. *Salmon v. Pearce,* 223 N.C. 587, 27 S.E. 2d 647; *Caulder v. Motor Sales, Inc.,* 221 N.C. 437, 20 S.E. 2d 338; *Howell v. Harris,* 220 N.C. 198, 16 S.E. 2d 829; *Hester v. Motor Lines,* 219 N.C. 743, 14 S.E. 2d 794; *Bank v. Toxey,* 210 N.C. 470, 187 S.E. 553; *Staley v. Park,* 202 N.C. 155, 162 S.E. 202; *Bank v. Sklut,* 198 N.C. 589, 152 S.E. 697; *Pangle v. Appalachian Hall,* 190 N.C. 833, 131 S.E. 42; *Berry v. Cedar Works,* 184 N.C. 187, 113 S.E. 772; *Bank v. Wysong & Miles Co.,* 177 N.C. 284, 98 S.E. 769. The declaration of the manager of the defendant's store did not fulfill the second and third prerequisites to admissibility, and was rightly rejected. Moreover, the statement was incompetent for another reason. It was an expression of opinion rather than a statement of fact. *National Life & Accident Ins. Co. v. McGhee,*

238 Ala., 471, 191 So. 884; *Wert v. Equitable Life Assur. Soc. of U. S.*, 135 Neb. 654, 283 N.W. 506; *Edwards v. Maryland Motorcar Ins. Co.*, 204 App. Div. 174, 197 N.Y.S. 460.

The fourth and fifth exceptions are to the rejection of evidence indicating that at some undisclosed time subsequent to plaintiff's fall the defendant covered the part of the entryway between the entrance door and the sidewalk with rubber matting. The testimony relating to this change in the condition of the premises was offered for the avowed purpose of showing that defendant was negligent on the particular occasion in controversy. Consequently, it was properly excluded. *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232; *Farrall v. Garage Co.*, 179 N.C. 389, 102 S.E. 617; *Muse v. Motor Co.*, 175 N.C. 466, 95 S.E. 900; *Boggs v. Mining Co.*, 162 N.C. 393, 78 S.E. 274; *Tise v. Thomasville*, 151 N.C. 281, 65 S.E. 1007; *Aiken v. Manufacturing Co.*, 146 N.C. 324, 59 S.E. 696; *Lowe v. Elliott*, 109 N.C. 581, 14 S.E. 51. The rule excluding evidence of subsequent repairs and precautions when offered to establish antecedent negligence is founded on the sound policy "that men should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers." *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N.E. 965, 18 Am. St. R. 303, 7 L.R.A. 588.

The sixth and seventh exceptions embrace rulings of the court rejecting testimony of the plaintiff's witness, Miss Annie Davis, that she visited the defendant's store right after the terrazzo flooring was put in the entryway; that she then observed what she took to be wax upon "the whole floor" of the store; and that she thereupon told one of the defendant's clerks that "it was too slippery." This witness could not fix the date of her observation and remark. The plaintiff testified, however, that the terrazzo was placed in the entryway "several months—six months or a year" before her fall. The testimony under scrutiny was tendered by plaintiff as a basis for invoking the evidential rule that "proof of the existence at a particular time of a fact of a continuous nature gives rise to an inference, within logical limits, that it exists at a subsequent time." 31 C.J.S., Evidence, section 124. The court rightly refused to admit the testimony even if it be assumed that the observation and remark of the witness applied to the entryway as well as the inside of the store. The condition described by the witness was of a highly temporary character. Hence, no presumption of its continuance arose. *In re Will of George V. Credle*, 176 N.C. 84, 97 S.E. 151; *Ross v. City of Stamford*, 88 Conn. 260, 91 A. 201; Wigmore on Evidence (3d Ed.), section 437.

The remaining assignment of error is directed to the entry of the compulsory nonsuit, and raises this query: Was the testimony produced by plaintiff at the trial sufficient in law to support findings that defend-

ant failed to exercise proper care in performing some legal duty which it owed to the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of plaintiff's fall and injury? *Truelove v. R. R.*, 222 N.C. 704, 24 S.E. 2d 537; *Mills v. Moore,* 219 N.C. 25, 12 S.E. 2d 661; *Gold v. Kiker,* 216 N.C. 511, 5 S.E. 2d 548. This question must be answered in the negative.

It was undoubtedly the legal duty of the defendant in its capacity as a storekeeper to exercise ordinary care to keep the entryway to its shop in a reasonably safe condition for the use of customers entering or leaving the premises, and to warn them of hidden perils in the entryway known to it or ascertainable by it through reasonable inspection and supervision. *Harris v. Montgomery Ward & Co., ante,* 485, 53 S.E. 2d 536; *Ross v. Drug Store,* 225 N.C. 226, 34 S.E. 2d 64; *Watkins v. Furnishing Co.,* 224 N.C. 674, 31 S.E. 2d 917; *Pratt v. Tea Co.,* 218 N.C. 732, 12 S.E. 2d 242; *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 166, 10 S.E. 2d 623; *Brown v. Montgomery Ward & Co.,* 217 N.C. 368, 8 S.E. 2d 199; *Pridgen v. Kress & Co.,* 213 N.C. 541, 196 S.E. 821; *Williams v. Stores Co., Inc.,* 209 N.C. 591, 184 S.E. 496; *Fox v. Tea Co.,* 209 N.C. 115, 182 S.E. 662; *Cooke v. Tea Co.,* 204 N.C. 495, 168 S.E. 679; *Farrell v. Thomas & Howard Co.,* 204 N.C. 631, 169 S.E. 224; *Clark v. Drug Co.,* 204 N.C. 628, 169 S.E. 217; *Parker v. Tea Co.,* 201 N.C. 691, 161 S.E. 209; *Bowden v. Kress,* 198 N.C. 559, 152 S.E. 625; *Bohannon v. Stores Company, Inc.,* 197 N.C. 755, 150 S.E. 356. But the testimony will not justify the conclusion that the defendant breached its duty to the plaintiff in any respect.

No inference of actionable negligence on the part of the defendant arises from the mere fact that the plaintiff suffered personal injury from a fall occasioned by stepping on some slippery substance on the defendant's premises. *Harris v. Montgomery Ward & Co., supra; Fox v. Tea Co., supra; Parker v. Tea Co., supra; Bowden v. Kress, supra.* The evidence does not disclose the size or dangerous character of such substance or indicate that the defendant placed or permitted it to be in the entryway. *Pratt v. Tea Co., supra; Brown v. Montgomery Ward & Co., supra.* Indeed, the testimony of the plaintiff's witness, Wayne Broadhurst, affirmatively absolves defendant from responsibility for putting it there. No fact or circumstance adduced at the trial suggests that the substance had been upon the floor of the entryway for any appreciable period of time before the plaintiff stepped upon it and fell. In consequence, the evidence does not support the theory that the defendant ignored an opportunity to discover the substance and avoid injury to plaintiff by removing it or warning plaintiff of its presence prior to the accident. *Pratt v. Tea Co., supra; Fox v. Tea Co., supra; Cooke v. Tea Co., supra.* The fact that the surface of the terrazzo flooring was smooth

and sloped downward from the entrance door to the sidewalk was insufficient of itself to show negligent construction of the entryway. *Griggs v. Sears, Roebuck & Co., supra.* Moreover, there was no proof of any causal relation between the surface and slope of the entryway and the plaintiff's fall.

For the reasons given, the trial in the court below was free of legal error, and the judgment must be upheld.

Judgment affirmed.

DEWITT ALLEN GREEN v. DEWITT ALLEN GREEN AND CITY BANK FARMERS TRUST COMPANY, EXECUTORS AND TRUSTEES OF THE ESTATE OF DELEON F. GREEN UNDER THE LAST WILL AND TESTAMENT OF DELEON F. GREEN, DECEASED, ELIZABETH P. GREEN, WIFE OF DEWITT ALLEN GREEN, AND DEWITT ALLEN GREEN, JR., ROBERT SATER GREEN AND BRENT PIERCE GREEN, INFANTS UNDER THE AGE OF 14 YEARS, AND ALL PERSONS NOT IN ESSE WHO HAVE OR MAY HAVE OR CLAIM AN INTEREST IN THE ESTATE OF DELEON F. GREEN, DECEASED, THE UNIVERSITY OF NORTH CAROLINA AND SIDNEY C. CHAMBERS, GUARDIAN AD LITEM OF DEWITT ALLEN GREEN, JR., ROBERT SATER GREEN AND BRENT PIERCE GREEN, INFANTS, AND ALL PERSONS NOT IN ESSE WHO HAVE OR MAY HAVE OR CLAIM AN INTEREST IN THE ESTATE OF DELEON F. GREEN, DECEASED.

(Filed 12 October, 1949.)

Wills § 33d—

Construing the will and codicil in suit to ascertain the testator's intent, *it is held* that the provision of the will that testator's son should be paid all or any part of the principal that he should request in writing, interpolated parenthetically in the provision setting up a trust with the net income to be paid the son for life, does not authorize the transfer of testator's residence to the son upon his request in fee unaffected by the limitations of the trust.

APPEAL by plaintiff from *Bone, J.*, at June Term, 1949, of HALIFAX. Affirmed.

Murray Allen for plaintiff, appellant.

No counsel contra.

DEVIN, J. The purpose of this suit is to determine the proper construction of the will of DeLeon F. Green, instituted by DeWitt Allen Green, son of the testator and a beneficiary under the will, to which suit the executors and trustees and all persons interested, including those not *in esse,* have been made parties defendant.

It appears from an examination of the will that after making bequest of certain personal property to his son, a sum to a servant, and a fund for the care of a cemetery lot, the testator in the fifth clause disposed of the remainder of his estate as follows:

"All the rest, residue and remainder of my estate, both real and personal and wheresoever situated, of which I shall die seized or possessed, or to which I shall be in any way entitled at the time of my death, I give, devise and bequeath to my Trustees hereinafter named, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect and receive the income thereof, and to pay or apply the net amount of such income (and in addition thereto so much, or all, of the principal thereof as he may at any time and from time to time and for any reason whatsoever request in writing) to or for the use of my son, DeWitt Allen Green, so long as he shall live, and upon the death of the survivor of my son and myself to divide and set apart the then remaining principal of the trust fund into so many equal shares that there shall be one such equal share for each then living grandchild of mine and one such equal share for the issue (collectively) then living of each then deceased grandchild of mine of whom issue may then be living and to hold and dispose of said equal shares as follows:" (Provisions not material to the decision are omitted.)

By codicil testator added the following:

"If at any time when my present residence property situated in part in Weldon and part in Halifax County, North Carolina, shall be held in trust, or partly in trust, under the terms of clause 'FIFTH' of my said Will, my son, DeWitt Allen Green, shall request in writing that the present residence thereon and any connected buildings (but not unconnected buildings) be demolished, I direct that such residence and connected buildings be forthwith demolished, and after my son's decease, if his wife, Elizabeth Pierce Green, while neither of my grandsons named in my said Will shall be living and over the age of 21 years, or such one or both of my grandsons as shall at the time be living and over the age of 21 years, shall request in writing that said residence and connected buildings be demolished, I direct that they be forthwith demolished. In any event, I direct that said residence property be not sold or disposed of by any trustees or trustee under my Will owning the same without first demolishing said residence and connected buildings, and that no consent of any individual shall be required for demolition in connection with any such sale or then pending sale. I direct the trustees or trustee holding at the time any other property of mine in trust under the provisions of clause 'FIFTH' of my Will to pay the cost of any demolition out of the trust principal then held by such trustees or trustee. It is my hope that eventually one or both of my said grandsons will desire to use and occupy

the said residence property as his or their residence, and as long during the term of any trust under clause 'FIFTH' as said residence and connected buildings remain on said residence property and it is the fact that it is, or seems possible that it may become the residence of either or both of my said grandsons, it is my wish, but I do not direct it, that the gross income from any other property held in trust under the terms of said clause be expended liberally for the maintenance and upkeep of said residence property."

The will was probated in New York with plaintiff and City Bank Farmers Trust Company, a New York corporation, qualifying as executors and trustees, and thereafter the will was duly admitted to probate in Halifax County, North Carolina, and the plaintiff DeWitt Allen Green qualified in North Carolina as sole executor and trustee. The testator left surviving two grandchildren, aged 11½ and 9½ years respectively, sons of the plaintiff, DeWitt Allen Green, and his wife Elizabeth P. Green.

The plaintiff desires, pursuant to the provisions of the will and codicil, now to withdraw from the trust the residence and connected buildings referred to in the codicil and to have same transferred to him to be held in his own right in fee simple. All defendants join in the prayer for construction of the will and for judicial determination of plaintiff's right thereunder.

The court below held that plaintiff did not have right to have the real estate described and improvements thereon withdrawn from the trust and conveyed to himself in fee simple. Judgment was entered accordingly, and plaintiff appealed.

By the fifth clause of his will the testator, after making several bequests of personal property, devised the remainder of his estate, real and personal, to trustees in trust to hold and manage, and to pay the income therefrom to his son for life, and upon his death, to divide and set apart the then remaining principal of the trust into equal shares for the benefit of testator's grandchildren. But immediately following the direction to the trustees to pay the plaintiff "such income," the testator inserted parenthetically the clause that "in addition thereto so much, or all, of the principal thereof as he may at any time and from time to time and for any reason whatsoever request in writing," and then, closing the parenthesis, the testator continued with the limitation "so long as he shall live."

The determinative question presented for our decision is whether the plaintiff upon written request has the right to have the residence property transferred to him to be held in his own right in fee simple freed from the provisions and limitations of the trust, or whether upon the transfer of this property at his request, he would hold it subject to the provisions

of the trust that it be held for life only and after his death be divided into equal shares for the testator's grandchildren.

It is argued for the plaintiff that the testator by the clause in parenthesis manifested his intention that his son should be entitled upon request to any or all of the principal absolutely, and that this view is supported by the subsequent direction to divide "the then remaining principal of the trust" into shares for his grandchildren, suggestive of diminution of the principal by valid transfers therefrom at the request of the son. But as the trustees were given authority by the will to deal with the trust estate and to sell any part of it if deemed proper, we do not think the use of the word "remaining" necessarily should be understood as indicating the testator had in mind that the principal might be permanently reduced by transfer in fee to the plaintiff. Though the trustees were directed to pay or apply to the plaintiff the net income, and in addition a part or all of the principal if so requested, it does not follow that property transferred to the plaintiff under this provision would not be subject to the general limitation for the life of the son and then to be divided between testator's grandchildren.

When we examine the will and codicil, and every part thereof, we conclude therefrom it was not the intention of the testator that the residence property should be conveyed to the plaintiff at his request in fee simple freed from the limitations of the trust. The testator's evident concern for the benefit of his grandchildren, and the elaborate provision he made in the will for the eventual holding and disposition of equal shares in the trust estate by them and their issue, coupled with his expressed hope that one or both of his grandchildren should use and occupy the residence property as a residence, would seem to negative the contention that it was the testator's intention that the son should be entitled on request to a conveyance of this property by the trustees to himself individually, in fee simple, unaffected by the limitations of the trust, to the exclusion of the grandchildren.

No explanation is offered in the record as reason for the testator's direction that the residence property should not be sold or disposed of by his trustees without first demolishing the residence and connected buildings. The court found this property has a replacement value of $50,000. However, whether a court of equity would enforce that provision, if occasion should arise, it is not necessary to decide on this appeal.

We think the court below has ruled correctly and the judgment is

Affirmed.

J. Q. ADAMS AND C. B. ADAMS v. GROWERS' WAREHOUSE, INCORPORATED, AND DIXIE GROWERS WAREHOUSE, INC.

(Filed 12 October, 1949.)

1. Agriculture § 1a—

Title to and possession of crops cultivated and harvested by a tenant or share cropper rests in the landlord until the rents are paid and the landlord's lien for advancements is discharged, and the landlord may have recourse against any person who may get possession of the crops without his consent. G.S. 42-15.

2. Same—

Where landlords give their tenant possession of their AAA marketing card, and the tenant sells tobacco grown on the farm and receives the purchase price from the warehouseman, the landlords may not hold the warehouseman liable for their lien for rents and advancements, since their clothing of the tenant with authority or apparent authority to receive payment amounts to a consent to such payment. Although the landlord may not deprive the tenant of his share of the tobacco on his marketing card, he can, through its possession, control the sale and protect his lien. 7 U.S.C.A. 1312 *et seq.*

APPEAL by plaintiffs from *Frizzelle, J.*, June Special Term, 1949, JOHNSTON. Affirmed.

Civil action to recover the value of tobacco sold on defendants' warehouse floor.

The defendants operate a warehouse in Smithfield, N. C., for the sale of leaf tobacco by tobacco producers. In 1946 one Semmie Stancill cultivated tobacco on the lands of plaintiffs as a share crop tenant. During the year, plaintiff made certain advancements to him to enable him to cultivate and harvest the crop.

Prior to 25 October 1946 plaintiffs delivered their AAA marketing card to Stancill and told him to carry his tobacco to Varina. However, they did not require him or their other tenants to carry tobacco to any particular market. Stancill told them at the time he was not willing to carry it to Varina. With this information they permitted him to retain the marketing card.

On 25 October, Stancill carried 2,080 pounds of tobacco to Smithfield and sold it on the defendants' warehouse floor. Defendants issued their check for the net amount of the sale in the sum of $997.20 to Stancill and Adams and delivered same to Stancill. He presented the check to the bank for payment and received the money therefor. He applied $600 of the proceeds on a mortgage note to the Farm Security Administration, signed by him and his landlord. He has not accounted for the balance. At the time, plaintiffs had a landlord's lien on the tobacco for rent and

advancements and entered this suit to recover the value of the tobacco to be applied to the discharge thereof.

At the conclusion of the evidence, the court, on motion of defendants, entered judgment of nonsuit and plaintiffs appealed.

Lyon & Lyon for plaintiff appellants.
Hooks & Mitchiner for defendant appellees.

BARNHILL, J. We are not concerned here with any misconduct on the part of Stancill in disregarding the request of plaintiffs, or in disposing of property subject to lien, or in failing to account for the proceeds of sale. We are concerned only with the liability of defendants to plaintiffs for the value of tobacco raised on plaintiffs' farm and sold on defendants' warehouse floor.

Title to and possession of crops cultivated and harvested by a tenant or share cropper rests in the landlord until the rents are paid and the landlord's lien for advancements is discharged, and the landlord may have recourse against any person who may get possession of the same without his consent. G.S. 42-15; *Rhodes v. Fertilizer Co.*, 220 N.C. 21, 16 S.E. 2d 408.

Did the plaintiffs assent to the sale so as to relieve defendants of liability for the value of tobacco they admittedly received from the tenant? Upon the answer to this question decision must rest.

Flue-cured tobacco is now marketed under a quota system prescribed by Act of the Congress and approved by vote of the tobacco farmers, 7 U.S.C.A. sec. 1312 *et seq.*, and its sale is controlled by marketing quota regulations adopted by the U. S. Department of Agriculture under authority of the Congressional Act. 7 U.S.C.A. 610. Under this statute and the regulations adopted pursuant thereto, an acreage allotment is made each year to the owner or operator of a farm devoted in part to the cultivation of tobacco, and a marketing card is issued in the name of the owner for the farm as a whole and delivered to the owner. 7 U.S.C.A. 1313 (g). The card is evidence of compliance with the statute and the regulations adopted thereunder, and is authority to make sale of the tobacco raised on the farm for which the card is issued.

Sale of tobacco in excess of the allotment or without a marketing card is subject to heavy penalty. This penalty is to be collected by the warehouseman at the time of sale, and if he fails to do so or makes payment without the production of a sale memorandum out of the marketing card, he must pay the penalty. 7 U.S.C.A. 1314.

The farmer places his tobacco on the warehouse floor for sale. It is auctioned off and bid in by the buyers attending the sale. The warehouseman then issues his bill of sale in the name of the producer and his

tenant, if any. This bill of sale is identified by number and contains detailed information respecting the sale, including the gross sale price, the warehouse charges, and the net amount due the seller. Up to this point in marketing the tobacco, the production of the marketing card is not essential, for the farmer may make sale of tobacco in excess of his allotment or without allotment by paying the 40% penalty charge.

Upon receipt of the bill of sale, the farmer carries it to the office for the purpose of demanding and receiving check for the net amount due him. This is the time he must produce his marketing card.

This marketing card is in the form of a coupon book. Each page or coupon is composed of a stub and a memorandum sheet upon which is to be entered certain information at the time the sale is closed. Each marketing of tobacco from a farm must be identified by an executed memorandum of sale from the marketing card issued for the farm on which the tobacco was produced. This memorandum is executed upon production of the warehouse bill of sale by an authorized AAA agent and is authority of the warehouseman for the issuance and delivery of the purchase price check. In the absence of such memorandum duly executed the sale or "marketing" must be suspended, and if the card is not produced within four weeks thereafter, the sale is subject to the full 40% penalty.

Upon receipt of the memorandum from the marketing card, executed by the agent of the AAA, the warehouseman issues his check for the net amount due the seller less any penalty charges noted upon the memorandum. The serial number of the memorandum of sale issued to identify each marketing of tobacco or the number of warehouse bill covering the marketing must be recorded on the check register or check stub for the check written with respect to such sale of tobacco. See U. S. Department of Agriculture Tobacco Marketing Quota Regulations, Title 7, Part 725.

Thus the possession and production of the marketing card and the issuance of a sales memorandum therefrom by the AAA agent is authority for the warehouseman to issue and deliver his check for the purchase price of the tobacco.

When the plaintiffs delivered their marketing card to Stancill, they placed him in position to produce it as his credentials for the receipt of the check for the tobacco. This is the only use to which he could have put it. By their act they consented to the payment. They cannot now complain that defendants acted on the authority or apparent authority they thereby vested in their tenant. The resulting loss must rest on them and not on defendants.

It is true the applicable regulations provide that the owner or operator must sell or permit the sale of his tenant's share of the tobacco on his marketing card. But this does not mean that he must surrender the card to his tenant or forego the protective provisions of the State law respect-

ing the possession and sale of agricultural products. It simply means he cannot sell his share and leave the tenant, to whom no marketing card is issued, without means of disposing of his share. The card is for the sale of all tobacco produced on the farm. Through its possession the landlord can control the sale and protect his lien. At the same time he must not deprive his tenant of his marketing privileges through the medium of the farm marketing card.

For the reasons stated the judgment below is

Affirmed.

WILLIE WILLIAMS, ADMINISTRATOR OF THE ESTATE OF NELLE GRAY WILLIAMS v. RAYMOND HENDERSON.

(Filed 12 October, 1949.)

1. Automobiles § 8a—

A motorist is under duty at all times to operate his vehicle at a reasonable rate of speed and maintain constant attention to the highway. G.S. 20-140.

2. Automobiles § 12f—

A motorist is required to keep a proper lookout for persons on or near the highway, and decrease his speed when any special hazards exist with respect to pedestrians. G.S. 20-141 (c).

3. Same—

While ordinarily a motorist is not required to anticipate that a pedestrian will leave a place of safety and get in a line of travel, when the circumstances are such that it should appear to the motorist that a pedestrian is oblivious of his approach, or when he may reasonably anticipate the pedestrian will come into his way, it is his duty to give warning by sounding his horn. G.S. 20-174 (e).

4. Automobiles §§ 18h (2), 18h (3)—Questions of negligence and contributory negligence held for jury in this action to recover for death of pedestrian.

The evidence disclosed that intestate was standing on the shoulder of a highway at a mail box with her back to defendant's truck, which was approaching along a straight highway 150 feet behind another truck traveling in the same direction, that defendant did not slacken speed or sound his horn, and that when defendant's truck was within 15 or 20 feet, intestate suddenly turned and started walking across the highway, and was struck by the truck. *Held:* The evidence was sufficient to be submitted to the jury upon the issue of negligence and, under the circumstances, intestate's failure to look before she started back across the highway cannot be held for contributory negligence as a matter of law.

APPEAL by plaintiff from *Nettles, J.*, May-June Term, 1949, HENDERSON. Reversed.

Civil action to recover damages for wrongful death.

The evidence considered in the light most favorable to plaintiff tends to establish the following facts:

Deceased lived on the north side of Highway 64 east of Hendersonville. On 17 November 1947 she left her home to go to her mail box located on the southern edge of the highway. As she crossed the highway, two heavily loaded oil trucks belonging to defendant were approaching from the west, traveling about 45 or 50 miles per hour. The second or rear truck was being operated by defendant. The first truck passed deceased. As the second truck approached, deceased was standing at the mail box on the shoulder of the road, apparently oblivious of the approach of the second truck. When this truck was within 15 or 20 feet of deceased, she turned suddenly and "started back across the highway in a fast walk." Defendant swerved his truck to the left in an attempt to avoid striking her but the rear-view mirror located on the right side struck her head and her body struck the corner of the truck to the rear of the cab.

She was thrown 112 feet down the road and fell on the right-hand shoulder of the road. The truck traveled 250 feet—to the left shoulder then to the right—before it stopped. Glass from the rear-view mirror and fragments of paint were scattered on the pavement not more than 12 inches from the southern edge of the pavement. The road was straight in each direction so that each could have seen the other for a considerable distance. As defendant approached the mail box he did not sound his horn or slacken his speed. He said he was too close to the other truck to see her until he was within just a few feet of her. When he first saw her, she was at the mail box with her back to the road.

When the plaintiff rested, the court, on motion of defendant, entered judgment of nonsuit and plaintiff appealed.

Arthur J. Redden, W. Roy Francis and Smathers & Meekins for plaintiff appellant.

R. L. Whitmire for defendant appellee.

BARNHILL, J. A motorist operates his vehicle on the public highways where others are apt to be. His rights are relative. Should he lapse into a state of carelessness or forgetfulness his machine may leave death and destruction in its wake. Therefore, the law imposes upon him certain positive duties and exacts of him constant care and attention. He must at all times operate his vehicle with due caution and circumspection, with due regard for the rights and safety of others, and at such speed and in such manner as will not endanger or be likely to endanger the lives or property of others. G.S. 20-140; *Kolman v. Silbert,* 219 N.C. 134, 12 S.E. 2d 915.

He must operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, *Cox v. Lee, ante,* 155, decrease his speed when any special hazard exists with respect to pedestrians, G.S. 20-141 (c), and, if circumstances warrant, he must give warning of his approach by sounding his horn. G.S. 20-174 (e); *Williams v. Woodward,* 218 N.C. 305, 10 S.E. 2d 913; *Parr v. Peters,* 150 A. 34; *Tel. Co. v. Payne,* 69 S.W. 2d 358.

While a driver of a motor vehicle is not required to anticipate that a pedestrian seen in a place of safety will leave it and get in the danger zone until some demonstration or movement on his part reasonably indicates that fact, *Tysinger v. Dairy Products,* 225 N.C. 717, 36 S.E. 2d 246, he must give warning to one on the highway or in close proximity to it, and not on a sidewalk, who is apparently oblivious of the approach of the car or one whom the driver in the exercise of ordinary care may reasonably anticipate will come into his way. *Trainor's Adm'r. v. Keller,* 79 S.W. 2d 232.

It is his duty to sound his horn in order that a pedestrian unaware of his approach may have timely warning. If it appears that the pedestrian is oblivious for the moment of the nearness of the car and of the speed at which it is approaching, ordinary care requires him to blow his horn, slow down, and, if necessary, stop to avoid inflicting injury. *Walmer-Roberts v. Hennessey,* 181 N.W. 798; *Quinn v. Heidman,* 195 N.W. 774; *Olsen v. Peerless Laundry,* 191 P. 756; *McKinney v. Bissel,* 263 S.W. 533; *Leckwe v. Ritter,* 241 N.W. 339; *Cox v. Reynolds,* 18 S.W. 2d 575; 5-6 Huddy, Cyc. Auto Law, 84, sec. 52.

He must make certain that pedestrians in front of him are aware of his approach. 2 Blash. Auto 370, sec. 1242. And when it is apparent the pedestrian is oblivious of his approach he is bound to realize the hazard of driving his vehicle at a high rate of speed so close to the pedestrian that he might be taken unawares by the sudden discovery of the vehicle and make such deviation as to bring him in front of it. *Jacoby v. Gallaher,* 120 So. 888; *Tatum v. Crosswell,* 163 S.E. 228.

Here the defendant was operating his heavily loaded truck at 45 to 50 miles per hour within 150 feet of the vehicle just ahead. As the road was straight he saw or should have seen the deceased on the shoulder of the highway standing at the mail box even before the first truck passed her. She had her back to him and was apparently oblivious of his approach. Yet he did not slacken his speed or apply his brakes or sound his horn. These circumstances present a case for the jury.

Of course it was the duty of the deceased to look before she started back across the highway. Even so, under the circumstances here disclosed, her failure so to do may not be said to constitute contributory negligence as a matter of law. It is for the jury to say whether her

neglect in this respect was one of the proximate causes of her injury and death. *McKinney v. Bissel, supra.*

Tysinger v. Dairy Products, supra (225 N.C. 717, 36 S.E. 2d 246) is distinguishable. There, as the motorist approached, the deceased was walking toward the highway facing in a direction which enabled him to see the vehicle. There was nothing in the conduct of the deceased to put the defendant on notice that deceased did not see what was open for him to see. Here the deceased had her back toward the approaching vehicle with her attention diverted to the mail box or its contents. Thus the defendant was put on notice that she was apparently unaware of his nearness or his speed. It was his duty to take notice that she was in danger of getting in his way, or so the jury may find. *Quinn v. Heidman, supra; McKinney v. Bissel, supra.*

For the reasons stated the judgment below is

Reversed.

STATE v. HILBERT BOWEN AND JAMES McKEEL.

(Filed 12 October, 1949.)

1. Criminal Law § 50f—

Counsel must be allowed wide latitude in the argument of hotly contested cases, and the Supreme Court will not review the sound discretion of the trial judge in controlling the argument unless the impropriety of counsel is gross and calculated to prejudice the jury.

2. Same—

In this prosecution for larceny and receiving, the solicitor characterized defendants as "these two thieves," and the trial court refused to instruct the jury to disregard the solicitor's remark. *Held:* While characterization is not argument and the remarks were improper, they did not constitute comment on the personal appearance of defendants but a conclusion drawn from the evidence, and are of insufficient prejudicial effect to warrant the granting of a new trial on appeal from conviction of receiving.

APPEAL by defendants from *Bone, J.*, at April Term, 1949, of NORTHAMPTON.

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

Cameron S. Weeks for defendants.

DENNY, J. The defendants were tried under a bill of indictment charging larceny and receiving. The jury returned a verdict of guilty of receiving stolen goods, knowing them to have been stolen, as charged

in the second count of the bill of indictment. From this verdict and the judgment imposed pursuant thereto, the defendants appeal and assign error.

It is stated in the record that in the course of the Solicitor's argument to the jury, he referred to the defendants, Hilbert Bowen and James McKeel, as "these two thieves," to which remark counsel for the defendants interrupted the Solicitor's argument and objected to the reference to the defendants as "these two thieves." Whereupon the Solicitor reiterated his remarks, stating: "That's exactly what I called them, two thieves." The objection to the reference to the defendants as thieves and the instruction requested, namely, that the jury disregard such references were overruled. This ruling is assigned as error.

Counsel must be allowed wide latitude in the argument of hotly contested cases. But what is an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge, and we "will not review his discretion, unless the impropriety of counsel was gross and well calculated to prejudice the jury," *S. v. Baker,* 69 N.C. 147. *S. v. Bryan,* 89 N.C. 531; *Goodman v. Sapp,* 102 N.C. 477, 9 S.E. 483; *S. v. Tyson,* 133 N.C. 692, 45 S.E. 838; *Caton v. Toler,* 160 N.C. 104, 75 S.E. 929; *Cuthrell v. Greene,* 229 N.C. 475, 50 S.E. 2d 525. Counsel should not go beyond the testimony in a case or characterize a defendant in a manner calculated to prejudice the jury against him. *McLamb v. Railroad Company,* 122 N.C. 862, 29 S.E. 896. *Perry v. R. R.,* 128 N.C. 471, 39 S.E. 27; *Hopkins v. Hopkins,* 132 N.C. 25, 43 S.E. 506; *S. v. Howley,* 220 N.C. 113, 16 S.E. 2d 705; *S. v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *S. v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *S. v. Correll,* 229 N.C. 640, 50 S.E. 2d 717.

While we do not approve the language used by the Solicitor in the instant case, we do not think its use, in the light of the facts disclosed by the record, constitutes such prejudicial error as to justify a new trial. It is true that characterization is not argument, and a prosecuting attorney should not be permitted to characterize an accused or his conduct by terms of opprobrium which are not supported by the evidence. 23 C.J.S. 582. Evidently the Solicitor felt that the State had introduced sufficient evidence to show beyond a reasonable doubt that the defendants were guilty of larceny. Even so, his argument might well have been couched in less objectionable and more dignified language, which, no doubt, would have been equally as effective.

In the case of *S. v. Correll, supra,* where the defendant was on trial for murder, a private prosecutor characterized the defendant as "a small-time racketeering gangster." *Winborne, J.,* in speaking for the Court, said: "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 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."

Likewise, the characterization of the defendant as a "human hyena" was disapproved in *S. v. Ballard,* 191 N.C. 122, 131 S.E. 370; and in *S. v. Murdock,* 183 N.C. 780, 111 S.E. 610, where the defendant was being tried for the illegal manufacture of liquor and had not testified in his own behalf, this Court held remarks made by the Solicitor were improper, which remarks were as follows: "I do not know when I have seen a more typical blockader. Look at him, his red nose, his red face, his red hair and moustach. They are sure signs. He has the ear-marks of a blockader." However, in the above cited cases, the improper remarks, though disapproved, were held harmless, since the trial judge in each case sustained the objection to the improper argument.

A new trial was granted in the case of *S. v. Tucker,* 190 N.C. 708, 130 S.E. 720, where counsel assisting the Solicitor in the prosecution of defendants for violation of the prohibition laws, said in his argument to the jury: "Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers, their looks are enough to convict them." The defendants had not gone upon the witness stand and an objection was interposed to the improper argument in apt time, but the trial judge overruled the objection. The prejudicial error was in permitting the jury, over objection, to consider the comment of counsel upon the personal appearance of the defendants.

These defendants did testify in their own behalf. However, the remarks of the Solicitor to which they object, did not constitute comment on their personal appearance, but a conclusion drawn from the evidence introduced for the consideration of the jury.

No prejudicial error has been shown.

No error.

STATE v. ROBERT BROOKS SAWYER.

(Filed 12 October, 1949.)

1. Criminal Law § 34 (e)—

In this prosecution for reckless driving and driving while intoxicated, the State's evidence tended to show that an officer was making an investigation at the hospital after the accident and that a passenger in the car stated in the presence and hearing of defendant that the car belonged to defendant and that defendant was operating it at the time charged. *Held:* The circumstances were such as to call for a denial by defendant if the statements were false, and defendant's silence in the face of the statements is competent as an implied admission by him of their truth.

2. Automobiles §§ 29b, 30d—

Evidence that defendant was silent when accused of driving the automobile at the time in question when the circumstances were such as to call for a denial by him, together with the circumstantial evidence as to the condition of the automobile and the location of the occupants immediately after the accident tending to show that defendant was the driver, *is held* sufficient upon the question of whether defendant was driving the automobile at the time, and with the other evidence in the case was properly submitted to the jury on the charges of reckless driving and driving while intoxicated. G.S. 20-138, G.S. 20-140.

APPEAL by defendant from *Pless, Jr., J.*, at February Term, 1949, of YADKIN.

Criminal prosecutions upon two bills of indictment, one containing two counts, charging that on 16 November, 1947, defendant did unlawfully and willfully operate a motor vehicle on the public highways of Yadkin County (1) while under the influence of intoxicating liquors, and (2) while under the influence of narcotics, and the other containing eight counts, charging that on 16 November, 1947, defendant did unlawfully and willfully violate various statutes pertaining to the operation of motor vehicles upon the public highways of Yadkin County, including the charge of reckless driving as defined by the Uniform Act Regulating the Operation of Vehicles on Highways. But on the trial in Superior Court the charges pressed by the State, and on which defendant was tried, were (1) the operation of a motor vehicle upon the public highways of Yadkin while under the influence of intoxicating liquor, G.S. 20-138, and (2) reckless driving. G.S. 20-140.

Upon trial in Superior Court both the State and the defendant offered evidence. Recitation of such of the evidence offered by the State as is required in considering assignments of error is made in the opinion hereinafter shown.

Verdict: "Guilty of operating a car intoxicated," and "reckless driving"—and recommending mercy.

Judgment: For "operating a car while intoxicated": Imprisonment in common jail of Yadkin County for a term of twelve months and assigned to work on the roads under the supervision of the State Highway and Public Works Commission,—but "because of the prior record of defendant, this prison sentence is suspended" upon conditions stated.

And for reckless driving, prayer for judgment continued for five years, the court reserving discretionary authority to pronounce judgment at any time within that period.

Defendant appeals therefrom to Supreme Court and assigns error.

Attorney-General McMullan and John R. Jordan, Jr., Member of Staff, for the State.

Allen & Henderson and J. Livingston Williams for defendant, appellant.

WINBORNE, J. The gravamen of the argument advanced by brief and orally in behalf of defendant, on this appeal, is that the State failed to introduce sufficient evidence to support a finding by the jury, beyond a reasonable doubt, that defendant was operating the automobile in which the evidence tends to show he and another man, one Mitchell, were riding at the time charged in the bills of indictment, and, hence, motions for judgment as of nonsuit should have been allowed.

It is contended by defendant that the court erred in admitting in evidence statements of an officer tending to show that defendant remained silent when, at the hospital a short time after the accident, in which the automobile was involved, the man Mitchell stated that the automobile belonged to defendant, and that defendant was operating it at the time charged, and related the circumstances under which he, Mitchell, was riding in the automobile. It is contended that proper foundation was not laid for the admission of this evidence. However, the evidence tends to show that the officer was making investigation of the facts relating to the accident involved and that the statements of Mitchell were made in the presence and hearing of defendant.

Testing the evidence offered by the principles fully discussed by *Stacy, C. J.*, and set forth in *S. v. Wilson*, 205 N.C. 376, 171 S.E. 338, and applied in *S. v. Hawkins*, 214 N.C. 326, 199 S.E. 284, it appears that the statements of Mitchell were made under such circumstances as called for a denial by defendant. And "the general rule is, that statements made to or in the presence and hearing of a person, accusing him of the commission of or complicity in a crime, are, when not denied, admissible in evidence against him as warranting an inference of the truth of such statements." 1 R.C.L. 479; *S. v. Wilson, supra.*

But aside from the evidence as to silence of defendant in the face of Mitchell's statements, the State offered other evidence from which the jury could find, beyond a reasonable doubt, that defendant was operating the automobile. There is evidence tending to show that when the automobile came to rest, after colliding with another automobile and the gasoline tanks, and filling station supports, the right front door of it had been torn open, and would not shut, and the left side had been mashed in and the left door would not open; and that defendant was in the automobile, on the front seat; that Mitchell was standing on the outside, with his hands on the right door; and that he reached over and pulled defendant out from near the steering wheel.

And there is evidence tending to show that defendant stated to the father of a young lady who was hurt at the filling station that he was not going to drive the automobile away, but reached over and got the switch keys and put them in his pocket. From this evidence the jury might fairly and reasonably infer that the automobile belonged to defendant, and that he was the driver of it.

And the evidence, without reciting it, is sufficient to support a finding by the jury that defendant was under the influence of intoxicating liquors, and that the automobile was operated carelessly and recklessly within the meaning of the statute relating to reckless driving. G.S. 20-140.

Moreover, after full consideration thereof, other assignments of error fail to show error which would entitle defendant to a new trial.

Hence in the judgment below we find

No error.

THOMAS J. SPARKS v. GRADY SPARKS AND WIFE, THELMA SPARKS, AND BELL HENLINE AND HUSBAND, NELSON HENLINE.

(Filed 12 October, 1949.)

1. Pleadings § 22b—

In an action to quiet title, the court has authority to permit plaintiff to amend by striking from the complaint a paragraph setting up an estoppel as a further ground for relief, G.S. 1-163, since the amendment does not effect a substantial change in the claim.

2. Quieting Title § 2—

An action by a father alleging that he owns the fee simple in a described tract of land and that his son and daughter claim that they own the land in fee as tenants in common by inheritance from their mother subject to the father's life estate as tenant by the courtesy, states a cause of action to quiet title and remove an adverse claim as a cloud thereon, G.S. 41-10, and the spouses of the children being necessary to a complete adjudica-

tion of the cause, their joinder cannot constitute a misjoinder of parties, G.S. 1-69.

APPEAL by defendants from *Pless, J.*, at the April Term, 1949, of MITCHELL.

This is an appeal from a decision upon a demurrer and necessitates an analysis of the complaint.

When its particularized allegations are properly construed and reduced to ultimate averments, the complaint alleges that the plaintiff is the owner in fee simple of certain pertinently described land in Mitchell County, North Carolina; that the plaintiff is in the actual possession of the land; that the defendants assert a claim to the land adverse to plaintiff's fee simple title, *i.e.*, that the defendants, Grady Sparks, and Bell Henline, whose spouses are also made parties to the action, inherited the lands from their mother, the plaintiff's deceased wife, Mattie Sparks, and by reason thereof own the land in fee as tenants in common, subject, however, to the right of plaintiff to occupy the land during his natural life as tenant by the curtesy consummate; that such adverse claim of the defendants is wrongful for the reason that plaintiff owned the land in fee simple at the time of his wife's death and she then had no interest therein; and that such wrongful claim of the defendants constitutes a cloud on plaintiff's fee simple title. The prayer of the complaint is, in substance, that plaintiff's title to the land in controversy be quieted, and that the adverse claim of the defendants to the property be removed as a cloud thereon.

As originally filed, the complaint contained an additional paragraph, which was designated as Paragraph 8 and which sets forth these matters:

"8. That the defendant, Bell Henline, is further estopped from asserting or claiming any title, right or interest in said land for the reason that on 5 July, 1933, the plaintiff and his wife, Mattie Sparks, executed and deeded 37 acres of land to Nelson Henline and wife, Bell Sparks Henline, with the distinct understanding and agreement that the said 37 acres of land should be the full and complete share of said Bell Sparks Henline in the estate of the said Thomas J. Sparks and wife, Mattie Sparks, and that the said Bell Sparks Henline accepted said deed and had the same recorded in Book 93, page 5, office of Register of Deeds for Mitchell County, and is asked to be made a part of this amended complaint the same as if specifically alleged herein."

The defendants demurred to the complaint for misjoinder of parties and causes. Upon the hearing, the court permitted the plaintiff to amend his complaint by the withdrawal of Paragraph 8 in its entirety, and entered an order overruling the demurrer and authorizing defendants to plead to the complaint as amended. The defendants excepted and appealed.

Hall & Zachary for plaintiff, appellee.
Fouts & Watson for defendants, appellants.

ERVIN, J. The order allowing plaintiff to amend his complaint was authorized by G.S. 1-163 conferring upon courts the discretionary power to permit amendment of pleadings at any stage of a trial, even after final judgment, unless the amendment effects a substantial change in the claim or defense.

Manifestly, the complaint as amended states but one cause of action, *i.e.*, a cause of action to quiet title to the *locus in quo* and to remove an adverse claim as a cloud thereon. G.S. 41-10; McIntosh: North Carolina Practice and Procedure in Civil Cases, sections 986-987; 51 C.J., Quieting Title, sections 154-170; 44 Am. Jur., Quieting Title, section 79. In consequence, no basis remains for the contention that several causes of action have been improperly united. G.S. 1-127.

Moreover, the amended complaint makes it clear that the defendants claim interests in the land in dispute under a common source adversely to plaintiff, and that their presence before the court is necessary to a complete adjudication of the questions involved in the suit. Hence, there is no misjoinder of parties. G.S. 1-69; *McKeel v. Holloman,* 163 N.C. 132, 79 S.E. 445; *Swindell v. Smaw,* 156 N.C. 1, 71 S.E. 1; *Colgrove v. Koonce,* 76 N.C. 363; 51 C.J., Quieting Title, section 150; 44 Am. Jur., Quieting Title, section 77.

The elimination of the eighth paragraph from the complaint obviates the necessity for ruling whether it rendered the complaint in its former state bad for misjoinder of causes of action. We do suggest, however, without so deciding, that the advancement or estoppel set out in paragraph eight inures to the benefit of Grady Sparks as an heir of Mattie Sparks rather than to the plaintiff as her surviving husband, and that in consequence paragraph eight of the complaint as it originally stood did not state a second cause of action in favor of the plaintiff against the defendants or any of them. Be this as it may, the defendants have no just cause to complain of the refusal of the court to dismiss the action for the supposedly objectionable portion of the complaint was removed by the amendment. *Shore v. Holt,* 185 N.C. 312, 117 S.E. 165.

The judgment overruling the demurrer and authorizing the defendants to plead to the complaint as amended is

Affirmed.

R. B. JORDAN, AND ALL OTHER MINORITY STOCKHOLDERS IN THE NORTH CAROLINA NATURAL PRODUCTS CORPORATION WHO CARE TO MAKE THEMSELVES PARTIES PLAINTIFF *v.* R. H. HARTNESS AND R. P. ROSSER, MAJORITY STOCKHOLDERS IN THE NORTH CAROLINA NATURAL PRODUCTS CORPORATION.

(Filed 12 October, 1949.)

1. Corporations § 10—

Ordinarily, a stockholder may not maintain an action against other stockholders for dissipation of the assets of the corporation, even though he alleges depreciation in the value of his shares of stock, unless he alleges that action by the corporation has been demanded and refused.

2. Corporations § 25c—

An action against majority stockholders for wrongfully dissipating the assets of the corporation is for and in behalf of the corporation, and the corporation is a necessary party to such action.

APPEAL by plaintiff from *Burgwyn, Special Judge,* June Term, 1949, LEE. Affirmed.

Civil action to recover damages for the wrongful conversion of corporate assets, heard on demurrer.

Plaintiff alleges that he is a minority stockholder in the North Carolina Natural Products Corporation and that defendants own a majority of the capital stock thereof; that in December 1948 defendants took into custody the assets of the corporation and sold them for the grossly inadequate sum of $10,000. He alleges other misconduct on their part in respect to said assets, an ulterior purpose, and that by reason of said conversion and misconduct the value of his shares of stock has been materially depreciated to his damage in the sum of $10,000.

There is no allegation that defendants are officers or directors of the corporation or that they acted as such in disposing of its assets. Nor is there any allegation that plaintiff has made demand upon the corporation to institute suit to recover the damages resulting from the alleged misconduct of defendants, or that the corporation, through its officers, has declined to institute suit therefor.

The defendants demurred for that (1) the said corporation and other necessary parties are not made parties to the action; (2) no demand upon and refusal of the corporation to institute suit is alleged; (3) the plaintiff is not entitled to maintain this action; and (4) the complaint fails to state a cause of action. The demurrer was sustained by the court below and plaintiff appealed.

H. F. Seawell, Jr., for plaintiff appellant.

Warren F. Olmsted and Spence & Boyette for defendant appellees.

BARNHILL, J. The plaintiff does not allege a loss peculiar to himself. *Bane v. Powell,* 192 N.C. 387, 135 S.E. 118. The alleged wrong caused loss to stockholders and creditors generally. *Douglass v. Dawson,* 190 N.C. 458. Thus he has failed to allege a cause of action resting in him which he may enforce of his own right. *Bane v. Powell, supra.*

A cause of action for the conversion or dissipation of corporate assets rests in the corporation and must be enforced by the corporation. Ordinarily, in the absence of demand upon the corporation to prosecute the action and its wrongful refusal so to do, the action may not be maintained by an individual stockholder. *Winstead v. Hearne,* 173 N.C. 606, 92 S.E. 613; *Douglass v. Dawson, supra; Corporation Commission v. Bank,* 193 N.C. 113, 136 S.E. 362; *Sain v. Love,* 207 N.C. 588, 178 S.E. 98; *Taylor v. Holmes,* 14 F. 298, affirmed, 127 U.S. 489, 32 L. Ed. 179.

He must first seek relief through the corporation, *Winstead v. Hearne, supra,* and in the absence of allegation that action by the corporation has been demanded and refused, a demurrer must be sustained. *Douglass v. Dawson, supra; Merrimon v. Asheville,* 201 N.C. 181, 159 S.E. 413; *Roscower v. Bizzell,* 199 N.C. 656, 155 S.E. 558. This is true even though the injury to the corporation causes a depreciation in the value of his shares of stock therein. Anno. 59 A.L.R. 1099.

That is to say, the right of a stockholder to bring suit against other stockholders for dissipation of the assets of the corporation rests (1) in the existence of a complete cause of action against the defendants in favor of the corporation and (2) upon the neglect and refusal of the corporate body to act for itself. 13 A.J. 506. Even then the recovery is for and in behalf of the corporation, and so it is a necessary party to the action.

While there are exceptions to the rule that a stockholder must first demand action by the corporation, *Murphy v. Greensboro,* 190 N.C. 268, 129 S.E. 614; *Hawes v. Oakland,* 104 U.S. 450, 26 L. Ed. 827, the allegations in the complaint fail to bring this case within the exceptions.

For the reasons stated the judgment below is

Affirmed.

W. J. YANCEY v. DAISY YANCEY.

(Filed 12 October, 1949.)

1. Judgments § 33c—

Where plaintiff makes it appear to the court that the matters in controversy had been "settled," and thereupon the court adjudges that the plaintiff be nonsuited, *held* the judgment is not a judgment of involuntary nonsuit but a judgment in *retraxit,* and is a determination of the cause on its merits which will bar a subsequent action between the same parties on the identical cause.

2. Judgments § 25—

A judgment in *retraxit* was entered in a prior action between the parties. Plaintiff alleged that the judgment was entered in reliance upon the oral promise of defendant to convey to plaintiff a one-half interest in the land in controversy, and that the oral promise was afterwards breached. *Held:* In the absence of allegation of fraud, the complaint is insufficient to constitute the second action a direct proceeding to set aside the prior judgment for intrinsic fraud or other equitable cause collateral to that proceeding, and the prior judgment being *res judicata*, judgment on the pleadings for defendant in the second action was proper.

APPEAL by plaintiff from *Edmundson, Special Judge,* at April Term, 1949, of HARNETT. Affirmed.

Neill McK. Ross and Dupree & Strickland for plaintiff, appellant.
Neill McK. Salmon for defendant, appellee.

DEVIN, J. Plaintiff and defendant are husband and wife. In the complaint it was alleged that in October, 1937, land was purchased with the joint earnings and savings of both with the agreement that title to the land should be taken in the names of both, but that the defendant, who handled the closing of the negotiations for the purchase of the land, in violation of the agreement, had deed made to herself alone; that upon discovery of this fact in October, 1947, plaintiff instituted suit to establish a resulting trust and to have her decreed trustee for his benefit as to one-half interest in the land; that after filing his complaint in that action, upon the defendant's oral promise to make him a deed for his interest in the land, plaintiff in November, 1947, had judgment entered "that the matters and things in controversy have been settled between the parties," and that therefore it was "adjudged and decreed that plaintiff be nonsuited." The defendant having failed and refused to make the conveyance as promised, the plaintiff in February, 1948, instituted this action for substantially the same cause as that in which the judgment had been entered, that is, to enforce a resulting or constructive trust and to have the defendant declared trustee *ex maleficio* for his benefit as to one-half interest in the land. The dealings between the parties in respect to this land, and the circumstances under which plaintiff alleges the deeds were made, are set out at length in the complaint.

The defendant answered denying the material allegations of the complaint, and setting up the judgment of November, 1947, referred to in the complaint, as an estoppel by judgment, and a bar to plaintiff's action. The court below was of that opinion, and rendered judgment on the pleadings dismissing the action.

The plaintiff has elected to treat the judgment rendered in November, 1947, as merely a voluntary nonsuit, and has within a year brought a

new action for substantially the same equitable cause of action. Based upon this premise, his position is undoubtedly correct that the court would not be warranted in dismissing his present action as *res judicata* without finding adequate facts. *Batson v. Laundry Co.*, 206 N.C. 371, 174 S.E. 90; *Hampton v. Spinning Co.*, 198 N.C. 235, 151 S.E. 266. But we think the judgment was more than a nonsuit, and that on its face and in its legal effect it amounted to a *retraxit*. *Steele v. Beaty*, 215 N.C. 680, 2 S.E. 2d 854; *Grimes v. Andrews*, 170 N.C. 515, 87 S.E. 341; *Idding v. Hiatt*, 51 N.C. 402. It was a complete withdrawal of plaintiff's suit. The judgment declared that it had been made to appear to the court by the plaintiff that the matters and things in controversy had been "settled," and thereupon it was adjudged that the plaintiff be nonsuited. The word "settle" means "to place in a fixed or permanent condition; to determine" (Webster). And the word being used in connection with litigation must be understood as signifying that the controversy had been adjusted and brought to an end. Nothing else appearing, it indicated a determination on its merits. It constituted formal acknowledgment in open court that the plaintiff had no further cause of action. It was said by *Justice Barnhill*, speaking for the Court in *Steele v. Beaty*, 215 N.C. 680, 2 S.E. 2d 854, "A judgment in *retraxit* is usually based upon and follows a settlement out of court. Where the parties to an action have settled their dispute and agreed to a dismissal such dismissal is a *retraxit* and amounts to a decision upon the merits (citing authorities). The rule seems to be universal that a judgment of dismissal entered by agreement of the parties pursuant to a compromise and settlement of the controversy is a judgment on the merits barring any other action for the same cause." A judgment entered pursuant to and reciting a settlement of the matters in controversy between the parties is generally regarded as a determination of the cause on its merits. 2 A.L.R. (2) 567 (note).

The plaintiff admits that he had the judgment of November, 1947, entered as it appears of record, but that the inducement or consideration therefor was the oral promise of the defendant to convey to him a half interest in the land, and that defendant afterwards failed and refused to do so. He does not allege fraud. He has not attacked the judgment or sought to vacate it. Hence standing upon the docket it is a judgment of *retraxit*, and it bars a new action. Before he can prosecute another action for the same cause he must in some proper way remove this judgment from his pathway. *Moody v. Wike*, 170 N.C. 541, 87 S.E. 350; *Fowler v. Fowler*, 190 N.C. 536, 130 S.E. 315; McIntosh Prac. & Pro. 745. A mere allegation in the new action that the judgment was entered in reliance upon an oral promise which was afterwards breached would not be sufficient to constitute a direct proceeding to set aside the judgment for extrinsic fraud or other equitable cause collateral to the proceeding.

Horne v. Edwards, 215 N.C. 622, 3 S.E. 2d 1; *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452; *U. S. v. Throckmorton,* 98 U.S. 61. Nor would plaintiff's position be strengthened by the fact that the oral promise to convey land, when denied or the statute of frauds pleaded, might be unenforceable and insufficient to constitute valid consideration. *Craig v. Price,* 210 N.C. 739, 188 S.E. 321. The judgment still stands as a voluntary withdrawal of his suit and in effect a *retraxit,* and constitutes a bar to his present action.

The defendant's demurrer on the ground that plaintiff husband could not in any event maintain an action against his wife for the causes set out in his complaint was overruled, and defendant did not appeal. *Carlisle v. Carlisle,* 225 N.C. 462, 35 S.E. 2d 418. Hence the only question presented by plaintiff's appeal is the validity of the judgment on the pleadings.

On the record and for the reasons herein set out, we conclude that the judgment should be

Affirmed.

STATE v. HARVEY ASHBURN.

(Filed 12 October, 1949.)

Abduction §§ 3, 8—

In a prosecution under G.S. 14-41 it is not necessary for the State to show that the child was carried away by force. Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction.

APPEAL by defendant from *Burgwyn, Special Judge,* at January Term, 1949, of LEE. No error.

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

H. F. Seawell, Jr., for defendant, appellant.

DEVIN, J. The defendant was charged with the abduction of a girl under the age of 14 years, in violation of G.S. 14-41. There was verdict of guilty, and from judgment imposing sentence the defendant appealed.

The defendant's assignment of error chiefly debated was the denial of his motion for judgment of nonsuit, but we think the State's evidence was sufficient to carry the case to the jury. The defendant offered no evidence. The material facts as they appear from the State's evidence were substantially these: The girl was at the time of the offense charged not

quite 12 years of age, residing with her widowed mother, and in the sixth grade at school. The defendant was a married man, but this fact was unknown to the girl. She had been meeting him at the home of his cousin where he began kissing her and talked to her of marriage. She said he told her he wanted to marry her and asked her to marry him, and she consented. On the date alleged, during the noon recess, he drove to the school in an automobile, and said to her, "Come on, let's go," and she got in the car with him and he drove away. This was without the knowledge or consent of her mother. The traveled to Winston-Salem, to Surry County, to York, South Carolina, and returned after an absence of six days. She testified he had sexual relations with her four times during their travels.

Under the statute as interpreted by the decisions of this Court, it was not necessary for the State to show she was carried away by force, but evidence of fraud, persuasion, or other inducement exercising controlling influence upon the child's conduct would be sufficient to sustain a conviction. *S. v. Chisenhall,* 106 N.C. 676, 11 S.E. 518; *S. v. Burnett,* 142 N.C. 577, 55 S.E. 72; *S. v. Truelove,* 224 N.C. 147, 29 S.E. 2d 460.

We have examined the other exceptions noted by the defendant and brought forward in his assignments of error, but find that none of them are of sufficient merit to warrant vacating the verdict and judgment.

In the trial we find

No error.

HENDERSON COUNTY v. WILLIAM JOHNSON, JR., ET AL.

(Filed 12 October, 1949.)

1. Appeal and Error §§ 6c (2), 40a—

Where there are no exceptions to the findings of fact, and the sole assignment of error is to the court's conclusions of law and in signing the judgment, only the face of the record is presented for inspection and review.

2. Judgments § 18—

The findings of fact by the trial judge and the presumption of regularity arises from the fact that a court of general jurisdiction had acted in the matter, *is held* sufficient to sustain judgment denying motion to vacate a prior decree of foreclosure of a tax sale certificate on the ground that no valid service was obtained against the defendants therein.

3. Same—

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter.

APPEAL by movants from *Pless, J.*, in Chambers at Marion, 11 January, 1949; from HENDERSON.

Motion by William Johnson, Jr., and wife to vacate judgment and order of confirmation in tax certificate foreclosure and to redeem land.

This action was instituted 5 September, 1934, to foreclose tax certificates for the years 1929-1930-1931. Decree of foreclosure was entered 15 December, 1947, and order of confirmation on 27 February, 1948. Deed was executed to Henderson County 16 March, 1948, and thereafter conveyed by Henderson County to Mrs. B. B. Hill by deed dated 2 July, 1948, and duly spread upon the public registry of the county.

Motion to vacate was filed herein 6 December, 1948, grounded on the allegation that no valid service was obtained in the cause and that the judgment of foreclosure and order of confirmation were void for want of jurisdiction.

The motion was denied by the Clerk and on appeal to the Judge of the Superior Court, elaborate findings of fact were made and the judgment of the Clerk was ratified and confirmed.

Movants appeal, assigning as error "The Court erred in its conclusions of law and in signing the judgment as appears in the record."

L. B. Prince and M. F. Toms fro plaintiff, appellee.

R. L. Whitmire for defendants-movants, appellants.

STACY, C. J. The question for decision is the sufficiency of the record to support the judgment. There are no exceptions to any of the findings of fact. Hence, only the face of the record is presented for inspection and review. *In re Collins*, 226 N.C. 412, 38 S.E. 2d 160; *Wilson v. Robinson*, 224 N.C. 851, 32 S.E. 2d 601; *Vestal v. Vending Machine Co.*, 219 N.C. 468, 14 S.E. 2d 427; *Brown v. Truck Lines*, 227 N.C. 65, 40 S.E. 2d 476; *Harney v. Comrs. of McFarlan*, 229 N.C. 71, 47 S.E. 2d 535; *Rhodes v. Asheville*, 229 N.C. 355, 49 S.E. 2d 638; *Parker v. University, ante*, 656.

In addition to the facts found by the Judge, which are fortified by recitals in the judgment and the commissioner's deed, *Powell v. Turpin*, 224 N.C. 67, 29 S.E. 2d 26; *Everett v. Newton*, 118 N.C. 919, 23 S.E. 961, G.S. 98-16, the regularity of the proceeding is further supported by the principle *omnia rite acta praesumuntur*. *Williamson v. Spivey*, 224 N.C. 311, 30 S.E. 2d 46; *Downing v. White*, 211 N.C. 40, 188 S.E. 815; *Starnes v. Thompson*, 173 N.C. 466, 92 S.E. 259; *S. v. Mann*, 219 N.C. 212, 13 S.E. 2d 247. "A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter." *Williamson v. Spivey, supra; Graham v. Floyd*, 214 N.C. 77, 197 S.E. 873; *S. v. Adams*, 213 N.C. 243, 195 S.E. 822.

On the record as presented, no exceptive assignment of error is revealed which would seem to call for a disturbance of the judgment.

Affirmed.

STATE v. E. W. FREEMAN.

(Filed 12 October, 1949.)

Criminal Law § 52a (3)—Circumstantial evidence of defendant's guilt held insufficient to be submitted to the jury.

Evidence tending to show that defendant was the owner of a car covered by a chattel mortgage, that he was delinquent in a payment, that the car was struck at a grade crossing at night by a railroad train, that no one was in the car at the time of the collision, and that defendant filed a claim for the damage on a policy of insurance on the car, *is held* insufficient to be submitted to the jury in a prosecution of defendant for placing the car on the track with intent to destroy it and with presenting a false sworn statement in support of the claim for insurance. Whether the indictment was sufficient to charge an offense under G.S. 14-278, *quære?*

APPEAL by defendant from *Edmundson, Special Judge,* April Term, 1949, of JOHNSTON.

The defendant was tried upon a bill of indictment containing two counts: The first count charges that the defendant unlawfully, willfully and feloniously did maliciously place his automobile on the railway track of the Atlantic Coast Line Railroad Company, with the intent to destroy the automobile and thereby furnish the basis for a claim for loss under the terms of an insurance policy issued to him by Service Fire Insurance Company of New York. The second count charges the defendant with presenting a false sworn statement in proof and support of a claim filed with said insurance company, pursuant to the provisions of the aforesaid policy.

The evidence offered by the State in substance is to the effect that the defendant, the operator of a taxi, left Benson, N. C., about 12:30 a.m., 5 January, 1949, with several passengers for Dunn, N. C., which is seven miles South of Benson; that the 1948 Studebaker used by the defendant as a taxicab, was hit by an Atlantic Coast Line southbound passenger train at 1:27 a.m., on 5 January, 1949, at a railroad crossing two miles north of Benson; that no one was in the car at the time of the collision which completely demolished the automobile; that the defendant signed a statement to the effect that he had parked the car in front of his home and failed to lock it; that he did not know whether he left the key in the car or not, but he had been unable to find the key; that he went in the house, took a bath and retired about 12:30 a.m.; that he knew nothing

of the wreck until an officer came to his home about 3:30 a.m., whereupon he dressed and went to the scene of the wreck. It is further disclosed by the evidence that the defendant had collision and theft insurance and that he thereafter filed a claim with the insurance company for the theft of his automobile; and that he was twelve days delinquent in the payment of an installment due on the purchase price of the car at the time of the collision, which was not unusual, for he had been from 20 to 25 days late in the payment of each of his previous installments.

The defendant offered no evidence, but moved for judgment as of nonsuit. The motion was overruled and from a verdict of guilty as charged in the bill of indictment, and the judgment entered pursuant thereto, the defendant appeals and assigns error.

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

J. R. Barefoot and Carl E. Gaddy, Jr., for defendant.

PER CURIAM. The defendant preserved his exception to the ruling of the trial judge in refusing to sustain his motion for judgment as of nonsuit, and assigns such ruling as error. A careful review of the evidence leads us to the conclusion that the exception was well taken and must be sustained.

Moreover, the indictment is bottomed on the provisions of G.S. 14-278, the pertinent part of which reads as follows: "If any person shall willfully and maliciously put or place any matter or thing upon, over or near any railroad track; or shall willfully and maliciously destroy, injure or remove the road-bed, or any part therof, or any rail, sill or other part of the fixture appurtenant to or constituting or supporting any portion of the track of such railroad; or shall willfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall willfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a felony, . . ." While it is unnecessary to decide the question on this appeal, we doubt that the indictment charges a crime within the purview of this statute.

The ruling on the motion for judgment as of nonsuit is

Reversed.

ASSOCIATES DISCOUNT CORPORATION v. KENNETH McKINNEY AND MITCHELL FINANCE COMPANY.

(Filed 19 October, 1949.)

1. Chattel Mortgages § 8b—

The rule that the lien of a chattel mortgage properly registered under the laws of the state in which it was executed will be enforced under comity is subject to modification by the statutes of the state in which the lien is sought to be enforced when the full faith and credit clause of the Federal Constitution is not invaded.

2. Same—

The burden of proof is on the party claiming under the lien of a chattel mortgage registered in another state to show a valid lien under the laws of such other state and that his case is within the protection of the rule of comity as modified by the statutes of the state in which he seeks to enforce the lien.

3. Same—

Instructions susceptible to the interpretation that if the mortgagee used due diligence in ascertaining the identity and residence of the mortgagor, the lien would be valid, *held* favorable to the mortgagee and not erroneous on its appeal, since the validity of the registration depends upon the ultimate fact of record in the proper county and not upon the diligence addressed to its accomplishment.

4. Same—

Since the burden is upon one claiming under the lien of a chattel mortgage registered in another state to show that the lien is valid in such other state and also that it is enforceable in this State under the rule of comity, an instruction to the effect that if the chattel had come to rest in North Carolina and the mortgage had not been registered here (G.S. 47-20) the lien of the mortgage recorded in such other state would not be enforceable here, but if the chattel mortgage was properly registered in the state in which executed no one could get title free from such lien, *is held* favorable to the mortgagee and cannot be held for prejudicial error upon its appeal.

5. Same—Question of whether chattel mortgage was properly registered in accordance with the laws of the state in which executed held for jury.

Plaintiff's evidence tended to show that the automobile was purchased in another state, that the purchaser, purporting to be a resident of such other state, executed a conditional sales contract which was duly registered under its laws. Defendant introduced the deposition of the purported purchaser that he had not purchased the car and had not executed the conditional sales contract and that he resided in a third state. The laws of the state wherein the chattel mortgage was registered require that the instrument be recorded in the county in which the mortgagor resides. *Held:* The question of proper registration was largely one of fact, and the verdict of the jury in plaintiff's favor is determinative of the rights of the parties.

PLAINTIFF'S appeal from *Pless, J.*, April Term, 1949, MITCHELL Superior Court.

The plaintiff, an Indiana corporation, claims to be the owner of an automobile, in the possession of the defendant McKinney, by virtue of a conditional sales contract executed January 10, 1946, by one Vance Ledford in security of a purchase price note given to a dealer, Jerry Lynch, in Detroit, Wayne County, Michigan, and transferred by Lynch to it.

The conditional sales agreement was registered in Wayne County, Michigan, the purported residence of the plaintiff, (under the recitals in the contract and simultaneous oral statements, on January 16, 1946). The defendant McKinney denies plaintiff's title; says he is an innocent purchaser for value without notice; denies that Ledford executed the conditional sales contract, and contends that the registration thereof (for reasons which will appear *infra* in the analysis of the case), was insufficient to give notice to him as a purchaser for value or to his codefendant, the Mitchell Finance Company, to whom he executed a mortgage on the car at the time of its purchase.

The defendant Mitchell Finance Company adopts the answer of its codefendant.

The summary of evidence here undertaken is directed to an understanding of the decision and the ground on which it is based.

The plaintiff's evidence tends to show that Vance Ledford came to the place of business of Jerry Lynch, an automobile dealer in Detroit, Michigan, on January 9, 1946, and contacted Theodore C. Purol, an agent and salesman in charge. After looking over several Plymouth cars, Ledford finally selected one which he expressed a desire to buy. The price was agreed upon and Purol told him that if the finance company (this plaintiff) would pass upon the credit and agree to finance the deal, the sale would be closed; and advised him to come back next day. Ledford deposited $400.48 conditionally upon the purchase price and gave a "credit statement" to the effect that he was 25 years old, resided at 1425 Times Square, Detroit, and had formerly resided at 1202 Lincoln Street, Knoxville, Tennessee, for approximately 20 years; that he was now working for a gas station—had been there only a short time, having theretofore been in the army as a paratrooper. This information was given the finance company over the telephone that afternoon; and on the same afternoon the company called back and advised that it would finance the deal.

Ledford returned the next day, January 10, and the sale was closed, Ledford signing a note and conditional sales contract securing the same, now in controversy. In the conditional sales contract the residence of Ledford is given as above stated. This note and contract were immedi-

ately assigned to the plaintiff corporation and registered in Wayne County on the 16th day of January, 1946. Default having been made in the installments, the plaintiff undertook to locate Ledford, who was not to be found at the place of residence given.

Certificates of title introduced, some by plaintiff and some by defendants, and some by both, indicate that the automobile, since its purchase at Detroit, had been for a long time out of the State of Michigan and in various places for substantial periods of time and in the hands of a number of dealers and purchasers in Tennessee and North Carolina.

An automobile, however, of the description contained in the contract and bearing the same serial numbers, was found in the hands of the defendant McKinney in Mitchell County, North Carolina, and the plaintiff contends it is the car sold to Ledford. Title to a car of practically the same description, serial and motor numbers was registered in the name of Howard C. Hurd, Kingsport, Sullivan County, Tennessee, March 25, 1946; and title to what appears to be the same car was registered in the name of Virginia Silver, June 11, 1946, who gave her "address" as Circle Trailer Camp, Kingsport, Sullivan County, Tennessee.

Application for the registration of the title of Kenneth McKinney was made 19 February, 1947, in which the source of ownership is given as purchased from Virginia Silver, Kingsport, Tennessee, on 19 February, 1947, and in which there is declared a lien in favor of Mitchell Finance Company, Inc., Spruce Pine, North Carolina, in the sum of $445.68, as a conditional sales contract.

The defendants' evidence (and it is not necessary to distinguish in which behalf it is given) tended to show that McKinney purchased the automobile in his possession from Virginia Silver through automobile dealers Kyle Riddle and Early Hoyle in Mitchell County, N. C., at their place of business where it had been stored for sale, paying therefor $350 in cash and a 1939 Plymouth automobile valued at $700. Defendants' witness Kyle Riddle, the dealer from whom defendant McKinney purchased from Virginia Silver, stated that he had had the car for two weeks; that he knew Virginia Silver before that; that she lived in Avery County, right at the Mitchell County line (N. C.); she had been living in North Carolina six months . . . it may have been a year, but he would say at least six months . . . prior to the sale and had been using the automobile for pleasure.

On cross-examination he said that he had known Virginia Silver since 1917; that she had lived in Oak Ridge, Tennessee, but then lived in Avery County.

Deposition of Vance Ledford was introduced by the defendant. In it Ledford stated that he lived in Johnson City, Tennessee; that he did not execute a note to one Jerry Lynch in the City of Detroit, Wayne County,

Michigan, in the sum of $723.24; that he did not execute the conditional sales contract on a 1941, six-cylinder deluxe model Plymouth automobile of the serial and motor numbers as claimed by plaintiff. He testified that he executed neither the note nor the sales agreement and had never executed any sales agreement or note to Jerry Lynch. That he was not in Detroit, Michigan, January 10, 1946, and never did own the automobile described above; and never conveyed such an automobile to Howard Hurd, of Kingsport, Tenn. On cross-examination Ledford stated that he did not know Mr. Hurd; that he was in Michigan in 1930; that he had owned plenty of Plymouth automobiles which he got at various places; that he used to be in the used-car business; the last Plymouth he owned was a 1941 coupe which he got from Bill Reece; that he got a Plymouth car last year which was a 1946 model. In 1946 he was in the used car business in Johnson City, Tenn. During that time he handled various Plymouth automobiles but never made this transaction. The witness was permitted to write his name for comparison with the signature to the conditional sales contract and this was made a part of the deposition.

Upon this evidence the case was submitted to the jury on the following issues:

> "1. Is the plaintiff, Associates Discount Corporation, the owner of and entitled to the possession of the Plymouth Sedan, Motor No. D12451008, Serial No. 15118353, as alleged in the complaint?
>
> "Answer: No.
>
> "2. What was the reasonable market value of the said automobile on May 27, 1947?
>
> "Answer: $875.00."

We note the following portion of the instruction to the jury to which the plaintiff addresses an exception:

> "Gentlemen of the jury, a person making any kind of business transaction, he cannot depend upon the law to protect him unless he uses due diligence and interest in his own behalf, to see that he is not defrauded. It was the duty of Jerry Lynch, if someone went and told him that his name was Vance Ledford, to ascertain that he is Vance Ledford, to use due diligence in his own behalf, and to ascertain if he is, and if he lives on such and such a street, it is up to him to learn if he is living there. If somebody who says his name is Vance Ledford, and he deals with him, and takes his word for it, and a fraud is perpetrated on him it is his responsibility. It is his duty to ascertain with reasonable certainty that the person claiming to be Vance Ledford is Vance Ledford, and that he lives on such and such a street."

Plaintiff also excepted to the following instruction:

> "If you find that the car came to rest in North Carolina, so to speak, and that at the time of coming to rest, that is, it came here at least for more than temporary purposes, that the chattel mortgage given to Jerry Lynch had not theretofore, and while the purchaser was a resident of the State of Michigan, there in Detroit, and while the automobile in question was there in Detroit, if he had not while those things existed recorded that chattel mortgage there, then Kenneth McKinney's title would be good."

The plaintiff moved to set aside the judgment for errors occurring in the course of the trial. The motion was declined and plaintiff excepted. To the ensuing judgment on the verdict the plaintiff objected, excepted, and from it appealed, assigning errors.

W. C. Berry and Charles Hutchins for plaintiff, appellant.

C. P. Randolph and W. E. Anglin for defendant Kenneth McKinney, appellee.

Fouts & Watson for defendant Mitchell Finance Company, appellee.

SEAWELL, J. The pertinent North Carolina recording statute is G.S. 47-20. It provides that in case of personal estate where the donor, bargainor or mortgagor resides out of the State, the registration, to be valid, must be had "in the county where the said personal estate or some part of the same is situated." The statute was amended by the Session Laws of 1949, Chapter 1129, but since the transaction under review transpired before the ratification of that act it has no bearing upon the rights of the parties.

Encyclopedic references and collations of authority in annotated cases support the proposition that in the absence of a statute in the State of attempted enforcement a mortgage or conditional sales contract made in another state and timely and properly registered according to the laws of that state will be respected elsewhere on the principle of comity and there enforced. 14 C.J.S. 607, sec. 15; *Mercantile Acceptance Co. v. Frank,* 265 P. 190, 57 A.L.R. 696, Anno., p. 702; *Hornthal v. Burwell,* 109 N.C. 10, 13 S.E. 721; *Applewhite Co. v. Ethridge,* 210 N.C. 433, 187 S.E. 588.

On the other hand it is generally conceded that where the full faith and credit clause of the Federal Constitution is not invaded, the State statute, to the extent it may modify that principle, is controlling. The State may extend that degree of comity it requires or none at all. "Comity is not permitted to operate within a State in opposition to its settled

policy as expressed in its statutes, or so as to override the express provisions of its legislative enactments;" *Credit Corporation v. Walters, ante,* 443, loc. cit., p. 445; citing *Applewhite Co. v. Etheridge, supra,* and *Southern Gem Coal Corp.,* 12 F. 2d 605.

The Michigan statute concerned requires that to be valid against subsequent purchasers for value the instrument, when made by a resident of that state, shall be filed and registered in the office of the register of deeds of the county where the goods or chattels are located and also where the mortgagor resides. Section 13424, Compiled Laws of 1929, as amended; Mason Supp. 1935.

The North Carolina statute lends itself to the interpretation that where they are made by nonresidents it intends to leave within its protection only those mortgages on personal property and similar lien contracts, (including conditional sales, G.S. 47-23), which are registered in the county of the *situs in this State,* whether that *situs* be acquired before or after the foreign registry. And that view is presented on this appeal.

The following cases, *q.v.,* touch upon this matter: *Discount Corp. v. Radecky,* 205 N.C. 163, 164, 170 S.E. 640; *Weaver v. Chunn,* 99 N.C. 431, 6 S.E. 370; *Bank v. Cox,* 171 N.C. 76, 87 S.E. 967; *Sloan Bros. v. Sawyer-Felder Co.,* 175 N.C. 657, 96 S.E. 39; *Truck Corp. v. Wilkins,* 219 N.C. 327, 13 S.E. 2d 478; *Applewhite Co. v. Etheridge, supra; Hornthal v. Burwell, supra.* In a very recent case, *Finance Corp. v. Clary,* 227 N.C. 247, 248, 41 S.E. 2d 760, the Court observes: *"Whether, as a general rule, a chattel mortgage executed by a nonresident on property then situated at the domicile of the mortgagor and duly recorded there must also be recorded in this State in order to be valid against subsequent purchasers, is not presented in this case."* (Italics supplied.) See *Finance Corp. v. Hodges, ante,* 580.

Since the defendant challenged the Michigan registry on its factual aspects and was successful before the jury, the necessity of discussion of this phase of the case does not arise; for if there was no valid registry in Michigan, there was none anywhere.

The defendant contends that the plaintiff has not carried the burden of showing by evidence of constituent facts that the conditional sales contract was registered in compliance with the Michigan statute—particularly with regard to the residence of the mortgagor, or maker of the contract.

Recording acts are inspired with the hope that actual notice of instruments affecting the title to personalty may reach the diligent purchaser by requiring the information to be recorded where it is most likely to be sought or found. The necessity of certainty and of effectiveness of the registration, however, has eliminated much controversy by substituting constructive notice for actual notice as sufficient, when the legal require-

ments incident to registration have been complied with. But back of these requirements lies a body of evidential fact affecting the validity of the registration. As to this, the courts can make no assumption.

It is clear that it is incumbent on the plaintiff who depends on a lien created in a state foreign to the forum of its attempted enforcement to show that it was valid in the state of registration, in order to invoke the principle of comity at all; and to further show that the facts supporting the registration bring the case within the protection of the rule as modified by the local state law. A more serious question arises as to how that burden may be carried. Since recording statutes operate *ex propria vigore* without deference to privity of title between the original mortgagor and the purchaser for value, it would seem that the recitals of residence contained in the instrument, and oral representations of the mortgagor in that respect, should be regarded as *res inter alia acta.* On this principle it is difficult to square the admission of parol evidence of the declarations of the mortgagor pending the negotiations with rules of evidence we ordinarily apply. But conceding for the purposes of decision that evidence of that character is available, the evidence was submitted to the jury upon its merits and the verdict was unfavorable to the plaintiff.

We do not find that the jury was misled by either of the exceptive instructions; in fact, we have the impression that both were more favorable to the plaintiff than it had reason to expect. In the first instruction above quoted, Judge Pless no doubt was attempting to give the philosophy of recording statutes, and his illustration was apt. From it, however, the jury might have received the impression that although the plaintiff may have selected the wrong county, his diligence in the matter might condone the error. But validity of the registration depends upon the *ultimate fact* of record in the proper county and not upon the diligence addressed to its accomplishment.

The second exceptive instruction (see above statement) was immediately followed and qualified by the following:

> "But if it were registered under those circumstances, that is, while Ledford lived in Detroit, and the automobile was there in Detroit, then there would be no way that Virginia Silver or Kenneth McKinney or anybody else could get a good title out of Detroit, and you would answer that issue YES, under those circumstances."

The exceptions are without merit.

Determination of the controversy lay largely in the realm of fact. The evidence was submitted to the jury and the issue answered favorably to the defendant. We find nothing in the record that would justify us in disturbing the result. We find

No error.

STATE v. HOBERT GROSS.

(Filed 19 October, 1949.)

1. **Constitutional Law § 19a: Seaches and Seizures § 2—**

The complainant, B.W., signed the warrant in the name of a deputy sheriff "by B.W." The warrant stated the complaint was made "on oath." *Held:* The warrant is valid, since it was signed under oath by the person named in the body of the instrument as complainant.

2. **Same—**

A search warrant need not aver that an examination of complainant was had or what such examination revealed, it being presumed, nothing else appearing, that the requirements of the statute had been observed. G.S. 15-27.

3. **Criminal Law § 60a—**

A judgment is *in fieri* during term of court, and therefore where a judgment has been entered, unsigned, and several days later in the term a second judgment is duly signed and entered, the second judgment will be taken as the judgment of the court, and the provisions of the second judgment at variance with those of the first will prevail. The recitals in the second judgment of the sentence imposed in the first creates no ambiguity, but it construed as solely for the purposes of identification.

DEFENDANT'S appeal from *Rousseau, J.*, April Term, 1949, WATAUGA Superior Court.

The defendant was tried on a bill of indictment charging him in several counts, (1) with manufacturing intoxicating liquors; (2) of having intoxicating liquors in his possession for the purpose of sale; (3) in having intoxicating liquors for beverage purposes; (4) for transporting intoxicating liquors; (5) for selling intoxicating liquors; and with three other violations of the prohibition laws in which the name of the defendant was not set out. To all of these charges he pleaded not guilty. The jury returned a verdict of "Guilty as charged in count No. 2 of the Bill of Indictment and Guilty as charged in count No. 4 of the Bill of Indictment." Upon the coming in of the verdict the judge pronounced judgment as follows:

"The judgment of the Court is that the defendant be confined four months in the common jail of Watauga County and assigned to work on the roads under the control and supervision of the State Highway and Public Works Commission, on the count No. 2 of possessing liquor for the purpose of sale.

"On the other count, No. 4, of transporting, the judgment of the Court is that the defendant be confined in the common jail of Watauga County for a period of 12 months and assigned to work on

the roads under the control and supervision of the State Highway and Public Works Commission.

"This sentence is suspended for two years, on the following conditions:

"1. That the defendant not violate any of the laws of this State.

"2. That he not possess any substance containing alcohol, tax-paid or non-tax-paid, and that he not permit any liquor upon his premises, or the premises under his control.

"3. That he not operate an automobile on the public highways of this State for the period of 12 months, and that he surrender his driver's license to the Clerk of the Court to be forwarded to Raleigh for the purpose of having the same properly revoked.

"4. That he pay the costs of this action. (To be placed on probation after the service of the sentence of four months imposed on the count for possessing.)"

The defendant excepted to this judgment and gave notice of appeal. Time for filing case on appeal was given and appeal bond fixed. This judgment was unsigned. Later in the term, as of the 26th day of April, 1949, the judge presiding entered the following judgment in the same case which was signed and entered of record.

"1. This Cause coming on to be heard, and being heard at the April 1949 Term of the aforesaid Court, before the Honorable J. A. Rousseau, Judge of the Superior Court being held in the City of Boone, County of Watauga, North Carolina, and the above named defendant (WAS DULY CONVICTED OF) the crime of possessing liquor for purpose of sale. Sentence 4 mos. active, to be served now—in Docket #43 Transporting for purpose of sale. Sentence 12 mos. on roads.

"2. Now, Therefore, It is Ordered, Adjudged, and Decreed that the said defendant be, and is hereby sentenced by this Court to jail, to be assigned to work under the supervision of the State Highway and Public Works Commission of North Carolina for a period of 12 months.

It Appearing, However, to the satisfaction of the Court that the character of said defendant and the circumstances of the case indicate that probation will probably result in the reformation of the defendant and that he is eligible for probation under the North Carolina Statutes.

"It Is Further Ordered, Adjudged and Decreed that the aforesaid sentence of 12 months be, and the same is hereby suspended, and that the said defendant is hereby placed on probation for a period of 2 years under the supervision of the North Carolina Probation Commission and its officers, subject to the provisions of the laws

of this State and the rules and orders of said Commission and its officers with leave that the execution might be prayed at any time during the period of probation.

"3. That as a condition of probation the aforesaid defendant shall:

"(a) Avoid injurious or vicious habits;

"(b) Avoid persons or places of disreputable or harmful character;

"(c) Report to the probation office as directed:

"(d) Permit the probation officer to visit his home or elsewhere;

"(e) Work faithfully at suitable employment as far as possible;

"(f) Remain within a specified area and shall not change place of residence without written consent of the Probation Officer;

"(g) Pay the costs and any fine imposed herein;

"(h) Make preparation or restitution to the aggrieved party for the damage or loss caused by his offense in amount to be determined by the Court;

"(i) Support his dependents;

"(j) Violate no penal law of any state or the Federal Government and be of general good behavior.

"That as special conditions of probation ordered by the Court the defendant shall not possess any substance containing alcohol, Tax-paid or Non-tax-paid; that he not permit any liquor upon his premises, or the premises under his control; not to operate an automobile on the public highways of the state for a period of 12 mos. Surrender driver's license to C.S.C. to be forwarded to Raleigh for purpose of revocation. Pay the costs of this action. Deft—allowed 60 days to make up and serve statement of case on appeal. State allowed 30 days to serve counter-case or file exceptions,—in such manner as directed by the Probation Commission.

"4. That the Sheriff or other law enforcement officer, who has the custody of the defendant, is hereby ordered to deliver the said defendant to the Probation Officer of this district, or if the defendant is under bond, then such bond shall remain in full force and effect until said defendant reports to the Probation Officer as directed.

"IT IS FURTHER ORDERED that this order be filed with the Clerk of this Court in his office and that he forthwith forward a copy of the same to the Probation Officer in this district. This 26 day of April, 1949.

J. A. ROUSSEAU,
Judge Presiding."

Only two features on the case need to be mentioned as determinative on this review: The objection to the introduction of evidence on the part of

the State obtained upon a search and seizure which defendant contends was violative of the provisions of G.S. 15-27; and the two judgments rendered in the same case at the same term as above set out.

1. The evidence disclosed that the State officers searched the premises of the defendant some time prior to the trial under a purported search warrant issued by a justice of the peace. This was introduced upon the trial and reads as follows:

"Watauga County Before Edw. N. Hahn, J.P.

State
v.
Tee Gross & Joe Trivett } SEARCH WARRANT

"State of North Carolina

To any Constable or other Lawful Officer of said County—Greeting:

"Whereas, Ben Wood has this day made complaint on oath, before me, the undersigned Justice of the Peace of said County, that he has a reason and information to believe that the above parties has intoxicants on their premises for sale.

A. R. CHURCH
By Rev. Ben Wood"

Roger Parker testified that acting under this purported authority he, in company with Patrolman Roberts and Deputy Sheriff Church, searched the premises of the defendant. Mr. Church told Mr. Gross that he had a search warrant for the place and Mr. Gross told him to go ahead and search. The court held that, as a matter of law, whatever "the witness found he has a right to tell about." At this juncture counsel for the defendant asked to be permitted to call witnesses in attacking the search warrant.

The court declined but told the defendant that he might offer his evidence later. The jury was excused and in its absence A. R. Church testified as follows:

"Ben Woods brought this search warrant marked and identified as 'Exhibit B' and gave it to me and we took it and searched on it. I don't know how the warrant was issued. Ben Woods is here and Mr. Hahn is—he was a little bit ago."

The defendant offered E. H. Hahn, Justice of the Peace who issued the search warrant, and the State objected to his examination because the questions and answers might tend to incriminate him. His evidence was taken in the absence of the jury; was excluded and stricken from the

record and *counsel for the defendant agreed they would not take any exceptions to the ruling of the court.*

The jury was recalled and Church was permitted to testify over exception that a portion of a case of liquor was found up in front, and defendant said that was all he had. On further examination the officers went on in the back room and found about five more cases of tax-paid liquor in the store,—24 pints in a case and 12 fifths. It was close to six cases. He further testified that defendant did not ask him to see the search warrant, just told them to go ahead and search. He said, "Well, there is some whiskey up the front. Go ahead and get it. That is all I have." He did not ask that the warrant be produced.

The State rested and defendant moved for judgment as of nonsuit, which was denied, and defendant excepted. Defendant offered no evidence but renewed his motion for judgment of nonsuit, which was denied. The case was left to the jury which for its verdict found the defendant guilty of the violation of counts 2 and 4 of the indictment as above stated. Defendant moved to set aside the verdict for errors on the trial, which motion was declined. Defendant objected and excepted to the judgment of the court above appearing, designating the earlier rendition as (1) and the second (2), and assigned errors.

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

W. H. McElwee, Jr., and Louis N. Smith for defendant, appellant.

SEAWELL, J. The defendant, having by stipulation eliminated the testimony of Magistrate Hahn relating to the search warrant, has left to him only the warrant itself and what appears upon its face as evidence of its illegality. The pertinent statute invoked by appellant is as follows:

> "G.S. 15-27. Warrant issued without affidavit and examination of complainant or other person; evidence discovered thereunder incompetent.—Any officer who shall sign and issue or cause to be signed and issued a search warrant without first requiring the complainant or other person to sign an affidavit under oath and examining said person or complainant in regard thereto shall be guilty of a misdemeanor; and no facts discovered by reason of the issuance of such illegal search warrant shall be competent as evidence in the trial of any action."

The testimony of Church that he did not sign the affidavit supporting the warrant does not deprive it of its validity. Wood, who is named in the body of the paper as complainant, did sign it, and according to the official certificate, did it on oath.

The statute does not require that in order to be valid the warrant shall contain an averment that an examination of the complainant has been made, and what it revealed. Nothing else appearing, there is a presumption that the requirements of the statute have been preserved. *S. v. Elder,* 217 N.C. 111, 6 S.E. 2d 840.

2. Had the two pronouncements of sentence,—which the appellant refers to as judgment No. 1 and judgment No. 2,—been made and filed at the same time and in this way become one transaction, or at least to be considered *in pari materia,* we might have some difficulty in reconciling them; but under the procedure in this jurisdiction the defendant would not be thereby discharged as suggested by the appellee. The case would be remanded for a proper judgment on the verdict.

But the two entries were not simultaneously made,—the unsigned pronouncement of sentence preceding the latter entry by several days and both being made during the same term of court. Whether the latter was intended to clarify and render certain the sentence previously given or whether it was intended to operate independently or supplant the former sentence, we need not inquire. As the term of court had not expired the whole matter was *in fieri* and the right of the judge to modify, change, alter or amend the prior judgment, or to substitute another judgment for it, cannot be questioned. *S. v. Godwin,* 210 N.C. 447, 449, 187 S.E. 560; *S. v. McLamb,* 203 N.C. 442, 166 S.E. 507; *S. v. Manley,* 95 N.C. 661; *S. v. Stevens,* 146 N.C. 679, 61 S.E. 629; *S. v. Whitt,* 117 N.C. 804, 23 S.E. 452.

We do not consider that any doubt with which the sentence may be attended is fatal and resolving such doubt as may exist in favor of the defendant, we construe the latter entry as referring to the first by way of recital and identification; it thereupon, in its body, reassigns the punishment theretofore awarded suspending the entire sentence on all counts during which time the defendant was put on probation for the time and on the terms and conditions named therein. In further proceedings the defendant is entitled to be dealt with as we now construe the judgment.

Other exceptions of the appellant have been examined and do not disclose merit. We find no error in the trial.

No error.

STATE v. TOM WOOD.

(Filed 19 October, 1949.)

1. Criminal Law § 50d—

A remark of the court, made during the selection of the jury, that it was no reflection on the prospective juror's mentality that he did not understand certain principles of law "as some professors know little, if anything, except about what they teach," *is held* not to constitute prejudicial error, since it was not addressed to the testimony of defendant's witness, a psychiatrist and college professor, who later testified solely on the question of mental capacity, and further did not purport to disparage the testimony of a college professor in his field.

2. Criminal Law § 53b—

An instruction that reasonable doubt is a doubt based on reason and common sense arising from the testimony in the case, cannot be held for prejudicial error when the court immediately thereafter charges that if, upon the conclusion of all the testimony and arguments and the charge, the jury does not have an abiding faith to a moral certainty of defendant's guilt to acquit him, certainly where testimony of defendant's admission of guilt comes from his own witnesses.

3. Criminal Law § 5c—

The burden is upon defendant to prove his defense of insanity to the satisfaction of the jury.

4. Criminal Law § 53h—

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. G.S. 8-54.

APPEAL by defendant from *Burgwyn, Special Judge,* at March Term, 1949, of HARNETT.

Criminal prosecution on indictment charging the defendant with the murder of his wife, Ruby Wood.

On the afternoon of 12 December, 1948, the defendant and his wife left their mill-village apartment in the Town of Erwin and went off, walking in the direction of the neighborhood milldam and creek. The defendant returned sometime during the night or in the early morning hours. His wife did not. Three days later her body was found partly submerged in the waters of the creek. Examination revealed that she had been brutally stabbed to death by someone using a sharp instrument. Any one of several stabs about her head and chest were lethal in character.

Following an investigation, the defendant was arrested and charged with the murder of his wife. At first he denied it, and sought to give some explanation of her disappearance. Later he confessed to his own witness, Dr. George Silver and others, that "I killed my wife."

On the hearing, the defendant entered a plea of mental irresponsibility induced by an insane delusion that his wife was unfaithful to him and had been running around with other men. It was conceded on the hearing that the deceased was a woman of excellent character. Two psychiatrists supported the defendant in his plea of insanity.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

Everette L. Doffermyre for defendant.

STACY, C. J. The defendant has been convicted of murder in the first degree, uxoricide, with no recommendation from the jury and sentenced to die as the law commands. He appeals, assigning as errors an incautious remark of the judge during the selection of the jury, and alleged inaccuracies in the charge.

During the selection of the jury and after four jurors had been seated, the next prospective juror expressed some doubt on the *voir dire* as to his ability to distinguish between the different degrees of an unlawful homicide or to appreciate the significance of a reasonable doubt. Whereupon counsel for defendant asked the court to excuse the juror. In response, the court remarked: "It is no reflection on the juror's mental capacity not to know these things, as some college professors know little, if anything, except about what they teach." The defendant objected and excepted to the remark. The court found that no prejudice had resulted therefrom to the defendant as no college professors were on the jury, but did excuse the juror for cause. He was not asked to do more.

Conceding the infelicity of the remark, it was obviously without material significance to the defendant's cause. In the first place, it had no reference to the testimony of defendant's witness, Dr. George Silver, psychiatrist and college professor, who had not yet gone upon the witness stand or testified in the case. Moreover, it did not purport to disparage the testimony of a college professor in his field, the only field in which the defendant's expert witnesses professed to speak. *S. v. Howard,* 129 N.C. 584, 40 S.E. 71. The authorities are opposed to any invalidation of the trial on the basis of this exception. *S. v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594; *S. v. Baldwin,* 178 N.C. 687, 100 S.E. 348; *S. v. Robertson,* 121 N.C. 551, 28 S.E. 59; *S. v. Savage,* 78 N.C. 520.

Exception is also taken to a portion of the court's definition of a reasonable doubt: "a reasonable doubt is a doubt based on reason and common sense, and arising from the testimony in the case." Of course, a reasonable

doubt may arise from the lack of evidence as well as from the testimony in the case. But here, the court further instructed the jury: "If upon the conclusion of all the testimony and the arguments in the case, and the charge of the court, you cannot say that you have an abiding faith to a moral certainty of the defendant's guilt, it would in that event become your duty to find him not guilty." This was as favorable to the defendant as he could expect, and perhaps more, in the face of his admission that he killed his wife under the circumstances disclosed by the record. He would hardly be entitled to an acquittal since his confession of guilt comes from the mouths of his own witnesses, unless he were insane, and as to this he has the burden of satisfaction. *S. v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *S. v. Swink,* 229 N.C. 123, 47 S.E. 2d 852; *S. v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; *S. v. Norwood,* 115 N.C. 789, 20 S.E. 712; *S. v. Potts,* 100 N.C. 457, 6 S.E. 657. It was conceded on the hearing that the defendant's wife met a cruel death at his hands.

The cases of *S. v. Tyndall, ante,* 174, 52 S.E. 2d 272, and *S. v. Flynn, ante,* 293, 52 S.E. 2d 791, cited and relied upon by the defendant, are inapplicable to the facts of the instant record. Indeed, the *Flynn case* and authorities there cited, properly interpreted, seem to support the State's contention. No violence was done to the rule as stated in *S. v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

Complaint is also registered to the court's reference to the defendant's absence from the witness stand, calling attention to the fact that this was his right and should not be considered as a circumstance against him. G.S. 8-54. The defendant elected not to testify in his own behalf, but offered two expert witnesses, psychiatrists, who addressed themselves to his mental deficiency. Under these circumstances, the defendant contends that his silence should not have been brought to the attention of the jury at all by the trial court. He cites as authority for his position the recent case of *S. v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733. Suffice it to say *McNeill's case* is not at war with what the judge said. Moreover, the following cases are in support of the present charge: *S. v. Proctor,* 213 N.C. 221, 195 S.E. 816; *S. v. Horne,* 209 N.C. 725, 184 S.E. 470; *S. v. Riddle,* 205 N.C. 591, 172 S.E. 400; *S. v. Turner,* 171 N.C. 803, 88 S.E. 523.

The remaining exceptions are too attenuate to work a new trial or to require elaboration. They are not sustained, albeit they have been carefully examined.

On the record as presented, no reversible error has been shown. Hence, the verdict and judgment will be upheld.

No error.

STATE v. JAMES JOHNSON.

(Filed 19 October, 1949.)

1. Parent and Child § 16: Criminal Law § 62f—

Upon conviction of abandonment, the suspension of judgment upon conditions for the support and maintenance of the minor child is expressly authorized by statute. G.S. 14-324.

2. Criminal Law § 62f—

Upon the hearing of whether suspension of judgment should be revoked and the judgment enforced for condition broken, the court is the sole judge of the credibility of the witnesses and the weight of their testimony, and therefore when the State introduces evidence tending to show that defendant willfully violated the conditions of suspension, the court may properly find such fact from the evidence and revoke the suspension of the judgment.

3. Criminal Law § 63—

In a prosecution of defendant for abandonment of his minor child, a recommendation in a judgment that if defendant be of good conduct while incarcerated, he be paroled after serving one-fourth of his time on condition that he maintain and support his wife and minor child, is not subject to objection by defendant on the ground that his wife was also included in the condition of the recommended parole, since the recommendation is merely precatory and constitutes no part of the sentence, and further, even if such parole should thereafter be tendered, defendant would be at liberty to reject it.

4. Criminal Law § 73c—

Where, upon the disagreement of the parties, the trial judge settles the case on appeal from order revoking suspension of judgment, defendant may not complain of the insertion therein of testimony presented at the hearing. G.S. 1-283.

APPEAL by defendant from *Rousseau, J.*, at the February Term, 1949, of CATAWBA.

At the November Term, 1947, of the Superior Court of Catawba County, the defendant, James Johnson, pleaded *nolo contendere* to the charge of willfully abandoning his child, then aged three weeks, without providing an adequate support for such child contrary to G.S. 14-322.

The court entered judgment sentencing the defendant to confinement in the "common jail of Catawba County for twelve months to be assigned to work under the supervision of the State Highway and Public Works Commission," but suspended or stayed the execution of the sentence during a period of five years upon the express condition that the defendant "support and maintain his minor child, and to that end pay into the office of the Clerk Superior Court for the use and benefit of his minor

child the sum of $10.00 per week." The defendant did not object to this order, which contained this additional recitation and provision: "With consent of defendant this cause is retained to the end that the amount herein specified may be increased or decreased according to the reasonable ability of the defendant to earn." The defendant was thereupon released from custody.

The State subsequently charged that the defendant had breached the condition specified in the orders suspending or staying the execution of the sentence by failing to make the stipulated payments for the support of his child, and prayed the court to revoke the suspension or stay, and enforce the judgment. Defendant was brought before the court upon a capias at the February Term, 1949, of the Superior Court of Catawba County, and given notice and an opportunity to be heard as to whether or not he had violated the condition of the suspension or stay of execution of the original judgment. A hearing of the matter was held in open court before the presiding judge, and the defendant was represented thereon by counsel.

The State offered evidence indicating that the defendant had failed to make the payments required by the order; that he had made no application to the court at any time for a decrease in the amount of the stipulated payments on account of any inability on his part to meet them; that in fact "from shortly after he was tried in 1947, until the February Term, 1949, he was out of Catawba County and his whereabouts were unknown to the officers of said county"; and that he had admitted "that he was able to work until the summer of 1948." The defendant conceded that he had paid only $65.00 towards the support of his child since his trial in November, 1947. He testified: "The reason I have not kept up the payments is due to sickness and short time. My average weekly wage during the time has been not over $11.00 or $12.00. Since this judgment was entered I have made barely enough to support myself and have had to borrow money from my uncle to pay doctors and buy medicine." The defendant "admitted to the court that he had no evidence except his own that he had been sick and unable to work."

After hearing the testimony of both the State and the defendant, the presiding judge found as a fact that the defendant had willfully breached the condition requiring him to support his minor child, and entered this order: "It is the judgment of the court that commitment issue to put sentence heretofore imposed into execution, with the recommendation of this court that if the defendant be of good conduct while incarcerated that he be paroled after serving one-fourth of his time and paroled on the specific conditions that he maintain and support his wife and minor child." Defendant excepted and appealed, assigning errors.

Attorney-General McMullan and Assistant Attorney-General Rhodes, and John R. Jordan, Jr., Member of Staff, for the State.

Louis A. Whitener for the defendant, appellant.

ERVIN, J. The original judgment and the order suspending or staying its execution on the condition specified find express statutory authorization in G.S. 14-324 which prescribes that "upon any conviction for abandonment, any judge or any recorder having jurisdiction may, in his discretion, make such order as in his judgment will best provide for the support, as far as may be necessary, of the deserted wife or children or both, from the property or labor of the defendant."

The defendant concedes this. He confines his attack to the order entered at the February Term, 1949, revoking the suspension or stay of execution of the original sentence and ordering such sentence to be enforced by his commitment. He advances this argument to invalidate this order: (1) That the court had power to revoke the suspension or stay of execution and enforce the original judgment only for a willful breach of the condition specified in the original order; (2) that the entire evidence at the hearing demonstrated that the defendant's failure to perform the specified condition was not occasioned by willfulness on his part, but arose out of his physical and financial inability to comply; and (3) that by reason of these matters the court erred in adjudging the breach to be willful and in revoking the suspension or stay of execution of the original judgment and in ordering such judgment to be enforced.

The defendant's position is untenable for his minor premise, *i.e.*, that the entire evidence at the hearing disclosed that his breach of the condition was not willful, lacks validity.

The evidence produced by the State at the hearing was sufficient to show that the defendant possessed complete capacity to support his child according to the terms prescribed by the court from the time of the entry of the original order in November, 1947, down to the summer of 1948, and sustained the finding that the defendant's violation of the specified condition was willful in character. Since the court was the sole judge of the credibility of the witnesses and of the weight of their testimony, this finding supports the order entered at the February Term, 1949, and renders it unnecessary for us to express any opinion as to the validity of the defendant's major premise, *i.e.*, that when a court pronounces a sentence in a criminal action and suspends or stays its execution on a specified condition, it cannot subsequently revoke the suspension or stay and enforce the sentence for a breach of the condition on the part of the defendant unless such breach be willful.

The defendant complains of the suggestion incorporated in the order by the presiding judge "that if the defendant be of good conduct while

incarcerated that he be paroled after serving one-fourth of his time and paroled on the specific conditions that he maintain and support his wife and minor child." The basis of the objection is that this placed an additional burden on appellant as he was not convicted of abandonment of his wife. The defendant should suffer no disquietude on this score. The language quoted constitutes no part of the order in controversy. It is a mere precatory recommendation to the Governor that the defendant be offered a conditional parole at a future time upon the happening of an uncertain event. Even if such a parole should hereafter be tendered, the defendant would be at liberty to reject it.

The Solicitor and the defendant could not agree upon a case on appeal, and it was settled by the judge pursuant to G.S. 1-283. The complaint of defendant that the judge inserted therein testimony presented at the hearing is without merit. *S. v. Gooch,* 94 N.C. 982.

The judgment revoking the suspension or stay of execution and enforcing the original sentence is

Affirmed.

MABEL FLORENCE JONES BROWN, TOM D. JONES AND CARRIE E. JONES, V. C. G. HODGES AND CARRIE HODGES AND CHARLES M. HODGES.

(Filed 19 October, 1949.)

Boundaries § 10—

Where, in a processioning proceeding, the title of the respective parties is not in dispute, and the only real controversy is as to the location of the dividing line between the lands of the parties, nonsuit is erroneously entered. G.S. Chap. 38.

APPEAL by plaintiffs from *Coggin, Special Judge,* at June Term, 1949, of WATAUGA.

Processioning proceeding instituted by Mabel Florence Jones on 29 May, 1944, before the Clerk of Superior Court of Watauga County under the provisions of Chapter 38 of the General Statutes of North Carolina, formerly Chapter 9 of the Consolidated Statutes of North Carolina as amended, to determine the true boundary line between the lands of the plaintiff and of the defendants.

Plaintiff alleges in the petition that she is the owner of a certain tract of land in Watauga County (paragraph 2); and that defendants C. G. Hodges and wife, Carrie Hodges, own adjoining land; and that a dispute has arisen between plaintiff and said defendants as to the true location of the boundary line between the said lands of plaintiff and said lands of defendants; and that the true line is as specifically described by her.

Defendants, answering, aver that as to the allegation of ownership by plaintiff, "they are advised and believe that the land described in paragraph 2 of the petition, beginning at a stake and ending at a stake, that said description is void for uncertainty, and therefore, said paragraph is denied." And they admit ownership and possession of a certain specifically described tract of land. And while they "deny that there is any dispute, or at least that there should be any dispute between the plaintiff and the defendants about the boundary line between the land of the defendants and the land claimed by the plaintiff for the reason that both the deed that the defendants claim their property under and the alleged deed that the plaintiff claims her lands under, both call for a State highway leading from the town of West Jefferson to the town of Boone, known as North Carolina Highway No. 221, and running with said highway; and that the defendants are advised and believe and, therefore, allege that each of the adjoining land owners would own said land to the center of the highway."

And defendants deny that "plaintiff owns any land on the east side of the center line of said highway," and further deny the allegation of plaintiff as to her contention as to the true dividing line, and aver "the truth to be that said State highway called for in said deed was laid off and constructed in the year 1925, and that the deed under which the plaintiff claims title was not executed until January 10, 1944, and that at said date said highway as now constructed and located and as was located and constructed in the year 1927 has not been changed; that the deed under which the defendants claim title bears date of June 3, 1927, and calls for said highway as then and as now located, and that there is not and could not be any legal dispute as to the proper location of the boundary line between the plaintiff and the defendants."

It is made to appear in the record that the Clerk of Superior Court transferred the cause to the Superior Court for trial. In the Superior Court additional persons were made parties plaintiff, and an additional person was made party defendant, etc.

And upon the call of the case for trial in Superior Court the plaintiffs and defendants stipulated and agreed, "that the plaintiffs and defendants C. G. Hodges and Carrie Hodges derive their respective titles from a common source, to wit, from or through Edward Hodges" and "that the lands involved in this action . . . were voluntarily partitioned among the heirs at law and next of kin or their representatives" of Edward Hodges.

On the trial the plaintiffs offered evidence, and when they rested their case the court allowed motion of defendants for judgment as of nonsuit. Plaintiffs appeal therefrom to Supreme Court, and assign error.

Trivette, Holshouser & Mitchell and J. H. Burke for plaintiffs, appellants.

Bowie & Bowie and Higgins & McMichael for defendants, appellees.

WINBORNE, J. A reading of the averments in the answer of defendants in connection with the stipulation of parties entered upon the call of the case for trial in the Superior Court, reveals that defendants do not question plaintiffs' title, and that the only matter in controversy is the location of the dividing line between the lands of plaintiffs and the lands of defendants, that is, the location of the State highway admittedly called for in deeds under which both parties claim. Indeed, the title of plaintiffs is really not in dispute. See *Roberts v. Sawyer,* 229 N.C. 279, 49 S.E. 2d 468, and cases cited.

Thus the original purpose of the proceeding to determine the true dividing line between the lands of plaintiffs and the lands of defendants is the sole issue. Therefore, as in processioning proceeding under Chapter 38 of the General Statutes of North Carolina, the cause should not be dismissed as in case of nonsuit. See *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633, where the subject has been recently fully discussed and applied in opinion by *Barnhill, J.*

Hence plaintiffs' exception to the ruling of the trial court in sustaining the motion of defendants for judgment as of nonsuit is well taken, and there must be another trial when the issue may be submitted to and answered by a jury.

Reversed.

COY L. GUY; T. H. GARDNER; D. A. LANGDON; OLLIE WILLIFORD; A. D. NORDAN AND R. C. WILLIAMS, JR., v. LEWIS BAER AND WIFE, SADIE BAER; WILLIE MOFF AND WIFE, PEARL B. MOFF; J. R. OWEN AND J. K. ADAMS, JR.

(Filed 19 October, 1949.)

1. Bill of Discovery § 3—

An application for examination of the adverse party to obtain information necessary to the preparation and filing of complaint must show the grounds upon which the action is bottomed and in what manner the information sought is material and necessary to plaintiff's cause of action. G.S. 1-569 *et seq.*

2. Bill of Discovery § 1a—

An order for an adverse examination should never be allowed for the purpose of ascertaining whether or not a cause of action exists.

APPEAL by plaintiffs from *Williams, J.,* at Chambers in Lillington, N. C., 23 May, 1949. From HARNETT.

This action was instituted 15 April, 1949, and upon application of plaintiffs an extension of time was granted for filing complaint. The plaintiffs then applied to the Hon. Clawson L. Williams, Resident Judge of the Fourth Judicial District, for an order authorizing an examination of adverse parties; and the Judge issued an order for an examination of the defendants Lewis Baer, J. R. Owen and J. K. Adams, Jr. Whereupon these defendants filed a motion to strike out and vacate the order for the reason the application did not show the grounds upon which the action was bottomed nor in what manner the information sought is material and necessary to the plaintiffs' cause of action, if any. The motion was allowed and the plaintiffs appeal, assigning error.

I. R. Williams and Neill McK. Salmon for plaintiff.

Smith, Leach & Anderson and Wilson & Johnson for defendants.

DENNY, J. After a careful consideration of the plaintiffs' affidavit and application for an order to examine certain of the defendants in order to obtain information necessary to the preparation and filing of their complaint, we do not think the information sought is set forth with the particularity required by the statutes G.S. 1-569-570, as construed by the decisions of this Court, or its materiality shown. *Sudderth v. Simpson,* 224 N.C. 181, 29 S.E. 2d 550; *Washington v. Bus, Inc.,* 219 N.C. 856, 15 S.E. 2d 372; *Knight v. Little,* 217 N.C. 681, 9 S.E. 2d 377; *Bohannon v. Trust Co.,* 210 N.C. 679, 188 S.E. 390; *Whitehurst v. Hinton,* 184 N.C. 11, 113 S.E. 500; *Fields v. Coleman,* 160 N.C. 11, 75 S.E. 1005; *Bailey v. Matthews,* 156 N.C. 78, 72 S.E. 92. Moreover, it is stated that the purpose of the action is to have certain contracts, entered into between the plaintiffs and the defendants on 22 January, 1949, declared null and void, but no reason is assigned or explanation given as to why the contracts should be so declared. *Smith v. Wooding,* 177 N.C. 546, 94 S.E. 404.

An order for an adverse examination will be allowed only in an action pending between parties, McIntosh's N. C. Practice & Procedure, p. 1020. It follows, therefore, that an order for an adverse examination should never be allowed for the purpose of ascertaining whether or not a cause of action exists.

The judgment of the court below is

Affirmed.

ED GARDNER v. THE CAROLINA INSURANCE COMPANY OF WILMINGTON, NORTH CAROLINA.

(Filed 19 October, 1949.)

1. Insurance § 19a—

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both parties under the policy must be ascertained and determined in accordance with its terms. G.S. 58-177.

2. Insurance § 24a—

Ordinarily, plaintiff in an action on a policy of fire insurance must allege and prove that he filed proof of loss with insurer within sixty days after the occurrence of fire, as required by the policy, or waiver of such proof, and in the absence of allegation and evidence to this effect insurer's motion to nonsuit is properly allowed.

APPEAL by plaintiff from *Patton, Special Judge,* May Term, 1949, CLEVELAND. Affirmed.

Civil action to recover on a fire insurance policy.

Plaintiff, being in possession of a tract of farm land under a bond for title, applied for and obtained from defendant a policy of insurance in the sum of $2,000 dated 20 January 1948, insuring him against loss on account of the damage or destruction by fire of the building located on the farm. On 20 August 1948 the building was completely destroyed by fire. On 30 November 1948 plaintiff instituted this action to recover on the policy.

Plaintiff does not allege that he filed proof of loss within sixty days after fire and offered no evidence tending to show that such proof was filed or that it was in any manner waived. Instead, he testified: "The insurance company has never paid me for this house under this policy. I have not asked the insurance company to pay it."

In the trial below when plaintiff rested, the court, on motion of defendant, dismissed the action as in case of nonsuit. Plaintiff appealed.

A. A. Powell and J. R. Davis for plaintiff appellant.

D. Z. Newton for defendant appellee.

BARNHILL, J. The contract between plaintiff and defendant is in the standard form prescribed by statute. G.S. 58-177. The rights and liabilities of both parties under the policy must be ascertained and determined in accord with its terms. *Zibelin v. Insurance Co.,* 229 N.C. 567, and cases cited.

Under the terms of the policy the plaintiff was required to file with defendant proof of loss within sixty days after the fire occurred, and the policy provides that unless this proof is filed within the prescribed period

no suit may be maintained on the policy. *Tatham v. Ins. Co.,* 181 N.C. 434, 107 S.E. 450; *Zibelin v. Insurance Co., supra.* Ordinarily, compliance with these provisions of the contract must be alleged in the complaint and proved at the hearing.

The defendant, of course, could waive the filing of proof of loss, and it is generally held that a denial of liability by the insurer, made during the period prescribed by the policy for the presentation of proof of loss, on grounds not relating to the proof, will be considered a waiver of the provision requiring such proof. *Gerringer v. Insurance Co.,* 133 N.C. 407; *Felts v. Insurance Co.,* 221 N.C. 148, 19 S.E. 2d 259; *Gorham v. Insurance Co.,* 214 N.C. 526, 200 S.E. 5; Anno. 22 A.L.R. 408. But the record fails to disclose either allegation or evidence of waiver.

As the plaintiff filed no proof of loss and has failed to show waiver, he has no enforceable cause of action. Therefore the judgment below must be

Affirmed.

THOMAS L. HAINES v. W. PERMAN CLARK.

(Filed 19 October, 1949.)

Brokers § 12—

Where the principal denies that he made any contract with plaintiff broker for the sale of lumber and denies he had received any orders through plaintiff, the burden is on plaintiff not only to prove the brokerage contract but to prove each order upon which he asserts his right to commission, G.S. 8-45 not being applicable, and it is error for the court to charge on the issue of damages that there was no controversy as to the amount and that if the jury should find the plaintiff's evidence to be true to answer that issue in the sum demanded by plaintiff. G.S. 1-180.

APPEAL by defendant from *Rousseau, J.,* at May Term, 1949, of CALDWELL. New trial.

Plaintiff, a lumber broker, alleged that the defendant, a sawmill operator, contracted to ship lumber on orders secured by plaintiff on which plaintiff was to receive a commission to be paid by defendant; that the prices for different grades of lumber were agreed upon; that plaintiff secured orders from several responsible purchasers and gave defendant detailed shipping directions for twenty cars of lumber, but that defendant failed and refused to ship the lumber. It was alleged that the commissions on the orders so furnished defendant for shipment amounted in the aggregate to $1,293. Defendant denied that he had contracted to sell plaintiff any lumber, or had employed plaintiff to sell lumber for him, or had received any orders or shipping instructions from the plaintiff.

There was verdict (1) that defendant had contracted as alleged, (2) that he had breached the contract, and (3) that plaintiff was entitled to recover $1,293. From judgment on the verdict defendant appealed.

Williams & Whisnant and Hal B. Adams for plaintiff, appellee.
Max C. Wilson and Benjamin Beach for defendant, appellant.

DEVIN, J. Defendant assigns error in the court's instructions to the jury on the issue addressed to the amount, if any, plaintiff was entitled to recover of the defendant. On this issue the court charged the jury as follows: "There is no controversy about that, gentlemen. The defendant does not deny the amount claimed by the plaintiff. He says he owes the plaintiff nothing, that there was not any contract, and that he owes him nothing. Gentlemen, the court instructs you that if you answer the first issue yes, and you find the evidence of the plaintiff to be true, that you would answer this third issue $1,293, with interest from August 1, 1945. There is no controversy about the amount." In this we think there was error. Defendant had denied he made the contract for breach of which plaintiff was seeking recovery, or that he had received orders or shipping directions for any of the lumber on which commissions were claimed. According to plaintiff's testimony plaintiff had secured orders from six or seven different purchasers on each carload of which he charged commission. So that the total amount claimed was made up of many items. Defendant testified he and plaintiff could not agree on the prices for lumber; that he had made no contract, nor received orders as to any of the items included in plaintiff's total claim. Hence, we think the court erred in charging the jury that there was no controversy about the amount. The defendant was contesting every inch of ground, and in resisting plaintiff's claim for an amount made up of twenty items he was entitled to have the jury determine, uninfluenced by peremptory instructions, whether plaintiff was entitled to recover for all, or part, or none of these items, the burden of the issue being upon the plaintiff. *Fertilizer Co. v. Hardee,* 211 N.C. 653, 191 S.E. 725; *Phillips v. Giles,* 175 N.C. 409 (414), 95 S.E. 772; G.S. 1-180. The statute G.S. 8-45, declaring that a verified itemized statement of account for goods sold and delivered or services rendered shall be deemed *prima facie* evidence of the correctness of the account, is not determinative of the question here presented.

As there must be a new trial for the reason pointed out, it is unnecessary to discuss or decide the other exceptions noted by defendant and brought forward in his assignments of error, as they may not arise on another hearing.

New trial.

EARL FRANCIS v. CLEVELAND DRUG COMPANY.

(Filed 19 October, 1949.)

Negligence § 4d—

Plaintiff customer fell into an open stairway while in a part of a store which was not open for the accommodation of customers. *Held:* Judgment of nonsuit was properly entered.

APPEAL by plaintiff from *Patton, Special Judge,* May Term, 1949, CLEVELAND. Affirmed.

Civil action to recover damages for personal injuries.

At the conclusion of the plaintiff's evidence in chief the court, on motion of defendant, entered judgment of nonsuit and plaintiff appealed.

Horace Kennedy and C. C. Horn for plaintiff appellant.

D. Z. Newton for defendant appellee.

PER CURIAM. Plaintiff went to defendant's drug store to get a prescription filled. While waiting, he saw someone, not an employee of defendant, go to a refrigerator in a small storage room adjoining the prescription room and get a Coca-Cola. He went to the refrigerator and got one for himself. After drinking the Coca-Cola he undertook to place the empty bottle on a shelf in the room near an open stairway leading to the basement. In so doing, he fell into the open stairway and suffered certain personal injuries. The room was not open for the accommodation of customers and plaintiff was not invited therein by defendant. Upon this state of facts the judgment must be affirmed on authority of *Clark v. Drug Co.,* 204 N.C. 628, 169 S.E. 217, and *Wilson v. Dowtin,* 215 N.C. 547, 2 S.E. 2d 576.

Affirmed.

IN MATTER OF WILLIAM H. BLAIR.

(Filed 19 October, 1949.)

Trial § 48½—

An order of the trial court setting aside the verdict in the exercise of its discretion is not reviewable in the absence of abuse of discretion.

APPEAL by respondent William H. Blair from *Rousseau, J.,* at May Term, 1949, of CALDWELL. Appeal dismissed.

L. M. Abernethy and W. H. Strickland for respondent, appellant.

No counsel contra.

PER CURIAM. Petition to have William H. Blair declared incompetent by reason of want of understanding, to manage his affairs was heard before the clerk and a jury. From an adverse verdict and judgment the respondent appealed to the Superior Court in term. On the trial in the Superior Court there was verdict for respondent, whereupon the court, in its discretion, set aside the verdict and ordered the case docketed for trial at a subsequent term. Respondent appealed.

The action of the court, in the exercise of its discretion, in setting aside the verdict is not reviewable, in the absence of evidence of abuse of discretion, and the appeal therefrom must be dismissed. *Jarrett v. Trunk Co.*, 142 N.C. 466, 55 S.E. 338; *In re Beal*, 200 N.C. 754, 158 S.E. 388; *Privette v. Allen, ante*, 662, 55 S.E. 2d 188.

Appeal dismissed.

STATE v. TOM SUDDRETH.

(Filed 19 October, 1949.)

Criminal Law § 57b—

No appeal lies from the discretionary refusal of the Superior Court of a motion for a new trial on account of newly discovered evidence.

APPEAL by defendant from *Shuford, Special Judge*, at Special May Term, 1949, of CALDWELL.

Criminal prosecution upon a bill of indictment charging defendant with the murder of one Harry Crisp, Jr.

Verdict: Guilty of manslaughter.

Judgment pronounced at November Term, 1948, of Superior Court of Caldwell County.

On appeal to Supreme Court at Spring Term, 1949, no error was found,—see *ante*, 239, 52 S.E. 2d 924. Thereafter at Special May Term, 1949, of Superior Court of said county, defendant filed motion for a new trial on account of newly discovered evidence,—supporting same by certain affidavits. The judge presiding, after hearing the affidavits offered by defendant and the argument of his counsel, denied the motion in his discretion.

From order in accordance therewith defendant appeals to Supreme Court, and assigns error.

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

W. H. Strickland and Max C. Wilson for defendant, appellant.

PER CURIAM. Appeal to this Court does not lie from a discretionary determination of an application for a new trial on the ground of newly discovered evidence. See *S. v. Thomas,* 227 N.C. 71, 40 S.E. 2d 412; *S. v. Rodgers,* 217 N.C. 622, 8 S.E. 2d 927; *S. v. Lea,* 203 N.C. 316, 166 S.E. 292, and cases cited therein. See also *S. v. Grass,* 223 N.C. 859, 27 S.E. 2d 443.

Hence under the authority of decisions in these cases the appeal in the present case is

Dismissed.

NATIONAL STORE FIXTURE COMPANY, INCORPORATED, v. T. FLOYD WHALEY AND THOMAS WHALEY, T/A THE WHALEY FURNITURE COMPANY.

(Filed 21 September, 1949.)

APPEAL by defendants from *Morris, J.,* at May Term, 1949, of PASQUOTANK.

Civil action to recover on contract for various articles of merchandise.

The case was submitted to the jury, in the trial court, without objection, upon the single issue, to wit: "Are the defendants indebted to plaintiff, and, if so, in what amount?", to which the jury answered "Yes, $829.71." From judgment thereon in favor of plaintiff, defendants appeal to Supreme Court, and assign error.

Wayland P. Britton and John H. Hall for plaintiff, appellee.

J. Henry LeRoy for defendants, appellants.

PER CURIAM. The case on appeal discloses that the case was tried in Superior Court, in the main, as one of fact for the jury. The evidence shown in the record is sufficient to support the verdict. And appellants fail to show cause for a new trial.

No error.

LINDSEY-ROBINSON & CO., INC., v. J. H. JONES, INDIVIDUALLY AND TRADING AS J. H. JONES HATCHERY.

(Filed 21 September, 1949.)

DEFENDANT'S appeal from *Burgwyn, Special Judge,* May Term, 1949, PASQUOTANK Superior Court.

John H. Hall and McMullan & Aydlett for plaintiff, appellee.
Harry B. Brown for defendant, appellant.

PER CURIAM. The plaintiff obtained a judgment by default final against the defendant Jones for goods sold and delivered to him. The defendant moves to set aside the judgment as irregular and voidable because rendered on open account without allegation of express contract.

The judgment was rendered May 10, 1948. The motion to set aside was not made until March 18, 1949.

Meantime, in a partition proceeding entitled Mildred Hooker *v.* J. H. Jones, $998.50 had been paid into court as Jones' part of the proceeds of the sale of lands. The fund was attached for enforcement of a judgment obtained in a case entitled H. D. Scott & Co. *v.* Jones. Lindsey-Robinson & Co., Inc., intervened, claiming priority of lien under their judgment. In the ensuing litigation the defendant was an active party. The controversy reached the Supreme Court on appeals; and the case is reported *ante,* 74, q. v. H. D. Scott & Co. failed for want of service of summons to support the judgment and attachment levied thereunder, and the Lindsey-Robinson & Co. lien was sustained. *Mr. Justice Devin,* writing the opinion of the Court, said *re* this judgment:

> "While the judgment of the Lindsey-Robinson Co. seems to have been rendered by default final upon a complaint for goods sold and delivered (G.S. 1-211, G.S. 1-212), the judgment was not void, and there was no effort at the time of the hearing to attack it as irregular. Hence, the ruling of the judge below must be upheld. *Supply Co. v. Plumbing Co.,* 195 N.C. 629, 143 S.E. 248; *Jeffries v. Aaron,* 120 N.C. 167, 26 S.E. 696."

Judge Burgwyn heard the matter May 9, 1949, and, reviewing the records and pertinent facts, denied the motion, and movant appealed.

We find in the record nothing to justify interference with the result.

The judment is

Affirmed.

JOHN SCOTT v. C. E. REEVES, ET AL.

(Filed 28 September, 1949.)

APPEAL by plaintiff from *Nettles, J.*, at April Term, 1949, of RUTHERFORD.

Civil actions to try title to lands and for their recovery.

Four separate actions were brought by the plaintiff for the recovery of several lots of land, all of which were parts of a tract of land containing $5\frac{3}{16}$ acres described in the complaint in each action. The four cases were consolidated and tried together, and a reference ordered.

The report of the referee was favorable to the defendants. Exceptions were duly filed thereto, and upon the hearing, these were overruled and the report of the referee was confirmed. Plaintiff appeals, assigning errors.

R. S. Eaves for plaintiff, appellant.

J. S. Dockery and Thomas J. Edwards for defendants, appellees.

PER CURIAM. A careful perusal of the record leaves us with the impression that no reversible error has been made to appear. Hence, the judgment of the Superior Court will be upheld.

Affirmed.

IN RE WILL OF MARK WALTON.

(Filed 28 September, 1949.)

CAVEATORS' appeal from *Bone, J.*, February Term, 1949, BERTIE Superior Court.

Herman L. Taylor for caveators, appellants.

J. B. Davenport, J. W. Parker, and J. A. Pritchett for propounders, appellees.

PER CURIAM. The heirs at law of Mark Walton, deceased, filed a caveat to his will and it was offered for probate in solemn form. An issue as to mental capacity of the testator, and the usual issue of *devisavit vel non* were submitted, and both answered favorably to the propounders. From the ensuing judgment caveators appeal, assigning error in the admission of evidence and in the charge of the court.

Full consideration has been given to the exceptions and they are found to be without merit. The judgment is, therefore,

Affirmed.

MANLEY J. WILLIAMS, ET AL. v. J. EMORY JOINES, ET AL.

(Filed 19 October, 1949.)

APPEAL by plaintiffs from *Coggin, Special Judge,* at June Term, 1949, of WATAUGA.

Civil action by grantors to enforce resale and reconveyance of land pursuant to alleged stipulation in deed poll.

Upon issues joined, the jury found that the clause of repurchase was surreptitiously inserted in the deed by the plaintiffs with intent to defraud the defendant, J. Emory Joines.

Judgment on the verdict for defendants. Plaintiffs appeal, assigning errors.

Bowie & Bowie and Higgins & McMichael for plaintiffs, appellants.

Trivette, Holshouser & Mitchell for defendants, appellees.

PER CURIAM. It appears that the case has been tried in accordance with our former opinion, *Williams v. Joines,* 228 N.C. 141, 44 S.E. 2d 738, and no exception is presented which requires a disturbance of the verdict and judgment. Hence, they will be upheld.

No error.

THE FOLLOWING CASES WERE DISPOSED OF WITHOUT WRITTEN OPINIONS:

S. v. Hardison. Appeal by defendant from *Williams, J.,* April Term, 1949, of CRAVEN. Affirmed without written opinion 11 October, 1949.

S. ex rel. Barlow and Moore v. Benfield. Appeal by defendant from *Sharp, Special Judge,* August Term, 1949, of CALDWELL. Appeal dismissed 12 October, 1949, for want of brief of appellant.

Harris v. Mooresville-Co-operative Creamery, Inc. Appeal by plaintiff from *Armstrong, J.,* in Chambers at Charlotte 19 July, 1949. Appeal dismissed 19 October, 1949, for want of merit.

APPENDIX

RHODES v. ASHEVILLE.

(Filed 11 May, 1949.)

1. Municipal Corporations § 6—

The distinction between a governmental and proprietary function of a municipal corporation is a judicial and not a legislative question, and legislative declaration as to the nature of the authority delegated by the statute is not controlling.

2. Statutes § 6—

When the language of the statute permits, the courts must adopt that construction which would render the statute valid.

BARNHILL and WINBORNE, JJ., on petition to rehear:

On their petition for rehearing the defendants contend that the one question presented on the appeal was as to the effect of the language used in the Act under which the Asheville-Hendersonville Airport Authority was created, to wit: "The acquisition, establishment, construction, enlargement, improvement, maintenance . . . and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions, exercised for a public purpose and matters of public necessity." They contend that this is plain, unambiguous language which does not call for interpretation, and that none was sought, either by the appellee or the appellants. The petition for rehearing is based on the assumption that the Court misapprehended the question presented and proceeded to construe the language rather than to give it the force and effect plainly intended by the Legislature.

Unquestionably the Legislature intended to declare that the operation of the Asheville-Hendersonville Airport should be deemed and held to be in furtherance of a governmental function. But the mere legislative declaration to that effect did not make it so, for that is a judicial and not a legislative question. On consideration of the question as presented on the appeal, we were compelled, for the reasons there stated, to conclude that the operation of the airport is a proprietary undertaking.

We cannot attribute to the language used the force and effect urged by appellants. Instead, we must construe it in such manner as to bring it within the legislative authority of the General Assembly and make it consistent with the validity of the statute in which it is used. This is in accord with the applicable rule of construction.

The petition is denied.

APPENDIX

The following documents were brought to light by Dr. Preston W. Edsall and supplement a group of advisory opinions previously furnished by him for publication in 227 N.C. 715-723. An article by Dr. Edsall on *The Advisory Opinion in North Carolina* appeared in the NORTH CAROLINA LAW REVIEW for April, 1949.

IN RE A CONVENTION OF THE PEOPLE

1871

EXECUTIVE DEPARTMENT,
STATE OF NORTH CAROLINA,
RALEIGH, 9th February, 1871.

To the Honorable
The Chief Justice and the Associate Justices
of the Supreme Court of North Carolina

GENTLEMEN:

Enclosed herewith I send you a copy of an Act passed by the present General Assembly entitled "An act concerning a Convention of the people." By the first section of the act, the Governor is required to issue his proclamation commanding the Sheriffs to open polls and hold an election, &c, &c.

After carefully reading the various provisions of said act and giving to it such examination as I have been able to bestow, I am forced to the conclusion that it is in direct conflict with the Constitution of the State, which I have taken a solemn oath to support, in that it proposes to amend said Constitution in a way and by a method not recognized nor warranted by the Constitution itself. Entertaining this view I feel that I would be unfaithful to my trust were I in any way, even at the behest of the General Assembly, to become an instrument to assist in violating the Supreme law of the State, enacted by the people themselves. I am willing, however, to surrender my own opinion upon this vital question to the better opinion of the Supreme Court, which is the final arbiter of all questions involving the constitutionality of an act of the General Assembly.

I desire not to act rashly or unadvisedly, and therefore most respectfully ask the opinion of your honorable Court as to the constitutionality of said act; and whether if unconstitutional, it is my duty as Governor to assist in the execution thereof, as provided in the first and third sections of said act?

An early answer will confer a great favor.

Very respectfully
Your obt. servant
TOD R. CALDWELL,
Governor

—*Governors' Letter Books*, TOD R. CALDWELL, 1870-74, pp. 56-57.

The advisory opinion given in reply to this request follows:

STATE OF NORTH CAROLINA
SUPREME COURT
RALEIGH, Feb. 11, 1871

To his Excellency GOV. CALDWELL

SIR: In reply to your communication of the 9th inst., I have the honor to say: The *Chief Justice*, and *Justices Rodman*, *Dick* and *Settle* are of the opinion that the act to which you refer, is in violation of the constitution.

All legislative power is vested in the General Assembly. Calling a convention is an act of legislation. It follows that no convention can be called unless it be done by the General Assembly.

The people have reserved to themselves no power of Legislation. It follows that a convention cannot be called by a vote of the people, nor will such voting enable the General Assembly to call a convention in a manner not authorized by the constitution.

Justice Reade, for the reason stated by him, when the opinion of the *Justices* was requested, by the General Assembly in regard to the tenure of office(,) declines to give an opinion.

Upon the several questions in regard to your duty provided you believe the act to be unconstitutional, the *Justices* do not feel at liberty to offer any opinion.

Very respectfully &c &c

R. M. PEARSON *Ch. J. S. C.*

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

Where a prior action is pending between the same parties, involving substantially the same subject matter, the second action will be dismissed upon demurrer if the pendency of the prior action appears on the face of the complaint, G.S. 1-127, or upon answer which alleges the facts, treated as a plea in abatement, if the pendency of the prior action does not so appear, G.S. 1-133. *Dwiggins v. Bus Co.*, 234.

§ 9. Pending Action—Identity of Actions.

The pendency of a proceeding for partition, even though there are general allegations of waste, will not support a plea in abatement in a subsequent action between the tenants alleging particular acts of waste subsequently committed by specified defendants upon a particular tract of land, and seeking injunctive relief against future waste, since the causes are not identical and judgment in the former action would not support a plea of *res judicata* in the second. *Whitehurst v. Hinton*, 16.

One partner was sued individually for damages resulting in a collision occurring while the partner was driving a partnership vehicle in the course of the partnership business. Thereafter the individual partners instituted suit in another county against the plaintiff in the first action to recover damages resulting to them out of the same collision *Held:* The parties to the two actions are identical for the purposes of a plea in abatement, and the second action is abated in the Supreme Court upon the plea, the remedy in the second action being by counterclaim in the first. *Dwiggins v. Bus Co.*, 234.

ABDUCTION.

§ 3. Abduction of Children.

In a prosecution under G.S. 14-41 it is not necessary for the State to show that the child was carried away by force, and evidence that defendant induced minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. *S. v. Ashburn*, 722.

ABORTION.

§§ 2, 4. Nature and Elements of Offenses of Producing Miscarriage and Destroying Unborn Child.

The offenses proscribed by G.S. 14-44 and G.S. 14-45 are separate and distinct: G.S. 14-44 relates to the destruction of the child, which must be quick before it has independent life, and G.S. 14-45 relates to the miscarriage of, or injury to, or destruction of the woman. *S. v. Green*, 381.

§§ 10, 11. Sufficiency of Evidence and Variance.

Where, in a prosecution upon a warrant charging that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, G.S. 14-44, the evidence tends to show that the acts of defendant were committed prior to the time the child was quick, nonsuit for fatal variance between the indictment and proof should have been allowed. *S. v. Green*, 381.

ADMINISTRATIVE LAW.

§ 5. Exclusiveness of Statutory Remedy.

The remedy provided by statute for the enforcement of a right created by statute is exclusive, and a party asserting such right must pursue the prescribed remedy. *Allen v. Hunnicutt*, 49.

ADOPTION.

§ 10. Conclusiveness of Record and Proof of Adoption.

Certified copy of adoption issue by a charitable organization of another state authorized by act of assembly of such other state to grant adoptions *held* conclusive in absence of attack of validity of statute. *Hunter v. Nunnamaker*, 384.

ADVERSE POSSESSION.

§ 4a. Adverse Possession Between Tenants in Common.

Where less than twenty years has elapsed between the rendition of judgment declaring the parties to be tenants in common and the institution of the action by some of the tenants against the others for waste, defendants in the action for waste may not claim title by adverse possession, since as between tenants in common title by adverse possession cannot be acquired in less than twenty years. *Whitehurst v. Hinton*, 16.

§ 7. Tacking Possession.

Where the deed under which a party immediately claims fails to embrace within its description a contiguous strip of land, such party may not tack the possession of his predecessors in title as to such strip. *Simmons v. Lee*, 216.

§ 17. Presumptions and Burden of Proof.

The burden is on defendants in a processioning proceeding to establish title by adverse possession when relied on by them, since such claim of adverse possession constitutes an affirmative defense. *Plemmons v. Cutshall*, 595.

AGRICULTURE.

§ 1a. Liens for Rents and Advancements.

Title to and possession of crops cultivated and harvested by a tenant or share cropper rests in the landlord until the rents are paid and the landlord's lien for advancements is discharged, and the landlord may have recourse against any person who may get possession of the crops without his consent. G.S. 42-15. *Adams v. Warehouse*, 704.

Where landlords give their tenant possession of their AAA marketing card, and the tenant sells tobacco grown on the farm and receives the purchase price from the warehouseman, the landlords may not hold the warehouseman liable for their lien for rents and advancements, since their clothing of the tenant with authority or apparent authority to receive payment amounts to a consent to such payment. Although the landlord may not deprive the tenant of his share of the tobacco on his marketing card, he can, through its possession, control the sale and protect his lien. 7 U.S.C.A. 1312 *et seq.* *Ibid.*

APPEAL AND ERROR.

§ 1. Nature and Grounds of Jurisdiction of Supreme Court in General.

It is the province of the Supreme Court to decide questions of law and procedure presented by exceptions duly entered in the court below and brought forward in the briefs, and ordinarily it will not decide nonjurisdictional questions which are not thus presented. *S. v. Cochran*, 523.

§ 2. Judgments and Orders Appealable.

As a general rule an appeal will lie only from a final determination of the whole case, and an appeal from an interlocutory order will lie only when it puts an end to the action or where it may destroy or impair or seriously imperil some substantial right of the appellant. *Privette v. Privette*, 52.

While the Supreme Court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. *Ibid.*

An appeal will lie from the dissolution of a temporary restraining order. *Branch v. Board of Education*, 505.

An appeal from the overruling of execptions to the report of the referee and to the overruling of the motion that the entire evidence reported by the referee be stricken because not signed by the witnesses, G.S. 1-193, will be dismissed as premature. *Engineering Co. v. Thomas*, 516.

§ 3. Parties Who May Appeal—"Party Aggrieved."

Where no error is found on plaintiff's appeal from judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void, will be dismissed, since only the party aggrieved may appeal. *In re Westover Canal*, 91.

§ 6c (3). Form and Sufficiency of Objections and Exceptions to Findings of Fact.

Exceptions to findings of fact made by the referee in a compulsory reference are not presented on appeal when there are no exceptions to the findings of fact set out in the judgment confirming the report of the referee. *Simmons v. Lee*, 216.

§ 6c (4). Form and Sufficiency of Objections and Exceptions to Evidence.

A party should object not only to the question but also to the answer of the witness, and move to strike, in order to properly present his exception to the testimony. *In re Will of McDowell*, 259.

§ 6c (6). Requirement That Misstatement of Contentions or Evidence Be Brought to Trial Court's Attention.

Ordinarily, the omission of defendant's contention or misstatements of the evidence must be brought to the trial court's attention in apt time in order to preserve an exception. *Shipping Lines v. Young*, 80.

§ 12. Pauper Appeals.

Appeals *in forma pauperis* are not to be allowed as a subterfuge to permit appellant to escape payment of costs which might be taxed against him, and

the trial court should ascertain if the affidavit is made in good faith and whether the facts therein stated are true. *Perry v. Perry*, 515.

On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant is earning $300.00 per month, and permitted defendant to appeal from the order *in forma pauperis*. The cause is remanded to the end that the court may determine whether defendant is in fact entitled to appeal *in forma pauperis*. *Ibid.*

§ 31e. Dismissal for That Question Has Become Moot or Academic.

Where pending defendant's appeal from the denial of *mandamus* to compel a municipality to issue him an "off premises" license for beer and wine at his grocery store situate within 600 feet of a church, the General Assembly has passed an act proscribing the issuance of license for the sale of beer or wine within one and one-half miles of said church, the question sought to be presented has become academic, and the appeal will be dismissed. *Martin v. Holly Springs*, 388.

§ 38. Presumptions and Burden of Showing Error.

Order dissolving a temporary restraining order will be presumed correct, with burden of showing error on appellant. *Branch v. Board of Education*, 505.

Where there are no exceptions to any matters preceding the return of the verdict, it will be presumed that the trial up to that point was in accord with the applicable principles of law. *Proctor v. Highway Com.*, 687.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *MacClure v. Ins. Co.*, 661.

§ 39b. Error Cured by Verdict.

Error relating to one issue alone cannot be held harmless because of the answer to another issue when such other issue is not determinative of the rights of the parties. *Ballard v. Ballard*, 629.

§ 39e. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The exclusion of testimony of a telephone conversation offered by defendant, if error, cannot be held prejudicial when it appears that the conversation was substantially repeated several times by defendant on plaintiff's cross examination. *Shipping Lines v. Young*, 80.

Defendant purchaser claimed that the bananas purchased by him failed to meet the specifications set out in the contract and were unmerchantable. *Held:* The admission of testimony of the seller that the bananas were part of a shipload, the balance of which had been sold to various concerns throughout the country and paid for without complaint, even if technically erroneous, is insufficient to constitute reversible error. *Ibid.*

Exclusion of evidence cannot be held prejudicial when appellant recovers exact amount he would have recovered if evidence had been admitted and found true by jury. *Ingold v. Assurance Co.*, 142.

The exclusion of testimony cannot be held prejudicial when it does not appear what the witness would have testified if permitted to do so. *Martin v. Currie*, 511.

The exclusion of evidence cannot be held prejudicial when substantially the same evidence is subsequently admitted. *Fanelty v. Jewelers*, 694.

§ 39f. Harmless and Prejudicial Error in Instructions Generally.

Exception to the charge for failure to state the evidence and declare and explain the law arising thereon will not be sustained when the charge construed contextually is without prejudicial error. G.S. 1-180. *Tarkington v. Printing Co.*, 354.

Exceptions to the charge will not be sustained when the charge is free from prejudicial error when construed contextually. *Hooper v. Glenn*, 570.

Conflicting instructions upon a material aspect of the case must be held for prejudicial error. *Green v. Bowers*, 651.

§ 39l. Prejudicial and Harmless Error in Course and Conduct of Trial.

Argument by counsel for plaintiff as to matters not in evidence will be held harmless when it appears that defendant's counsel brought out the identical matter in the hearing of the jury in their argument upon a motion. Further, in this case, such matter appeared in the pleadings which were read to the jury. *Tarkington v. Printing Co.*, 354.

§ 40a. Review of Exception to Judgment or to Signing of Judgment.

A single exception "to the signing of the judgment" presents the sole question whether the facts found or admitted support the judgment. *Hardee v. Mitchell*, 40.

A sole assignment of error to the signing of the judgment presents only whether the facts found by the trial court are sufficient to support the judgment, and whether error of law appears upon the face of the record. *Simmons v. Lee*, 216; *Hanford v. McSwain*, 229.

A sole exception to the judgment and to the signing of same, presents only whether the record sustains the judgment. *Employment Security Com. v. Roberts*, 262.

A single assignment of error to the signing of the judgment presents only whether error appears on the face of the record. *Parker v. Duke University*, 656.

An appeal from judgment on the pleadings presents the question whether the judgment is supported by the record. *Credit Corp. v. Roberts*, 654.

Where there are no exceptions to the findings of fact, and the sole assignment of error is to the court's conclusions of law and in signing the judgment, only the face of the record is presented for inspection and review. *Henderson County v. Johnson*, 723.

§ 40b. Review of Matters in Discretion of Trial Court.

Trial court's ruling on motion to set aside verdict in exercise of court's discretion is not reviewable in absence of abuse of discretion. *Pruitt v. Ray*, 322.

On this appeal from an order allowing additional counsel fees under G.S. 50-16, the amount *is held* not so unreasonable as to constitute an abuse of dis-

cretion when viewed in the light of the circumstances under which made. *Stadiem v. Stadiem*, 318.

Discretionary refusal of application for leave to amend pleading is not reviewable in absence of abuse of discretion. *Hooper v. Glenn*, 570.

§ 40c. Review of Injunction Proceedings.

An order dissolving a temporary restraining order will be presumed correct, and when appellants fail to overcome the presumption of correctness the order will not be disturbed. *Branch v. Board of Education*, 505.

§ 40d. Review of Findings of Fact of Trial Court. (Of findings of Industrial Com. see Master and Servant.)

Findings of fact made by the trial court are not conclusive when they are not supported by evidence. *Scott & Co. v. Jones*, 74.

Upon motion to set aside a judgment under G.S. 1-220, the findings of the court as to excusable neglect and meritorious defense are conclusive when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence been considered in its true legal light. *Hanford v. McSwain*, 229.

The referee's findings of fact approved by the trial judge are conclusive on appeal when they are supported by evidence. *Griffin v. Jones*, 612.

§ 40f. Review of Orders Relating to Pleadings.

The denial of a motion to strike certain allegations from the pleadings will ordinarily be affirmed on appeal when the matter can best be presented by exceptions to the evidence. *Parker v. Duke University*, 656.

§ 40i. Review of Exceptions Relating to Motions of Nonsuit.

The Supreme Court may not ignore incompetent evidence admitted in the trial below in passing upon an exception to the refusal to nonsuit, since the exception does not present for review errors committed by the trial court in admitting testimony; and the motion will not be allowed on appeal even though the competent evidence, standing alone, is insufficient to carry the case to the jury, since if the incompetent evidence had been excluded, the plaintiff might have followed a different course in the trial court. *Ballard v. Ballard*, 629.

In passing upon plaintiff's exceptions to judgment as of nonsuit, the Supreme Court will not pass upon the credibility or weight the jury should give the evidence, but will consider the evidence in the light most favorable to plaintiff. *Alexander v. Lindsey*, 663.

§ 40l. Review of Constitutional Questions.

A constitutional question will not be determined when the appeal may be made to turn upon a question of lesser moment. *S. v. Stallings*, 252.

Courts never anticipate a question of constitutional law before the necessity of deciding it arises. *S. v. Trantham*, 641.

§ 51a. Force and Effect of Decision—Law of the Case.

On former appeal by defendant from a directed verdict in plaintiff's favor in her action on a policy of life insurance, it was held that the conflicting evidence as to conditional delivery of the policy or an absolute delivery upon

acceptance of applicant's promise to pay the balance of the first premium, should have been submitted to the jury, and that the directed verdict in plaintiff's favor was error. *Held:* The decision on the former appeal is the law of the case, and upon the subsequent trial upon substantially identical evidence it was error for the trial court to grant defendant's motion to nonsuit. *Stallings v. Ins. Co.*, 304.

§ 51b. Force and Effect of Decision—Stare Decisis.

Decisions of long standing adjudicating homestead rights, which have not been overruled, create rules of property governing such rights so long as they are not superseded by the act of the Legislature. *Willliams v. Johnson*, 338.

§ 52. Jurisdiction and Proceedings in Lower Court After Remand.

In an action to redeem land from foreclosure, a decision of the Supreme Court that the foreclosure was invalid does not preclude the *cestui* from setting up the defenses of estoppel, laches and title by adverse possession in the subsequent proceedings, the defenses not having been invoked and not being in view at the time of the rendition of the decision. *Grady v. Parker*, 166.

ARREST AND BAIL.

§ 1b. Right of Officers to Make Arrest Without Warrant.

An officer may not make an arrest without a warrant for a misdemeanor not committed in his presence unless expressly authorized to do so by statute, and it is required that the warrant be in the possession of the officer purporting to act thereunder or in the possession of a person acting in conjunction with him. *Alexander v. Lindsey*, 663.

§ 9. Arrest in Civil Actions—Nature and Grounds of Remedy.

A defendant may be arrested and held to bail in a civil action in tort to recover for a willful, wanton or malicious injury to the person. *Long v. Love*, 535.

§ 10. Arrest in Civil Actions—Procedure to Obtain.

In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 535.

ASSAULT.

§ 8d. Nature and Elements of Assault With Deadly Weapon With Intent to Kill.

Assault with a deadly weapon with intent to kill is a misdemeanor. *S. v. Silvers*, 300.

§ 9a. Self-Defense.

In absence of intent to kill, defendant may fight in self-defense even though not in real or apparent danger of death or great bodily harm. *S. v. Anderson*, 54.

ASSAULT—*Continued.*

§ 10. Warrant and Indictment.

The indictment charged defendant with an assault with a deadly weapon with intent to kill "and murder," inflicting serious injury not resulting in death. *Held:* The words "and murder" are surplusage and place no additional burden on the State. *S. v. Plemmons*, 56.

§ 14a. Instructions in Assault Cases in General.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. *S. v. Plemmons*, 56.

§ 14b. Instructions on Defenses.

A charge predicating the right of self-defense upon actual or real danger alone must be held for reversible error in excluding the right to fight or kill in self-defense if it reasonably appears from the circumstances surrounding defendant at the time that his assailant is about to take his life or to do him great bodily harm. *S. v. Anderson*, 54.

When applicable upon the evidence, court should charge that in absence of intent to kill, defendant has right to protect himself from bodily injury or offensive physical contact even though not put in actual or apparent danger of death or great bodily harm. *Ibid.*

A charge on the right of self-defense that if defendant was at his place of business and an assault was made upon him, he had a right to protect himself regardless of whether the assault was felonious or nonfelonious, and use such force as was necessary or reasonably appeared to him necessary under the circumstances to protect himself from death or great bodily harm, is correct and adequate, and an exception thereto is not sustained. *S. v. Plemmons*, 56.

ASSIGNMENTS.

§ 1. Rights and Interests Assignable.

A contract to convey is assignable, and defense that assignment was by parol may not be set up by vendor in action for specific performance by assignee. *Cadillac-Pontiac Co. v. Norburn*, 23.

Defendant *held* not to have shown that contract to convey was based on personal credit of purchaser so as to preclude assignment. *Ibid.*

AUTOMOBILES.

§ 8a. Due Care in General—Attention to Road.

While the driver of an automobile is not required to anticipate negligence on the part of others, he is under duty to keep a reasonably careful lookout at all times, and will be held to the duty of seeing what he ought to see. *Cox v. Lee*, 155; *Dawson v. Transportation Co.*, 36.

A motorist is under duty at all times to operate his vehicle at a reasonable rate of speed and maintain constant attention to the highway. G.S. 20-140. *Williams v. Henderson*, 707.

§ 8d. Stopping, Parking, Signals and Lights.

While a motorist is not under duty to anticipate that an unlighted vehicle may be standing on the traveled portion of the highway without flares or other

warning, he is still under duty to keep a proper lookout and proceed as a reasonably prudent person would under the circumstances. *Dawson v. Transportation Co.*, 36; *Cox v. Lee*, 155; *Brown v. Bus Lines*, 493; *Wilson v. Motor Lines*, 551.

The mere fact that the driver of a bus stops such vehicle on the traveled portion of the highway for the purpose of receiving or discharging a passenger, nothing else appearing, will not be held to be a violation of G.S. 20-161. *Banks v. Shepard*, 86.

The stopping of a bus on the traveled portion of the highway to discharge a passenger without giving the signal required by statute is negligence, and ordinarily it is for the jury to determine whether such negligence is the proximate cause of injury. *Ibid.*

A tractor-trailer standing on the paved portion of a highway at nighttime is required to have the rear and clearance lights burning, G.S. 20-129, regardless of whether or not the vehicle is disabled within the meaning of G.S. 20-161 (c). *Thomas v. Motor Lines*, 122.

Stalling of truck on highway permits inference of negligent operation when the evidence discloses that truck was in perfect mechanical condition. *Thomas v. Motor Lines*, 122.

Decisions to the effect that a driver is guilty of contributory negligence if he drives upon the highway in the dark at such speed that the vehicle cannot be stopped within the distance that he can see an object ahead of him on the highway do not purport to state a rule of thumb, but merely apply the principle that a driver in such instance will be held to the conduct of a reasonably prudent person under the circumstances as they appear to him, and each case must be determined upon its particular facts. *Thomas v. Motor Lines*, 122.

§ 8g. Skidding.

The mere fact of the skidding of an automobile, without other evidence, does not necessarily impute negligence to the driver. *Winfield v. Smith*, 392.

§ 8i. Intersections.

It is negligence *per se* for a motorist to overtake another vehicle traveling in the same direction and pass it at a highway intersection unless given permission to do so by a traffic or police officer. G.S. 20-150 (c). *Cole v. Lumber Co.*, 616.

§ 8j. Sudden Emergency.

Where owner grabs wheel from driver upon skidding of car to a hardly perceptible degree, causing accident, there is no such emergency as to releave owner of imputation of negligence, and in driver's action against owner, issues of negligence and contributory negligence were for jury. *Chesser v. McCall*, 119.

Where driver of truck stalled diagonally across highway at nighttime, upon seeing lights of approaching car, spends entire time before collision in attempting to re-start motor instead of turning on rear and clearance lights, jury may infer negligence. *Thomas v. Motor Lines*, 122.

Where a sudden emergency is created by defendants' negligence, plaintiff will not be held to the wisest choice of conduct, but only to such choice as a

AUTOMOBILES—*Continued.*

person of ordinary care and prudence, similarly situated, would have made. *Winfield v. Smith*, 392.

§ 9b. Condition of and Defects in Vehicles—Lights.

The operation of tractor-trailer on highway at nighttime without the rear and clearance lights burning is negligence *per se*. *Thomas v. Motor Lines*, 122.

§ 12a. Speed in General.

The driver of an automobile is required at all times to operate his vehicle with due regard to traffic and conditions of the highway, and keep his car under control and decrease speed when special hazards exist by reason of weather or highway conditions or when necessary to avoid colliding with any other vehicle, G.S. 20-140, 141. *Cox v. Lee*, 155.

One who operates a motor vehicle at night must take notice of the existing darkness and must not exceed a speed which will enable him to stop within the radius of his lights. *Cox v. Lee*, 155; *Dawson v. Transportation Co.*, 36; *Brown v. Bus Lines*, 493; *Wilson v. Motor Lines*, 551.

Driving at a speed of 30 to 35 miles per hour in a heavy fog limiting visibility to 100 or 125 feet does not compel the conclusion that the driver was exceeding the speed at which he could stop within the range of his visibility. *Winfield v. Smith*, 392.

§ 12f. Duty of Motorist in Regard to Pedestrians.

A motorist is required to keep a proper lookout for persons on or near the highway, and decrease his speed when any special hazards exist with respect to pedestrians. G.S. 20-141 (c). *Williams v. Henderson*, 707.

While ordinarily a motorist is not required to anticipate that a pedestrian will leave a place of safety and get in a line of travel, when the circumstances are such that it should appear to the motorist that a pedestrian is oblivious of his approach, or he may reasonably anticipate the pedestrian will come into his way, it is his duty to give warning by sounding his horn. G.S. 20-174 (e). *Ibid.*

§ 13. Right Side of Road and Passing Vehicles Traveling in Opposite Direction.

Evidence that trailer-tanker was sticking out to its left of the center of the road when struck by defendant's car *held* to take case to jury on issue of negligence. *Gladden v. Setzer*, 269.

§ 14. Passing Vehicles Traveling in Same Direction.

Passing vehicle in heavy fog limiting visibility to 100 or 125 feet, 250 or 300 feet before reaching curve *held* sufficient evidence of negligence. *Winfield v. Smith*, 392.

§ 15. Bicycles.

Negligence on part of rider ordinarily will not be imputed to guest passenger on bicycle who has no control over its movement. *Hensley v. Biggs*, 114.

Evidence held for jury in action by guest passenger on bicycle against motorist colliding with the vehicle. *Ibid.*

§ 18g (4). Competency and Relevancy of Evidence—Opinion Evidence.

Testimony of the driver of a car that he would have passed defendant's truck several feet before reaching a highway intersection if the truck had not

pushed him off the road, *is held* competent as a "shorthand statement of fact" and not objectionable as a conclusional assertion invading the province of the jury. *Tarkington v. Printing Co.*, 354.

§ 18g (5). Evidence—Physical Facts.

Physical evidence at the scene of the accident in suit *held* not such as to necessarily negative plaintiff's testimony as to speed. *Winfield v. Smith*, 392.

§ 18h (2). Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Evidence held for jury as to whether mechanical signal as required by statute was given before stopping bus. *Banks v. Shepard*, 86.

Action of owner in grabbing wheel from driver upon skidding of car to hardly perceptible degree, causing accident injuring driver, *held* to take case to jury on issue of owner's negligence. *Chesser v. McCall*, 119.

Evidence that tractor-trailer was blocking car's lane of travel at night, and that tractor-trailer did not have rear and clearance lights burning as required by statute, *held* sufficient on issue of negligence to take case to jury, the question of proximate cause being for its determination. *Thomas v. Motor Lines*, 122.

Evidence that the driver of a tractor-trailer traveling north on a dark and stormy night had stopped at a filling station on the west side of the highway, and at the time of starting his vehicle back across the highway to resume his journey, the driver saw the lights of a car approaching from the opposite direction, but nevertheless drove his vehicle into the path of the approaching car, *is held* sufficient evidence of negligence to overrule defendant's motion to nonsuit and motion for a directed verdict in his favor on the issue of negligence. *Thomas v. Motor Lines*, 122.

Evidence that tractor-trailer was in perfect mechanical condition, and that engine unaccountably stalled as vehicle was being driven onto highway from filling station, is sufficient to permit an inference by jury that stalling of engine was due to want of due care on the part of the driver. *Ibid.*

Evidence that driver, upon stalling of his motor, and seeing headlights of approaching car, consumed whole time before collision in attempting to restart motor instead of turning on vehicle's rear and clearance lights *held* sufficient to permit jury to infer want of due care on part of driver. *Ibid.*

A passenger in the truck driven by intestate testified to the effect that intestate was driving on his right side of the road in an ordinary manner, that defendant's tractor with trailer-tanker was traveling in opposite direction, and that the truck hit the trailer-tanker which was sticking out to its left as the tractor was being driven to its right of the road, resulting in intestate's death. *Held:* The testimony is sufficient to support an inference that the defendant violated G.S. 20-146 in failing to drive his tractor-trailer on his right half of the highway, proximately causing the death of plaintiff's intestate, and nonsuit was error, defendant's evidence in contradiction not being considered. *Gladden v. Setzer*, 269.

Evidence tending to show that the driver of a truck was traveling 35 to 40 miles per hour in an early morning fog which limited visibility to 100 or 125 feet, that he had overtaken a vehicle traveling in the same direction and was attempting to pass such vehicle 250 or 300 feet before reaching a curve, and collided with plaintiff's car which approached from the opposite direction, *is held* sufficient to be submitted to the jury on the issue of the negligence of the driver of the truck. *Winfield v. Smith*, 392.

Evidence that defendant's disabled truck was standing on highway at night without lights or warning signals *held* sufficient to take case to jury on issue of negligence in each of actions instituted by driver and passengers in car which struck rear of bus. *Wilson v. Motor Lines*, 551.

Evidence held for jury on question of negligence of motorist in failing to slacken speed or sound horn in approaching pedestrian obviously oblivious to danger. *Williams v. Henderson*, 707.

§ 18h (3). Nonsuit on Ground of Contributory Negligence.

The evidence tended to show that in driving down grade nearing an underpass plaintiff ran into a dense fog mixed with smoke which limited visibility to about nine feet, that he immediately slowed to fifteen or twenty miles per hour, and, after proceeding six or eight yards, ran into the rear of defendant's bus, which was stopped about the center of plaintiff's lane of traffic without lights, flares or other warning signals. *Held:* The evidence is insufficient to establish contributory negligence on the part of plaintiff as a matter of law, and nonsuit on this ground was error. *Dawson v. Transportation Co.*, 36.

Evidence held insufficient to establish contributory negligence as matter of law on part of driver hitting unlighted vehicle on highway. *Thomas v. Motor Lines*, 122.

Evidence held to show contributory negligence as matter of law on part of driver hitting unlighted vehicle on highway. *Cox v. Lee*, 155; *Brown v. Bus Lines*, 493; *Wilson v. Motor Lines*, 551.

Plaintiff's car struck truck which had passed third vehicle traveling in same direction as truck, but while rear of truck was still blocking part of plaintiff's lane of traffic, impact occurring while plaintiff's car was a little to its left of center of road where it had skidded when plaintiff applied brakes upon being suddenly confronted with blocked highway after rounding curve. *Held:* Evidence did not disclose contributory negligence on part of plaintiff as a matter of law. *Winfield v. Smith*, 392.

Passing vehicle at intersection in violation of G.S. 20-150 (c) held contributory negligence as matter of law. *Cole v. Lumber Co.*, 616.

Pedestrian held not guilty of contributory negligence as matter of law under circumstances of the case in failing to look before attempting to cross highway. *Williams v. Henderson*, 707.

§ 18i. Instructions in Auto Accident Cases.

Plaintiff was a four year old boy, and thus too young to be chargeable with contributory negligence. *Held:* An instruction that if plaintiff's acts were the sole proximate cause of his injury the jury should answer the issue of negligence in the negative, but further charging that the jury would have to further find that there was no negligence on the part of the defendant in the operation of his motor vehicle, must be held for reversible error as omitting the element of proximate cause, even though in other parts of the charge the court correctly instructed the jury that negligence on the part of defendant must have been the proximate cause of the injury to render defendant liable therefor. *Green v. Bowers*, 651.

§ 20. Negligence on Part of Guest or Passenger.

In this action by a passenger against the driver of the vehicle, defendant alleged that the accident was caused by the interference of the passenger with defendant's driving when they were confronted with an emergency. The only

evidence of interference was that the passnger exclaimed "Look out . . . that car is going to hit you," and defendant testified that the examination had no effect on him. *Held:* The refusal of the court to submit an issue of contributory negligence was not error. *Hooper v. Glenn*, 570.

Owner held negligent in grabbing wheel from guest-driver when car skidded to slight extent on wet highway. *Chesser v. McCall*, 119.

§ 20b. Negligence Imputed to Guest or Passenger.

Negligence on the part of the rider ordinarily will not be imputed to a guest passenger on the bicycle who has no control over its movement. *Hensley v. Briggs*, 114.

Negligence on the part of the driver will not be imputed to a guest riding in the automobile when the guest has no interest in the car and no control over the driver. *Thomas v. Motor Lines*, 122.

§ 22. Actions by Guests or Passengers.

In this action to recover for injuries to a boy riding on a bicycle with the owner, plaintiff's evidence tended to show that the bicycle was being ridden on its left shoulder of the highway and that an automobile operated by defendant, traveling in the opposite direction, was suddenly driven off the hard surface on its right, and hit the bicycle. Plaintiff alleged that defendant saw or by the exercise of reasonable care could have seen the boys on the bicycle and could have avoided the collision by the exercise of reasonable care. *Held:* The granting of defendant's motion of nonsuit was error. *Hensley v. Briggs*, 114.

In this action by passengers in an automobile against the driver and owner of a truck to recover for injuries sustained when the car collided with the truck parked on the highway at night without the statutory warning signals, an instruction that plaintiffs would not be entitled to recover if the negligence of the driver of the car was the sole proximate cause of the accident, *is held* sufficient on the question of insulated negligence. *Wilson v. Motor Lines*, 551.

§ 23a. Owner's Liability for Driver's Negligence in General.

Mere ownership does not impose liability for the negligence of the driver of an automobile but liability of the owner rests upon the doctrine of *respondeat superior*, which applies only if the driver is the owner's employee and is at the time about the owner's business and acting in the course of his employment. *Hinson v. Chemical Corp.*, 476

While not every deviation of the servant from the strict execution of his duty is sufficient to suspend the master's liability, if the servant, though originally bound upon a mission for his master, completely forsakes his employment and goes on an exclusively personal mission, the course of employment is interrupted and is not resumed until the servant returns to the path of duty where the deviation occurred, or to some place where in the performance of his duty he should be. *Ibid.*

§ 24½e. Sufficiency of Evidence on Issue of Respondeat Superior.

The evidence tended to show that defendant's driver was employed to transport certain workers to and from defendant's plant, that he was required to keep the car at defendant's plant during the night, that on the day in question, after discharging the last employee at his home, the driver went on an unauthorized personal mission of his own, and that the accident in suit

occurred while the driver was returning to his work the next morning but before he had reached the place where the deviation from the course of his employment occurred. *Held:* The evidence is insufficient to be submitted to the jury on the issue of *respondeat superior*. *Hinson v. Chemical Corp.*, 476.

Evidence in this case *held* insufficient to show that defendant employee parked the truck of his codefendant on the highway where it was permitted to stand until after darkness without lights or flares, or that, if he did so, he was engaged in the scope of his employment, and judgment of nonsuit is upheld. *Owens v. White*, 614.

§ 28d. Competency of Evidence in Manslaughter Prosecutions.

Where there is evidence that defendant was driving at excessive speed on the entire trip to and from a city in another state, the admission of testimony as to excessive speed at the beginning of the journey, even though somewhat remote, will not be held prejudicial. *S. v. Fentress*, 248.

Testimony of a witness that the car passed with the accelerator "wide open" and that in his opinion the car was traveling 85 miles per hour, *is held* competent as testimony of matters apprehended by the witness through his senses and relevant to the issue, and its admission does not constitute reversible error, certainly in view of its support from the physical facts at the scene of the wreck which occurred a few moments later, and the fact that the witness later testified to substantially the same import without objection. *Ibid.*

§ 28e. Sufficiency of Evidence and Nonsuit in Manslaughter Prosecutions.

Evidence in this case of defendant's driving at an excessive speed while intoxicated, resulting in an accident causing the death of passengers in his car, held sufficient to sustain conviction of manslaughter. *S. v. Fentress*, 248.

The evidence favorable to the State, though contradicted in material respects by defendant's evidence, tended to show that defendant was intoxicated, that he collided with a motorcycle which was traveling in the opposite direction, resulting in the death of the cyclist, and that the only marks on the highway tending to show the point of impact were on defendant's left side of the highway. *Held:* The evidence was sufficient to overrule defendant's motions to nonsuit in a prosecution for manslaughter. *S. v. Spivey*, 375.

§ 28f. Instructions in Manslaughter Prosecutions.

There was evidence that a fifth of whiskey was found in the wrecked car which defendant was driving and that shortly before the accident an officer of the law had told defendant he was too drunk to drive and required him to turn over the wheel to another. *Held:* The evidence of defendant's intoxication was sufficient to justify the court in reading the statute and charging the jury upon the law of drunken driving. *S. v. Fentress*, 248.

§ 29b. Prosecutions for Reckless Driving.

The State's evidence tending to show that defendant was driving some eighty to ninety miles per hour over a highway whereon several other vehicles were moving at the time, is sufficient to overrule defendant's motion to nonsuit and sustain conviction of reckless driving, G.S. 20-140, and driving at a speed in excess of fifty-five miles per hour, G.S. 20-141. *S. v. Vanhoy*, 162.

Circumstantial evidence, together with defendant's silence in face of accusation under circumstances calling for denial *held* sufficient on question of defendant's identity as driver of car. *S. v. Sawyer*, 713.

AUTOMOBILES—*Continued.*

§ 30c. "Highway" Within Meaning of Drunken Driving Statute.

The portion of a sidewalk between a street and a filling station, open to the use of the public as a matter of right for the purposes of vehicular traffic, is a "highway" within the meaning of G.S. 20-138. *S. v. Perry*, 361.

§ 30d. Prosecutions for Drunken Driving.

Circumstantial evidence, together with defendant's silence in face of accusation under circumstances calling for denial, *held*, sufficient as to defendant's identity as driver of car. *S. v. Sawyer*, 713.

§ 34b. Procedure for Revocation of Driver's License.

Power to suspend or revoke an automobile driver's license is vested exclusively in the State Department of Motor Vehicles, subject to the right to review by the Superior Court, G.S. 20, Art. 2, and a provision in a judgment in a prosecution for violation of a statutory provision regulating the operation of motor vehicles, that defendant's license be surrendered and that defendant not operate a motor vehicle on the public highways for a stipulated period, is void and will be stricken on appeal. *S. v. Warren*, 299.

BASTARDS.

§ 1. Elements of Offense of Willful Nonsupport.

In a prosecution of defendant for willful nonsupport of his illegitimate child, the burden is on the State to prove beyond a reasonable doubt that defendant is the father of the child, that he had refused or neglected to support it, and that such refusal or neglect was willful. *S. v. Ellison*, 59.

The offense proscribed by G.S. 49-2 is the willful neglect or refusal of the father to support his illegitimate child, the mere begetting of the child not being denominated a crime, and the question of paternity being incidental to the prosecution for nonsupport. *S. v. Bowser*, 330.

§ 5. Competency of Evidence in Prosecutions for Willful Nonsupport.

In a prosecution of defendant for willful failure to support his illegitimate child conceived during wedlock of the mother, the admission of testimony by the prosecutrix as to the nonaccess of the husband at the time of conception is error entitling defendant to a new trial. *S. v. Bowman*, 203.

§ 6. Sufficiency of Evidence and Nonsuit in Prosecutions for Willful Nonsupport.

Evidence in this prosecution of defendant for his willful neglect or refusal to support his illegitimate child *held* sufficient to overrule motions to nonsuit. *S. v. Bowser*, 330.

§ 7. Verdict in Prosecutions for Willful Nonsupport.

A verdict of "guilty of willful nonsupport of illegitimate child" is insufficient in that it fails to fix the paternity of the child. *S. v. Ellison*, 59.

§ 9. Appeal in Prosecutions for Willful Nonsupport.

Under the provisions of G.S. 49-7 a defendant in a prosecution for nonsupport of his illegitimate child may appeal from a verdict establishing his paternity of the child notwithstanding that the verdict finds him not guilty of nonsupport. *S. v. Clement*, 614.

BASTARDS—*Continued.*

§ 18. Action By or on Behalf of Child Against Father.

G.S. Chap. 49 and G.S. 7-103 provide an exclusive remedy to compel a father to provide for the support of his illegitimate child, and the statutes do not authorize the child to maintain a civil action to compel its father to provide for its support. *Allen v. Hunnicutt*, 49.

BILL OF DISCOVERY.

§ 1b. Nature and Scope of Remedy to Obtain Information to Draft Complaint.

Under G.S. 8-89 a plaintiff is entitled to an order requiring defendant to produce specified papers and documents to afford information necessary to the filing of the complaint. *Flanner v. St. Joseph's Home*, 227 N.C. 342, distinguished in that the matter sought to be discovered in that case was not necessary as a basis for filing complaint but to the contrary related to matter which it would have been improper to allege or which was not necessary to the statement of the cause of action. *Nance v. Gilmore Clinic*, 534.

An order for an adverse examination should never be allowed for the purpose of ascertaining whether or not a cause of action exists. *Guy v. Baer*, 748.

§ 3. Affidavit and Proceedings to Secure Order for Examination.

An application for examination of the adverse party to obtain information necessary to the preparation and filing of complaint must show the grounds upon which the action is bottomed and in what manner the information sought is material and necessary to plaintiff's cause of action. *Guy v. Baer*, 748.

BILLS AND NOTES.

§ 3. Consideration.

Mutual considerations in execution of note cannot support subsequent agreement by payee to forego interest. *Clement v. Clement*, 636.

§ 24b. Acceleration Clauses.

Subsequent agreement held to defeat payee's right to invoke acceleration clause. *Credit Corp. v. Roberts*, 654.

§ 34½. Judgment on Pleadings in Action on Note.

Where the maker admits execution of a note and chattel mortgage and the nonpayment of the note, nothing else appearing, the payee is entitled to judgment on the pleadings, and the submission to the jury of the question of the maker's liability on the note is error. *Hutchins v. Davis*, 67.

§ 37. Elements and Essentials of Offense of Issuing Worthless Check.

The offense proscribed by G.S. 14-107 is not the attempted payment of a debt, but the giving of a worthless check with its resulting injury to society in undermining confidence in negotiable paper. *S. v. White*, 513.

BOUNDARIES.

§ 1. Ascertainment of Boundaries—General Rules.

What are the boundaries of a deed is to be determined in accordance with the intent of the grantor from the four corners of the instrument and is a

BOUNDARIES—*Continued.*

question of law for the court; and it is for the jury to determine where the boundaries are actually located. *Lee v. McDonald*, 517.

§ 2. General and Specific Descriptions.

Where a deed states in the description that it includes certain lots, designated by number, but the prior description by metes and bounds does not include such lots in their entirety, the particular description by metes and bounds controls unless it is clear that the grantor intended to convey the additional land not embraced in the particular description. *Lee v. McDonald*, 517.

It is only when the specific description is ambiguous, or insufficient, or there is reference to a fuller or more accurate description, that the general description is allowed to control. *Ibid.*

§ 7. Processioning Proceedings—Parties and Procedure.

Where defendant in a processioning proceeding denies petitioners' title and pleads twenty years adverse possession as a defense, G.S. 1-40, the proceeding is assimilated to an action to quiet title, and the clerk should transfer the cause to the civil issue docket for trial upon the issues of whether petitioners own the land described in the petition and as to the location of the land so described. G.S. 1-399. *Simmons v. Lee*, 216.

§ 9. Burden of Proof in Processioning Proceedings.

Where defendant pleads title by adverse possession he has the burden of proof upon this affirmative defense. *Plemmons v. Cutshall*, 595.

§ 10. Nonsuit in Processioning Proceedings.

Where in a processioning proceeding it appears that the parties are owners of adjoining tracts and that a *bona fide* dispute exists between them as to the location of the dividing line, nonsuit is not proper; if additional parties are necessary to final determination, court should grant continuance and not nonsuit. *Plemmons v. Cutshall*, 595.

Where, in a processioning proceeding, the title of the respective parties is not in dispute, and the only real controversy is as to the location of the dividing line between the lands of the parties, nonsuit is erroneously entered. G.S. Chap. 38. *Brown v. Hodges*, 746.

BROKERS.

§ 12. Actions for Commissions.

Where the principal denies that he made any contract with plaintiff broker for the sale of lumber and denies he had received any orders through plaintiff, the burden is on plaintiff not only to prove the brokerage contract but to prove each order upon which he asserts his right to commission, G.S. 8-45 not being applicable, and it is error for the court to charge on the issue of damages that there was no controversy as to the amount and that if the jury should find the plaintiff's evidence to be true to answer that issue in the sum demanded by plaintiff. G.S. 1-180. *Haines v. Clark*, 751.

§ 13. Rights and Liabilities of Third Persons to Broker.

Plaintiff broker alleged that he had been given exclusive contract to sell certain property, that he secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the

BROKERS—*Continued.*

prospect, after the expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split commission. *Held:* In the absence of allegation that plaintiff's option was registered, the complaint fails to state a cause of action. *Eller v. Arnold*, 318.

BURGLARY.

§ 10. Competency and Relevancy of Evidence.

Evidence as to the conduct of defendant after breaking and entering may be considered by the jury in ascertaining the intent of the accused at the time of the breaking and entering. *S. v. Reid*, 561.

§ 11. Sufficiency of Evidence and Nonsuit.

The State's evidence tended to show that defendant's estranged wife went to her father's home for protection and that her father furnished her a house on his farm, that defendant went to this house at nighttime, went to a bedroom window, aroused his wife and threatened to kill her if she did not let him in, cut the screen window from top to bottom and finally entered the house through the back door, and left when he found that his wife had fled. *Held:* The evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. *S. v. Surles*, 272.

Evidence of each defendant's guilt of first degree burglary *held* sufficient to be submbitted to the jury and overrule defendants' motions for nonsuit on this charge. *S. v. Mathis*, 508.

Whether defendant intended to commit rape as charged in bill of indictment or crime against nature in accordance with his evidence, *held* question for jury. *S. v. Reid*, 561.

Fingerprint testimony, together with other evidence of defendants' guilt, *held* sufficient to take question of defendant's identity as perpetrator of crime to jury. *Ibid.*

§ 12b. Instructions on Less Degrees of Crime.

In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. *S. v. Mathis*, 508.

§ 13b. Right of Jury to Convict of Less Degrees.

In a prosecution for burglary in the first degree, it is permissible for the jury to convict the defendant of an attempt to commit burglary in the second degree. *S. v. Surles*, 272.

Even where the jury finds facts constituting burglary in the first degree in a prosecution for this offense, it may return a verdict of guilty of burglary in the first degree, or guilty of burglary in the first degree with recommendation for imprisonment for life, or, if the jury deems it proper, guilty of burglary in the second degree. *S. v. Mathis*, 508.

§ 14. Judgment and Sentence.

Upon conviction of an attempt to commit burglary, court may sentence defendant to State's Prison for term not in excess of ten years, since the attempt is a felony. *S. v. Surles*, 272.

CARRIERS.

§ 11. Carriage of Goods—Spoilage in Transit.

A shipper makes out a *prima facie* case by showing delivery of perishables to the carrier in good condition and delivery to the consignee at destination in bad condition. *Precythe v. R. R.*, 195.

It is the duty of a common carrier to transport perishable goods in proper cars and to use reasonable care for their preservation and prompt delivery. *Ibid.*

The original carrier is liable to the shipper for loss occasioned by negligence of its connecting carrier. *Ibid.*

Evidence of failure to re-ice at terminal yard as required by rules *held* sufficient for jury on issue of carrier's negligence. *Ibid.*

§ 13. Carriage of Goods—Liability After Arrival of Goods at Destination.

Defendant carrier's contention that its liability for care of a shipment of perishables ceased upon delivery of the car on consignee's private track is not determinative when there is evidence of negligent failure to exercise due care for the preservation of the shipment resulting in the damage prior to delivery of the car on the consignee's track. *Precythe v. R. R.*, 195.

§ 21b. Injuries to Passengers in Transit.

Evidence that a cab driver traversed a sharp turn at 40 miles per hour, and that the violent motion of the cab threw plaintiff, a passenger, against the right rear door, that the door came open, and plaintiff fell from the cab to his injury, *is held* sufficient evidence of negligent operation of the taxicab to overrule the cab company's motion to nonsuit in the passenger's action for damages. *Lunsford, v. Marshall*, 610.

Plaintiff passenger testified that he was thrown against the rear door of the taxicab by the violent motion of the cab, that the door came open, and that he was thrown from the cab to his injury. Plaintiff testified that he did not know whether the door was securely fastened or not, and the driver testified that as far as he knew the door was in perfect condition. *Held:* It was error for the court to submit to the jury as an element of negligence whether the cab company failed to maintain the door and lock in proper condition. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 8a. Place of Registration—Instruments Executed in Other States.

Where personal property subject to a conditional sale contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a *situs* here within the meaning of our registration statute, and such lien is not required to be registered in any county of this state. *Credit Corp v. Walters*, 443.

§ 8b. Lien of Mortgages Registered in Other States.

The uniform sales act of the state wherein the property was purchased and the conditional sales contract registered in accordance with its laws cannot be given an effect contrary to the provisions of our registration statutes, G.S. 47-20, G.S. 47-23, since our statutes make no exception in favor of a conditional sale contract or chattel mortgage executed and effected in another state when the property embraced in such instrument is subsequently brought into this State. *Credit Corp v. Walters*, 443.

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

An automobile purchased by a nonresident in another state and subject to a conditional sale contract, registered in accordance with the laws of such other state, was brought into this State by the nonresident while on a temporary visit. The automobile was seized under execution of a judgment obtained here against the nonresident. *Held:* The lien of the conditional sale contract is superior to the lien obtained by levy under execution. *Ibid.*

The lien against personalty acquired by levy under execution of a judgment cannot be superior to the interest of the judgment debtor in the property, and where the judgment debtor owns only an equity of redemption, the lien acquired by execution is subject to the prior lien of a chattel mortgage or conditional sale contract when such instrument is not required to be registered here. *Ibid.*

The rule that the lien of a chattel mortgage properly registered under the laws of the state in which it was executed will be enforced under comity is subject to modification by the statutes of the state in which the lien is sought to be enforced when the full faith and credit clause of the Federal Constitution is not invaded. *Discount Corp. v. McKinney*, 727.

The burden of proof is on the party claiming under the lien of a chattel mortgage registered in another state to show a valid lien under the laws of such other state and that his case is within the protection of the rule of comity as modified by the statutes of the state in which he seeks to enforce the lien. *Ibid.*

Instructions susceptible to the interpretation that if the mortgagee used due diligence in ascertaining the identity and residence of the mortgagor, the lien would be valid, *held* favorable to the mortgagee and not erroneous on its appeal, since the validity of the registration depends upon the ultimate fact of record in the proper county and not upon the diligence addressed to its accomplishment. *Ibid.*

Since the burden is upon one claiming under the lien of a chattel mortgage registered in another state to show that the lien is valid in such other state and also that it is enforceable in this State under the rule of comity, an instruction to the effect that if the chattel had come to rest in North Carolina and the mortgage had not been registered here (G.S. 47-20) the lien of the mortgage recorded in such other state would not be enforceable here, but if the chattel mortgage was properly registered in the state in which executed no one could get title free from such lien, *is held* favorable to the mortgagee and cannot be held for prejudicial error upon its appeal. *Ibid.*

Plaintiff's evidence tended to show that the automobile was purchased in another state, that the purchaser, purporting to be a resident of such other state, executed a conditional sales contract which was duly registered under its laws. Defendant introduced the deposition of the purported purchaser that he had not purchased the car and had not executed the conditional sales contract and that he resided in a third state. The laws of the state wherein the chattel mortgage was registered require that the instrument be recorded in the county in which the mortgagor resides. *Held:* The question of proper registration was largely one of fact, and the verdict of the jury in plaintiff's favor is determinative of the rights of the parties. *Ibid.*

§ 10b. Registration and Time of Attachment of Lien.

A chattel mortgage is effective as against creditors and purchasers for value only from the time of registration. *Finance Corp. v. Hodges*, 580.

CHATTEL MORTGAGES AND CONDITIONAL SALES—*Continued.*

§ 10c. Who Are Creditors and Purchasers for Value Protected Against Unregistered Instruments.

A creditor is not protected from the claim of the mortgagee in an unregistered chattel mortgage until he has in some legal manner acquired a lien against the personal property, but a pre-existing debt is a valuable consideration and is sufficient to support the claim of the creditor when he has acquired a lien on the property thereunder. *Finance Corp. v. Hodges*, 580.

§ 10d. Liens and Priorities Under Registered Instruments.

Where chattel mortgage is not registered until after the property had been seized under execution on a judgment against the mortgagor, the lien of execution has priority over the lien of the chattel mortgage. *Finance Corp. v. Hodges*, 580.

§ 10e. Claims and Priorities Under Unregistered Instruments.

An unregistered chattel mortgage creates no equity in the mortgagee. *Finance Corp. v. Hodges*, 580.

The rule that the equitable owner may assert his claim against the grantee or lienee of the apparent owner unless such grantee or lienee is a purchaser for value without notice, does not apply to the mortgagee in an unregistered chattel mortgage, since an unregistered chattel mortgage creates no quity in the mortgagee. *Ibid.*

§ 17. Right to Foreclose and Defenses.

Defendant executed note secured by chattel mortgage on an automobile payable in monthly installments and containing an acceleration clause in case of default in any monthly payment. Defendant alleged that the car was involved in a wreck, that she reported same to the manager of one of plaintiff's offices in accordance with the agreement, that the manager advised her to withhold further payments until the repairs to her car could be adjusted with the insurance company, and that in violation of this agreement plaintiff instructed the repair shop not to release the car until the entire balance due on the purchase price was paid and instituted this action to recover the entire amount due. *Held:* The allegations are sufficient to defeat plaintiff's right to invoke the acceleration clause, and judgment on the pleadings in plaintiff's favor was error. *Credit Corp v. Roberts*, 654.

CLERKS OF COURT.

§ 7. Jurisdiction as Juvenile Court.

Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the Superior Court and not the Juvenile Court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. *S. v. Bowser*, 330.

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. *Scholtens v. Scholtens*, 149.

Common law disability of husband to maintain action in tort against wife obtains in this state. *Ibid.*

CONSPIRACY.

§ 1. Acts Constituting Civil Conspiracy.

An agreement to do a lawful act cannot constitute a wrongful conspiracy. *Eller v. Arnold*, 418.

CONSTITUTIONAL LAW.

§ 8c. Legislative Power—Delegation of Authority.

The General Assembly cannot delegate authority to make law. *S. v. Curtis*, 169.

§ 10b. Power and Duty to Determine Constitutionality of Statutes.

The courts will not declare an act of assembly unconstitutional even when clearly so, except in cases properly calling for the determination of its validity, and where the parties refrain from raising the question by plea or otherwise, the court may not determine that an act of assembly is unconstitutional but must act upon the presumption of constitutionality. *Hunter v. Nunnamaker*, 383.

§ 10d. Supervisory Power of Supreme Court.

The Supreme Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. N. C. Const., Art. IV, sec. 8. *S. v. Cochran*, 523.

And will stay judgment when, upon the record, it would be manifest injustice to permit imposition of sentence on the verdict. *Ibid.*

The Supreme Court, in its supervisory power, has authority to entertain an application for permission to apply to the Superior Court for a writ of error *coram nobis*. *In re Taylor*, 566.

§ 11. Scope of Police Power in General.

Uniform regulation operating alike on all within respective classes and which bears reasonable relation to health, safety, morals or general welfare *held* valid, notwithstanding that property might be more valuable if devoted to use proscribed by the regulation. *Kinney v. Sutton*, 404.

§ 14. Police Power—Morals and Public Welfare.

It is within the police power of the State to enact laws prohibiting secular pursuits on Sunday. *S. v. Trantham*, 641.

Which power state has delegated to its municipalities. *Ibid.*

§ 18. Equal Protection Application and Enforcement of Laws.

Legislative bodies may make classifications for the application of regulations provided the classifications are practical and apply equally to all persons within a class, since the constitutional mandate proscribing discrimination requires only that there be no inequality among those within a particular group or class. Fifth Amendment to the Federal Constitution; Art. 1, Sec. 17, of the N. C. Constitution. *S. v. Trantham*, 641.

§ 19a. Searches and Seizures.

The fact that evidence is obtained by unlawful means does not render such evidence inadmissible in this State in the absence of statutory provision to the contrary, and therefore testimony by officers that they searched and found a

quantity of nontax-paid liquor in defendant's car is competent notwithstanding the search was made without a warrant. *S. v. Vanhoy*, 162.

Search warrant *held* valid. *S. v. Gross*, 734.

§ 20a. Due Process of Law; Law of the Land—Nature and Scope of Mandate in General.

Fact that lot would be more valuable if devoted to use proscribed by zoning regulation does not deprive owner of property without due process of law. *Kinney v. Sutton*, 404.

§ 22. Right to Jury Trial—Civil Actions.

Constitutional right to jury trial may be waived, and is waived in compulsory reference by failure to follow appropriate procedure for preservation of right. *Simmons v. Lee*, 216.

§ 33. Right to Trial by Impartial Jury—Criminal Prosecutions.

Exclusion of Negroes from grand and petty juries solely because of their race or color denies Negro defendants in criminal prosecutions the equal protection of the laws required by the Fourteenth Amendment to the Federal Constitution. *S. v. Speller*, 345.

Ordinarily, trial court's findings that Negroes had not been excluded from jury because of race, are conclusive, but not so when defendant's counsel have not been given reasonable time to procure evidence in support of their challenge to the array, and therefore findings are barred on incomplete evidence. *Ibid.*

Findings that persons of defendant's race had not been excluded from jury because of race *held* supported by evidence and conclusive on appeal. *S. v. Reid*, 561.

§ 34d. Right to Be Represented by Counsel.

While in a capital case, accused is entitled to have counsel present at every stage of the proceeding, it is the duty of counsel to observe what transpires during the regular sittings of the court and to arrange for his notification should the occasion arise. *S. v. Cochrell*, 110.

The constitutional right of every defendant in a criminal prosecution to be represented by counsel contemplates not only that accused shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare, and present his defense. Constitution of N. C., Art. 1, sec. 11. XIV Amendment to the Federal Constitution. *S. v. Speller*, 345.

New trial awarded for failure to grant counsel opportunity to procure evidence to support challenge to the array. *Ibid.*

The appointment of counsel for a defendant charged with felonies less than capital is within the discretion of the trial court; but in prosecutions for capital offenses the appointment of counsel is mandatory. *In re Taylor*, 566.

Where verified petition for leave to apply to the Superior Court for writ of error *coram nobis*, the record in the cases in which petitioner was convicted, and *habeas corpus* proceedings instituted by him, make it appear that petitioner was confronted with indictments for capital offenses and indictments for felonies less than capital, and that the trial court failed to appoint counsel to represent him notwithstanding his alleged inability to employ counsel and his request for counsel, the petition will be allowed in respect of the capital

CONTITUTIONAL LAW—*Continued.*

felonies and denied in respect of the felonies less than capital upon such *prima facie* showing. *Ibid.*

§ 38. Cruel and Unusual Punishment.

Sentence of 18 months on roads upon plea of guilty of issuing worthless check, without suspension upon condition of payment of check, is within that allowed by law for misdemeanor and cannot be "cruel and unusual" in constitutional sense. *S. v. White*, 513.

CONTEMPT OF COURT.

§ 2b. Willful Disobedience of Court Order.

In order for the willful disobedience of a court order to be punishable for contempt it is necessary that the order be lawfully issued, and the disobedience of an order void *ab initio* for want of jurisdiction may not be made the basis for contempt proceedings. *Patterson v. Patterson*, 481.

CONTRACTS.

§ 4. Acceptance and Mutuality.

It is necessary to the mutuality of promises that each promise imposed a legal liability upon the promisor so as to give rise to an action for nominal damages at least upon its breach. *Kirby v. Board of Education*, 619.

The county board of education offered plaintiff a contract to teach "in the public schools of the district." Plaintiff's written acceptance was to teach in a particular school of the district. *Held:* In plaintiff's action for breach of the contract for that she was assigned to teach in another school in the district, demurrer was properly sustained in the absence of allegation that the school authorities consented to the variation in the contract, since in such case there was no mutuality of agreement and therefore no contract to constitute the basis of the action. *Ibid.*

§ 15. Novation or Waiver. (See, also, Waiver.)

Burden is on party asserting alteration of contract by valid waiver to prove same. *Clement v. Clement*, 636.

§ 26. Wrongful Interference With Contractual Rights by Third Persons.

Where exclusive right to sell property is not registered, third persons have right to deal with property as if there were no contract and broker cannot maintain action against such third persons for interfering with his sales contract. *Eller v. Arnold*, 218.

CORPORATIONS.

§ 6a (2). Duties and Liabilities of President.

Ordinarily the president of a corporation is *ex vi termini* its head and general agent, and when he signs a bill of sale for goods on hand in a large amount five days after inventory, he will be held to actual or constructive knowledge of a material misrepresentation in the bill of sale. *Mills v. Mills*, 286.

§ 10. Power of Stockholders to Sue and Defend on Behalf of Corporation.

Ordinarily, a stock holder may not maintain an action against other stockholders for dissipation of the assets of the corporation, even though he alleges

CORPORATIONS—*Continued.*

depreciation in the value of his shares of stock, unless he alleges that action by the corporation has been demanded and refused. *Jordan v. Hartness*, 718.

§ 20. Representation of Corporation by Officers and Agents.

Where the president of a corporation executes a contract to purchase realty in his own name, but acts throughout the transaction as undisclosed agent of the corporation, the corporation has the right to sue thereon in its own name. *Cadillac-Pontiac Co. v. Norburn*, 23.

§ 25b. Liability of Officers for Torts Committed by Themselves for Corporation.

An officer of a corporation who commits a tort is liable therefor individually notwithstanding that he was acting for the corporation; and he will be held liable for fraudulent misrepresentation in bill of sale of corporate inventory upon constructive knowledge of such misrepresentation. *Mills v. Mills*, 286.

§ 25c. Action for Wrongful Dissipation of Assets.

An action against majority stockholders for wrongfully dissipating the assets of the corporation is for and in behalf of the corporation, and the corporation is a necessary party to such action. *Jordan v. Hartness*, 718.

COSTS.

§ 3a. Civil Actions—Successful Party.

In an action at law the court has no discretion in apportioning the costs, and upon judgment awarding plaintiff at least a part of the amount claimed by him he may not be taxed with any part of the costs, and judgment apportioning the costs among the parties is error. *Ingold v. Assurance Co.*, 142.

COUNTIES.

§ 3. Private and Corporate Powers.

While ordinarily a county does not perform any function except in a governmental capacity, in the exercise of which it is not subject to tort liability, where a statute authorizes it to engage in a function which is proprietary or corporate in character, the county may be held liable in tort to the same extent as a municipality engaged in the same activity. *Rhodes v. Asheville*, 134.

Operating airport is proprietary or corporate function of county. *Ibid.*

§ 24. Liability for Torts.

Complaint alleging that intestate was shot and killed by night watchman employed by county—municipal airport, *held* to state cause of action. *Rhodes v. Asheville*, 134.

COURTS.

§ 4c. Appeals to Superior Court From Clerk.

Since the Superior Court acquires jurisdiction of any special proceeding sent to it on any ground whatever from the clerk, with discretionary power in the Superior Court to remand, G.S. 1-276, a motion in the Superior Court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket, is untenable. *Plemmons v. Cutshall*, 595.

COURTS—*Continued.*

§ 14. Conflict of Laws—Comity.

Comity does not operate in opposition to settle statutory policy or enactments. *Credit Corp. v. Walters*, 443.

CRIMINAL LAW.

§ 2. Nature and Elements of Crime—Attempts.

An attempt to commit a crime is an act done with intent to commit that crime, carried beyond the mere preparation to commit it, but falling short of its actual commission. *S. v. Surles*, 272.

§ 5c. Burden of Proving Insanity.

The burden is upon defendant to prove his defense of insanity to the satisfaction of the jury. *S. v. Wood*, 740.

§ 11. Distinction Between Crimes and Misdemeanors.

Infamous offenses within the purview of G.S. 14-3, which prescribes that misdemeanors which are infamous or done in secrecy and malice shall be felonies, are those involving an act of depravity or of moral turpitude. *S. v. Surles*, 272.

Assault with a deadly weapon with intent to kill is a misdemeanor. *S. v. Silvers*, 300.

§ 12e. Jurisdiction of Minor Offenders.

Where defendant is over sixteen years of age during the time he is charged with willfully neglecting or refusing to support his illegitimate child, the Superior Court and not the Juvenile Court has jurisdiction, notwithstanding that conception of the child occurred prior to defendant's sixteenth birthday. *S. v. Bowser*, 330.

§ 17c. Plea of Nolo Contendere.

Plea of *nolo contendere* is tantamount to a plea of guilty for the purposes of the particular prosecution, and empowers the court to pronounce judgment against the accused for the crime charged in the indictment. *S. v. Stansbury*, 589; *S. v. Shepherd*, 605.

§ 27. Judicial Notice.

Courts will not take judicial notice that "white liquor" means nontaxpaid liquor. *S. v. Wolf*, 267.

§ 28. Presumptions and Burdens of Proof.

The burden is on the State to establish the guilt of the accused beyond a reasonable doubt, and not on the defendant to raise a doubt as to his guilt, and therefore reasonable doubt may arise from lack or deficiency of evidence as well as on the evidence introduced. *S. v. Tyndall*, 174.

§ 29a. Facts in Issue and Relevant to Issues—Collateral Matters in General.

Where defendants have elicited testimony disclosing delay in commencement of the prosecution against them in order to establish an inference that the State's witnesses were conscious of the weakness of the State's case against defendants, it is competent for the State to explain the delay for the purpose

of showing that such inference was not warranted by the circumstances. *S. v. Black*, 448.

§ 29b. Facts in Issue and Relevant to Issues—Evidence of Guilt of Other Offenses.

As a general rule, testimony of defendant's guilt of a prior crime which is separate and distinct from the crime charged, is incompetent as substantive proof. *S. v. Fowler*, 470.

As an exception to the general rule, testimony of defendant's guilt of a crime separate and distinct from the crime charged is competent when the offenses are similar and such other crime is so connected with the offense charged that it tends to show *quo animo*, intent, design, guilty knowledge or *scienter*, or to make out the *res gestæ*, or establish a chain of circumstances relevant to the offense charged. *Ibid.*

Defendant was charged with murder. *Held:* Testimony of defendant's confession that he was a fugitive from a life sentence for a prior murder, entirely separate and unconnected with the offense charged, is incompetent, and its admission constitutes prejudicial error. *Ibid.*

There was no evidence that deceased knew defendant's prior criminal record or had it in mind when she threatened to call the sheriff shortly before defendant killed her, but to the contrary the evidence supported the inference that deceased threatened to "call the law" because of present difficulty with defendant. *Held:* The inference that defendant killed deceased to prevent her from disclosing his past, rests upon mere surmise, and evidence of defendant's guilt of a prior murder and that at the time he was a fugitive from a life sentence therefor, is not competent to show motive for the offense charged. *Ibid.*

§ 31e. Footprints and Tire Tracks.

Evidence of shoeprints or tire tracks has no probative force to identify accused as the perpetrator of a crime unless it is shown that they were found at or near the place of the crime, were made at the time of the crime and correspond respectively with the shoes worn by accused at the time of the crime or the car driven by accused at that time. *S. v. Palmer*, 205.

The opinion of a witness that a particular shoeprint is the track of a specified person is without probative force unless the witness describes unique characteristics upon which he bases his judgment of identity. *Ibid.*

§ 32c. Ownership of Articles Found Near Scene of Crime.

Testimony of an expert as to the similarity of strings taken from the trunk of defendant's automobile and strings of one of thirty-six different fabrics of an unidentified quilt is incompetent and without probative value when there is no evidence tending to identify the quilt as the one which was wrapped about the corpse when it was recovered from the river. *S. v. Palmer*, 205.

Articles of clothing identified as those worn by the accused and the prosecutrix at the time of the crime, bearing tears and stains corroborative of the State's theory of the case, are properly admitted in evidence. *S. v. Speller*, 345.

§ 33. Confessions.

Where there is evidence that incriminating statements made by defendant to officers were voluntary, it is not error for the court to admit testimony thereof in evidence. *S. v. Speller*, 345.

CRIMINAL LAW—*Continued.*

While defendant is entitled to have his confession admitted in its entirety, including any explanatory or exculpatory statements contained therein, where defendant at the time of confessing to the crime charged also confesses to another and distinct offense, and the part pertaining to the crime charged can be separated from the part relating to such other offense without distorting or twisting the relevant part, only the part of the confession material to the inquiry should be received in evidence. *S. v. Fowler*, 470.

§ 34a. Admissions and Declarations by Defendant.

Incriminating statements voluntarily made by one defendant to an officer are competent against him, and will not be held incompetent because they contain statements tending to incriminate the other defendants, the jury being instructed to consider them solely against the defendant who made them. *S. v. Flynn*, 293.

§ 34d. Flight as Implied Admission of Guilt.

Flight of defendant may be considered with other circumstances as implied admission of guilt, but is not evidence of premeditation or deliberation in homicide prosecution. *S. v. Blanks*, 501.

§ 34e. Silence as Implied Admission of Guilt.

In this prosecution for reckless driving and driving while intoxicated, the State's evidence tended to show that an officer was making an investigation at the hospital after the accident and that a passenger in the car stated in the presence and hearing of defendant that the car belonged to defendant and that defendant was operating it at the time charged. *Held:* The circumstances were such as to call for a denial by defendant if the statements were false, and defendant's silence in the face of the statements is competent as an implied admission by him of their truth. *S. v. Sawyer*, 713.

§ 34g. Acts and Declarations of Co-conspirators.

Evidence of acts done by each defendant in furtherance of conspiracy which culminated in crime charged *held* competent even though indictment did not charge conspiracy. *S. v. Absher*, 598.

§ 35. Hearsay Evidence.

The hearsay rule precludes the admission in evidence of extrajudicial assertions of a third person for the purpose of establishing the truth of the facts asserted by such third person, but it does not preclude testimony as to such assertions for the purpose of showing the state of mind of the witness in consequence of such assertions. *S. v. Black*, 448.

Defendants elicited testimony disclosing delay in commencing the prosecution against them. To controvert the inference sought to be established by defendants from such delay, a deputy sheriff was permitted to testify for the State that an S.B.I. agent, not a witness, told the deputy not to arrest defendants at the time because they were giving the agent some information on another, unconnected case. *Held:* The testimony of the deputy is not incompetent as hearsay since it does not come within the rule. *Ibid.*

§ 38f. Experimental Evidence.

The State's case rested largely upon what a witness testified she saw through a certain window on a particular morning. Defendant introduced testimony that at the time in question the whole sky was overcast. Defendant

tendered witnesses who would have testified that on the day before the trial the sky was overcast, and that they stood outside the window at distances varying from one to ten feet and could not distinguish any objects in the room, but that they did not know the climatic conditions on the day in question. *Held:* The exclusion of the testimony was error, since it appears from the evidence that the experiments were made under conditions substantially similar to those existing on the day in question. *S. v. Hedgepeth*, 33.

While the similarity of the circumstances and conditions is a preliminary question for the court in determining the competency of testimony of experiments, the exclusion of such testimony will be held for prejudicial error when such evidence is very material, and adequate predicate for its admission has been laid. *Ibid.*

§ 40d. Competency of Evidence of Bad Character.

Where defendant offers no evidence and does not put his character in issue, testimony of a State's witness of defendant's confession of a prior offense, separate and distinct from the offense charged, violates the rule which forbids the State initially to attack the character of the accused and also the rule that bad character may not be proved by particular acts. *S. v. Fowler*, 470.

§ 42c. Cross-Examination.

It is reversible error for the court to ask a witness an impeaching question. *S. v. Cantrell*, 46.

§ 43. Evidence Obtained by Unlawful Means.

The fact that evidence is obtained by unlawful means does not render such evidence inadmissible in this State in the absence of statutory provision to the contrary, and therefore testimony by officers that they searched and found a quantity of nontax-paid liquor in defendant's car is competent notwithstanding the search was made without a warrant. *S. v. Vanhoy*, 162.

§ 46. Right of Defendant to Be Present and Represented by Counsel.

While in a capital case, accused is entitled to have counsel present at every stage of the proceeding, it is the duty of counsel to observe what transpires during the regular sittings of the court and to arrange for his notification should the occasion arise. *S. v. Cockrell*, 110.

§ 48c. Evidence Competent as Against One of Several Defendants.

Incriminating statements voluntarily made by one of defendants to an officer are competent as against him, and the fact that such statements contained references to conversations, declarations, acts and incidents said and performed by his codefendants will not render the testimony incompetent upon objection of each of the other defendants when in each instance objection was made the court instructed the jury that the testimony was competent solely against the defendant who made the statements and was not to be considered against the other defendants. *S. v. Flynn*, 293.

§ 50d. Expression of Opinion by Court During Progress of Trial. (In instructions see hereunder § 53f.)

The court, in interrogating defendant's witness, stated "in other words you were in sympathy with" defendant. *Held:* The remark is reversible error as tending to prejudice the witness or defendant in the eyes of the jury and as

constituting an expression of opinion by the court as to the weight or sufficiency of the evidence. *S. v. Cantrell*, 46.

A remark of the court, made during the selection of the jury, that it was no reflection on the prospective juror's mentality that he did not understand certain principles of law "as some professors know little, if anything, except what they teach," *is held* not to constitute prejudicial error, since it was not addressed to the testimony of defendant's witness, a psychiatrist and college professor, who later testified solely on the question of mental capacity, and further did not purport to disparage the testimony of a college professor in his field. *S. v. Wood*, 740.

§ 50f. Argument and Conduct of Solicitor.

Counsel must be allowed wide latitude in the argument of hotly contested cases, and the Supreme Court will not review the sound discretion of the trial judge in controlling the argument unless the impropriety of counsel is gross and calculated to prejudice the jury. *S. v. Bowen*, 710.

In this prosecution for larceny and receiving, the solicitor characterized defendants as "these two thieves," and the trial court refused to instruct the jury to disregard the solicitor's remark. *Held:* While characterization is not argument and the remarks were improper, they did not constitute comment on the personal appearance of defendants but a conclusion drawn from the evidence, and are of insufficient prejudicial effect to warrant the granting of a new trial on appeal from conviction of receiving. *Ibid.*

§ 51. Province of Court and Jury.

The competency of evidence is for the court, not the jury. *S. v. Fowler*, 470.

§ 52a (1). Consideration of Evidence on Motion to Nonsuit.

Upon defendant's motion to nonsuit, the evidence must be considered in the light most favorable to the prosecution. *S. v. Surles*, 272; *S. v. Braxton*, 312; *S. v. Skipper*, 387; *S. v. Reid*, 561.

§ 52a (2). Sufficiency of Evidence to Take Case to Jury in General.

Defendant's motion to nonsuit is properly denied if there is any competent evidence to support the allegations of the bill of indictment, considering the evidence in the light most favorable to the State and giving it every reasonable inference to be drawn therefrom. *S. v. Reid*, 561.

§ 52a (3). Sufficiency of Circumstantial Evidence to Overrule Nonsuit.

Circumstantial evidence of defendants' guilt of larceny *held* sufficient. *S. v. Flynn*, 293; *S. v. Skipper*, 387; *S. v. Absher*, 598.

Circumstantial evidence of unlawful possession of material and equipment for the manufacture of whiskey *held* sufficient to overrule nonsuit. *S. v. Medlin*, 302.

Finger print testimony *held* sufficient, with other evidence of guilt, to overrule defendant's motion to nonsuit. *S. v. Reid*, 561.

Evidence tending to show that defendant was the owner of a car covered by a chattel mortgage, that he was delinquent in a payment, that the car was struck at a grade crossing at night by a railroad train, that no one was in the car at the time of the collision, and that defendant filed a claim for the

damage on a policy of insurance on the car, *is held* insufficient to be submitted to the jury in a prosecution of defendant for placing the car on the track with intent to destroy it and with presenting a false sworn statement in support of the claim for insurance. Whether the indictment was sufficient to charge an offense under G.S. 14-278, *quœre? S. v. Freeman*, 725.

§ 53b. Instructions on Burden of Proof.

It is error for the court to charge that if jury has a reasonable doubt "growing out of the evidence in the case," to acquit defendant, since reasonable doubt may arise from lack or deficiency of evidence as well as on the evidence introduced. *S. v. Tyndall*, 174; *S. v. Braxton*, 312.

But when immediately thereafter the court charges the jury to acquit defendant if, after considering all the evidence, they do not have an abiding faith to a moral certainty of defendant's guilt, the charge will not be held prejudicial. *S. v. Wood*, 740.

Where at the beginning of the charge the court instructs the jury as to the common law presumption of innocence in defendant's favor and places on the State the burden of proving defendant's guilt beyond a reasonable doubt, and at the beginning of the instruction complained of, repeats the charge upon the burden of proof, it will not be held for reversible error that the court, in charging upon the question of manslaughter failed to charge again upon the burden of proof, since the charge will be construed contextually and it is not required that the court repeat the burden of proof each time it refers to any finding on the evidence. *S. v. Tyndall*, 174; *S. v. Suddreth*, 239.

The charge in this case *is held* to have properly instructed the jury upon the presumption of innocence and placed the burden on the State to prove defendant's guilt beyond a reasonable doubt and to have correctly defined reasonable doubt. *S. v. Glatly*, 177.

§ 53c. Instructions—Applicability to Counts and Evidence.

Court properly charges law of conspiracy when warranted by evidence even though indictment does not charge conspiracy. *S. v. Absher*, 598.

§ 53d. Instructions—Statement of Evidence and Application of Law Thereto.

It is the duty of the trial court to explain and apply the law to the evidence in the case, and an instruction which presents an erroneous view of the law or an incorrect application thereof, even though given in stating the contentions of the parties, is reversible error. *S. v. Hedgepeth*, 33.

The statement of the court in its charge that defendant had admitted that he had been tried and convicted of certain offenses, *held* not supported by the evidence of record. *S. v. Cantrell*, 46.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. *S. v. Plemmons*, 56

The charge of the court in this case, both as to the statement of the evidence and the law arising on the essential features of the evidence, *is held* to be in substantial compliance with the requirements of G.S. 1-180. *S. v. Vanhoy*, 162.

CRIMINAL LAW—*Continued.*

The charge in this case *held* to have correctly instructed the jury as to the essential elements of the offense charged. *S. v. Glatly*, 177.

The effect of defendant's evidence of good character is not an essential feature of the case, and the court is not required to charge thereon in the absence of a request. *Ibid.*

In a prosecution for a statutory crime it is not sufficient for the court merely to read the statute and the indictment, but the court, in discharging its duty to charge on all substantial features of the case, should explain the statute and outline the essential elements of the offense, and apply the law as thus defined to the evidence in the case. *S. v. Sutton*, 244.

Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi, if believed by the jury. *Ibid.*

Failure of court to charge upon law of flight *held* not error, there being no instruction that jury should consider flight as evidence of guilt, but merely recitation of testimony that after the offense defendant went to the city and surrendered to officers. *S. v. Blanks*, 501.

§ 53e. Charge on Circumstantial Evidence.

Where the State relies upon direct and circumstantial evidence for conviction, a charge that the burden is on the State to prove defendants' guilt beyond a reasonable doubt is sufficient in the absence of a request for special instructions as to the nature of circumstantial evidence. *S. v. Flynn*, 293.

§ 53f. Instructions—Expression of Opinion by Court on Weight or Credibility of Evidence.

Charge *held* not to have unduly emphasized testimony of State's witnesses. *S. v. Blanks*, 501.

§ 53h. Charge on Failure of Defendant to Testify.

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. G.S. 8-54. *S. v. Wood*, 740.

§ 53j. Charge on Credibility of Witnesses and Consideration of Corroborative and Impeaching Evidence.

Testimony of the sheriff in this case was competent for the purpose of contradicting the testimony of one of defendant's witnesses. *Held:* An instruction to the effect that the State contended that the jury should believe the testimony of the officer and find the defendant guilty of the offense charged, is erroneous as charging, that the impeaching testimony was substantive evidence, and the prejudicial character of the charge was emphasized by the fact that the witness singled out by the court was an officer of the law. *S. v. Hedgepeth*, 33.

The court correctly charged the jury as to the specific factors it might consider in determining the credibility of the witnesses and the weight to be attached to their testimony, and then charged that the jury might take into consideration "any other factors that suggest themselves to your good judgment and common sense to enable you to pass upon the credibility" of each witness. *Held:* The charge construed contextually merely instructed the jury that it might determine the credibility of the witnesses from the factors spe-

cially enumerated by the court and other circumstances in evidence tending to throw light upon these matters, and so construed, the charge is not erroneous. *S. v. Black*, 448.

Objection to the charge on the ground that in stating the contentions the court in effect gave the State's evidence of bad character the weight of substantive proof, is untenable when it appears that the court specifically charged the jury that such evidence should be considered only upon the question of the credibility of the defendant as a witness in his own behalf. *S. v. Muse*, 495.

The failure of the court to charge that the testimony of a witness, an alleged accomplice, should be scrutinized closely and accepted with care, will not be held for prejudicial error in the absence of a special request for instructions, since the matter relates to a subordinate rather than a substantial feature of the case. *Ibid.*

§ 53k. Instructions—Statement of Contentions.

Error of law, even though made in stating the contentions, must be *held* for reversible error. *S. v. Hedgepeth*, 33.

Objection that in stating the contentions, the court unduly emphasized the testimony of certain of the State's witnesses *held* untenable, it appearing that the court stated the testimony of these and other winesss fully and fairly. *S. v. Blanks*, 501.

§ 53m. Recalling Jury and Additional Instructions.

Upon request from the jury, the court gave additional instructions, presumably at regular session of court. *Held:* Counsel is charged with notice of matters transpiring during regular session of court, and therefore even if counsel for defendant were absent when the additional instructions were given, such absence would not perforce result in a new trial. *S. v. Cockrell*, 110.

Objection to the giving of additional instructions in the absence of counsel should be raised in the trial court and a finding and ruling made thereon as the basis for an exceptive assignment of error. *Ibid.*

§ 54b. Form, Sufficiency and Effect of Verdict.

When the jury undertakes to spell out its verdict without specific reference to the charge it is essential that the spelling be correct. *S. v. Ellison*, 59.

Where a general verdict of guilty is returned to indictment containing numerous counts, it will be presumed that the verdict relates to the counts supported by the evidence. *S. v. Vanhoy*, 162.

§ 56. Arrest of Judgment.

Where warrant fails to charge a criminal offense, the judgment thereon will be arrested, even *ex mero motu* in the Supreme Court. *S. v. Ivey*, 172.

A motion in arrest of judgment will lie only for some fatal defect appearing upon the face of the record proper, which does not include the case on appeal, and the court, in considering the motion, is confined to the record and may not consider extraneous facts or circumstances. *S. v. Cochran*, 523.

§ 57a. Motions for New Trial for Irregularity or Misconduct of or Affecting Jury.

One of the jurors, while the prosecution for homicide was pending, had the sister of the dead man as one of his passengers in a four mile automobile trip.

CRIMINAL LAW—*Continued.*

Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. *Held:* Exception to the refusal of the motion is not reviewable, since the court's ruling upon the competency of jurors is conclusive unless accompanied by some imputed error of law. *S. v. Suddreth*, 239.

§ 57b. Motions for New Trial for Newly Discovered Evidence.

No appeal lies from the discretionary refusal of the Superior Court of a motion for a new trial on account of newly discovered evidence. *S. v. Suddreth*, 754.

§ 57d. Motions After Verdict or Judgment—Writ of Error Coram Nobis.

The common law writ of error *coram nobis* to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. *In re Taylor*, 566.

Supreme Court has authority to entertain application for writ of error *coram nobis*. *Ibid.*

Application for writ of error *coram nobis* will be granted upon *prima facie* showing that defendant was charged with capital crime and was not represented by counsel, but ultimate merits of petitioner's claim are for trial court. *Ibid.*

If the trial court denies petitioner's application for writ of error *coram nobis* it should find the facts, and petitioner should be returned to prison and be allowed to appeal as in other proceedings; if it grants the petition, the judgments should be vacated, the pleas stricken out or permitted to be withdrawn, and the cases restored to the docket for trial in accordance with law. *Ibid.*

§ 60a. Judgment—Rendition, Form and Sufficiency.

A judgment is *in fieri* during term of court, and therefore where a judgment has been entered, unsigned, and several days later in the term a second judgment is duly signed and entered, the second judgment will be taken as the judgment of the court, and the provisions of the second judgment at variance with those of the first will prevail. The recitals in the second judgment of the sentence imposed in the first creates no ambiguity, but is construed as solely for the purposes of identification. *S. v. Gross*, 734.

§ 60b. Judgment and Sentence—Conformity to Verdict or Plea.

The record recited that defendant, through his counsel, "enters a plea of *nolo contendere* and permits the court to hear the evidence and find the facts." After hearing evidence the court announced that defendant was guilty of at least two charges on his own testimony, but later stated that the court had "rendered no verdict" but was pronouncing judgment on the plea of *nolo contendere*. *Held:* The court is authorized to render judgment upon a plea of *nolo contendere* and if defendant had intended the plea to be conditional, with the ultimate issue of his guilt or innocence to be determined by the court, he had ample opportunity to request permission to withdraw his plea, and in the absence of such request the judgment is affirmed. *S. v. Shepherd*, 605.

§ 62a. Severity of Sentence.

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State's Prison for a term not in excess of ten years, G.S.

14-3, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. *S. v. Surles*, 272.

A sentence directing that defendant be confined in the State's Prison for a term of ten years at hard labor is in excess of that permitted upon conviction of a misdemeanor, and in this case *certiorari* is granted and the cause remanded to the Superior Court for further proceedings in conformity with law. *S. v. Silvers*, 300.

A sentence of 18 months on the roads entered upon defendant's plea of guilty to a misdemeanor is within that permitted by law, and therefore cannot be "cruel and unusual" in a constitutional sense. *S. v. White*, 513.

Sentence within the limits prescribed by valid statute cannot be held cruel or unusual in the constitutional sense. *S. v. Stansbury*, 589.

The court, in imposing sentence within the limits prescribed by statute for an offense against the laws of this State, does not abuse its discretion in failing to take into consideration sentence theretofore served by the defendant for a related offense against the laws of the United States, but on the present record it affirmatively appears that the court carefully heard and painstakingly considered all available information concerning the nature of the offense, the character and propensities of defendant and his past record, in fixing the kind and amount of his punishment. *Ibid.*

§ 62f. Suspended Judgments and Executions.

Consent to suspended sentence waives right to appeal. *S. v. Barnhardt*, 223.

Where defendant appeals to the Superior Court from a suspended sentence entered in a municipal court, he may not complain that upon his plea of guilty in the Superior Court, sentence is entered without conditional or elective suspension. *S. v. White*, 513.

Upon conviction of abandonment, the suspension of judgment upon conditions for the support and maintenance of the minor child is expressly authorized by statute. G.S. 14-324. *S. v. Johnson*, 743.

Upon the hearing of whether suspension of judgment should be revoked and the judgment enforced for condition broken, the court is the sole judge of the credibility of the witnesses and the weight of their testimony, and therefore when the State introduces evidence tending to show that defendant willfully violated the conditions of suspension, the court may properly find such fact from the evidence and revoke the suspension of the judgment. *Ibid.*

§ 63. Recommendations and Matters Extraneous Sentence Proper.

In a prosecution of defendant for abandonment of his minor child, a recommendation in a judgment that if defendant be of good conduct while incarcerated, he be paroled after serving one-fourth of his time on condition that he maintain and support his wife and minor child, is not subject to objection by defendant on the ground that his wife was also included in the condition of the recommended parole, since the recommendation is merely precatory and constitutes no part of the sentence, and further, even if such parole should thereafter be tendered, defendant would be at liberty to reject it. *S. v. Johnson*, 743.

§ 67c. Matters Reviewable.

It is the province of the Supreme Court to decide questions of law and procedure presented by exceptions duly entered in the court below and brought

CRIMINAL LAW—*Continued.*

forward in briefs, and ordinarily it will not decide nonjurisdictional questions which are not thus presented. *S. v. Cochran*, 523.

But where record contains formal admission by solicitor of fact that negates offense, Supreme Court will nevertheless stay judgment in the exercise of its supervisory power. *Ibid.*

§ 68b. Right of Defendant to Appeal.

Where defendant consents to the suspension of sentence on a particular count, he waives and abandons his right to appeal in regard thereto. *S. v. Barnhardt*, 223.

Under Statutory provision, defendant in prosecution for wilfull nonsupport of illegitimate child may appeal from verdict establishing his paternity but finding him not guilty of wilfull nonsupport. *S. v. Clements*, 614.

§ 73a. Duty to Make Out and Serve Case on Appeal.

It is the duty of appellant to see that the record is properly made up and transmitted. *S. v. Wray*, 271.

§ 73c. Settlement of Case on Appeal by Court.

Where, upon the disagreement of the parties, the trial judge settles the case on appeal from order revoking suspension of judgment, defendant may not complain of the insertion therein of testimony presented at the hearing. G.S. 1-283. *S. v. Johnson*, 743.

§ 76c. Certiorari to Determine Legality of Imprisonment.

Certiorari will lie to the Supreme Court to determine the legality of defendant's imprisonment upon his contention that his sentence is in excess of that authorized by law for the offense of which he stands convicted. *S. v. Silvers*, 300.

§ 77d. Conclusiveness and Effect of Record.

The Supreme Court can judicially know only what appears of record. *S. v. Cockrell*, 110.

The Supreme Court is bound by the record. *S. v. Sutton*, 244.

§ 78d (1). Form and Sufficiency of Objections and Exceptions to Evidence.

Where objection is not made to the question but only to the answer of a witness, its exclusion is discretionary with the court. *S. v. Fentress*, 248.

§ 78e (1). Form and Requisites of Objections and Exceptions to Charge.

An exception to the failure of the court to declare and explain the law arising upon the evidence should point out wherein the charge is deficient. *S. v. Glatly*, 177.

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of G.S. 1-180. *S. v. Sutton*, 244.

Where the only part of the charge applying the law to the evidence in the case is the statement of the respective contentions of the parties, exceptions for failure of the court to instruct the jury as to the law arising on the evidence, taken in each instance where the court arrayed the facts in the form of a contention, are sufficient to present defendant's contention that the charge failed to comply with G.S. 1-180. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 78e (2). Necessity for Calling Court's attention to Inaccuracy in Statement of Contentions on Recapitulation of Evidence.

Ordinarily misstatements of the contentions or the evidence must be brought to the trial court's attention in time to afford opportunity for correction in order for an exception thereto to be reviewed. *S. v. Flynn*, 293.

Misstatements by the court of the contentions of the State must be brought to the trial court's attention in order for an exception thereto to be considered. *S. v. Spivey*, 375; *S. v. Black*, 448.

Exception to an immaterial misstatement of the evidence will not be considered when the matter was not called to the trial court's attention at the time. *S. v. Blanks*, 501.

§ 78g. Necessity, Form and Requisites of Assignments of Error.

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, G.S. 1-180, exceptions on this ground will not be considered. *S. v. Spivey*, 375; *S. v. Muse*, 495.

§ 79. Matters Not Discussed in Briefs Deemed Abandoned.

Where defendant attacks the ordinance under which he was convicted on the ground that it was beyond the police power of the municipality but does not attack it on the ground that its provisions are too vague and indefinite to be enforceable, the court will limit its decision to the ground properly presented and fully argued. *S. v. Stallings*, 252.

Exceptions not brought forward in the brief and argued will be deemed abandoned. *S. v. Stallings*, 252; *S. v. Muse*, 495; *S. v. Reid*, 561.

§ 80b (4). Dismissal for Failure to Prosecute Appeal.

Where defendant fails to file statement of case on appeal or apply for writ of *certiorari* within the time allowed, the appeal will be dismissed on motion of the Attorney-General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. *S. v. Garner*, 66.

Where defendant does not file case on appeal within the time allowed, the appeal will be dismissed upon motion of the Attorney-General, but when defendant has been convicted of a capital felony this will be done only after an examination of the record proper fails to disclose error or irregularity. *S. v. Lewis*, 539.

§ 80b (5). Dismissal for Incomplete or Defective Record.

Where only one of several indictments consolidated for trial appears in the record, and the record does not make it clear whether the indictment therein set out is the one referred to in the verdict, the appeal will be dismissed on motion of the Attorney-General for incompleteness and defectiveness of the record in material particulars. *S. v. Wray*, 271.

§ 81b. Presumptions and Burden of Showing Error.

Appellant has the burden of showing that alleged error was prejudicial in order to be entitled to a new trial. *S. v. Cockrell*, 110.

The presumption of regularity prevails in the absence of a showing to the contrary, and where matter complained of does not appear of record, appellant has failed to make irregularity manifest. *Ibid.*

The judgment of the Superior Court is presumed correct and the burden is on appellant to show error. *S. v. Wray*, 271.

The burden is upon appellant to show error against the presumption of regularity. *S. v. Shepherd*, 605.

§ 81c (2). Harmless and Prejudicial Error in Instructions.

A charge that reasonable doubt is a doubt based upon reason and common sense "growing out of the evidence in the case" is erroneous, since reasonable doubt may arise from lack of evidence as well as upon the evidence adduced, and such instruction must be held for prejudicial error since it involves the intensity of proof as well as the burden. *S. v. Braxton*, 312.

But when court immediately thereafter gives correct charge on reasonable doubt, error is not prejudicial. *S. v. Wood*, 740.

Where the charge of the court contains no prejudicial error when construed contextually, objection thereto will not be sustained. *S. v. Bowser*, 330.

§ 81c (3). Harmless and Prejudicial Evidence in Admission or Exclusion of Evidence.

Defendant, charged with uxoricide, contended that difficulty arose because of intimate relations between his wife and his landlord. *Held:* The action of the court in sustaining objection to question asked on cross-examination of the landlord whether he had not been accused of breaking up three homes theretofore, if error, cannot be held of sufficient prejudicial effect to warrant a new trial. *S. v. Cockrell*, 110.

Admission of testimony over objection is ordinarily harmless when identical matter is later introduced without objection. *S. v. Fentress*, 248; *S. v. Muse*, 495.

Where the answer negatives any harmful effect of an improper question the matter cannot be held prejudicial. *S. v. Muse*, 495.

§ 81c (5). Error Relating to One Count Only.

When separate convictions are consolidated for judgment, and error is found in trial of one indictment, cause must be remanded for proper judgment on other indictment. *S. v. Braxton*, 312.

Where it appears that the verdict of the jury found defendant guilty upon both of two counts in a warrant, one of which counts was legally insufficient to support a verdict or empower the court to render judgment thereon, a single judgment rendered on the verdict will be remanded for proper judgment on the valid count. *S. v. Camel*, 426.

§ 81h. Review of Findings on Motions.

Ordinarily, findings of the trial court that special veniremen were drawn and summoned in accordance with law and that there had been no discrimination against persons of defendant's race in preparing the jury list, are conclusive when supported by evidence, but when it appears that the trial court refused to give defendant time to investigate and procure evidence in support of his challenge to the array and that such refusal amounted to a denial of defendant's constitutional right to proper representation by counsel, the findings upon incomplete evidence are not conclusive. *S. v. Speller*, 345.

Findings of trial court that persons of defendant's race were not excluded from jury because of race *held* supported by evidence and conclusive on appeal. *S. v. Reid*, 561.

CRIMINAL LAW—*Continued.*

§ 83. Disposition of Cause in Supreme Court.

Where warrant fails to charge a criminal offense, the judgment thereon will be arrested, even if the Supreme Court must act *ex mero motu*. *S. v. Ivey*, 172.

The jury returned a verdict of guilty in each of two separate prosecutions of defendant. After verdict the court consolidated the cases for the purpose of judgment, and rendered a single judgment upon the verdicts. *Held:* A new trial being awarded for error in the trial of one of the indictments, the judgment must be set aside and the cause remanded for proper judgment upon the verdict rendered in the other indictment. *S. v. Braxton*, 312.

Cause remanded for proper judgment on valid count. *S. v. Camel*, 426.

Where record contains formal admission of solicitor which negates commission of crime, Supreme Court will stay judgment in exercise of its supervisory power notwithstanding absence of error of law in trial. *S. v. Cochran*, 563.

CURTESY.

§ 2. Rights and Incidents of Estate.

Where deed to husband and wife is reformed by striking his name therefrom and declaring her sole owner, husband is initially only tenant by curtesy initiate, and his release and right-of-way agreement, executed prior to reformation, does not bar her action for compensation for taking under eminent domain. *Bailey v. Highway Com.*, 116.

DAMAGES.

§ 13a. Instructions on Issue of Damages.

An instruction that the amount of damages rested solely in the discretion of the jury will not be held for reversible error when the charge, construed contextually, is to the effect that the discretion of the jury was within the bounds and under the instructions of the court which stated correctly the rule as to the measure of damages. *Tarkington v. Printing Co.*, 354.

DEATH.

§ 4. Time Within Which Action for Wrongful Death Must Be Instituted.

The requirement that an action for wrongful death be brought within one year after such death is a condition annexed to the cause of action itself, and not a statute of limitation, and the personal representative must allege and prove that his action is instituted within the time prescribed. *Wilson v. Chastain*, 390.

§ 6. Pleadings in Actions for Wrongful Death.

In this action for wrongful death it was alleged that death occurred "on or about midnight of November 21-22, 1947, and which is less than one year next preceding the institution of this action." The summons and complaint were stamped "filed Nov. 22, 1948, at 2:35 p.m." *Held:* Demurrer on the ground that it appeared upon the face of the complaint and record that the action was not brought within one year of death, was properly overruled.

DEATH—*Continued.*

§ 8. Wrongful Death—Expectancy of Life and Damages.

The measure of damages in an action for wrongful death is the present worth of the pecuniary loss suffered by those entitled to the distribution of the recovery, which is to be measured by the probable gross income of the deceased during his life expectancy less the probable cost of his own living and usual or ordinary expenses. *Hanks v. R. R.*, 179.

In an action for wrongful death, evidence relating to the age, health and life expectancy of deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had of earning money is competent. *Ibid.*

Also court records relating to prosecutions for nonsupport of wife; his verified complaint in his action for divorce setting forth agreement for custody and support of children; inventory of his estate showing salary due and claim for wrongful death as sole assets; are competent upon the issue. *Ibid.*

In an action for wrongful death, complaint and order for temporary alimony in an action for reasonable sustenance theretofore brought by the deceased's wife against him, which had not been served on deceased because of his death, are properly excluded. *Ibid.*

Since exemplary or punitive damages are not recoverable in an action for wrongful death, evidence of the pecuniary state of defendant is irrelevant, and objection is properly sustained to a question asked defendant as to the amount of land he owned. *Martin v. Currie*, 511.

DECLARATORY JUDGMENT ACT.

§ 2a. Actions Maintainable Under the Act—Subject of Action.

Action for judicial declaration of plaintiff's right to easement appurtenant or by necessity over lands of defendant held authorized by the Act, the proceeding not being to establish cartway which must be instituted before the clerk. *Carver v. Leatherwood*, 96.

DEEDS.

§ 1a. Nature, Requisites and Validity.

While the courts will go far to sustain informal and non-technical instruments purporting to convey interests in real estate, and while technical words of conveyance are not necessary, it is required that words of conveyance, in common parlance at least, be employed. *Pope v. Burgess*, 323.

The word "deed" ordinarily denotes an instrument in writing, signed, sealed and delivered by the grantor, whereby an interest in realty is transferred from the grantor to the grantee. *Ballard v. Ballard*, 629.

§ 2b. Competency of Grantee.

The provisions of G.S. 41-5 that an infant unborn, but *in esse*, is capable of taking by deed or other writing in the same manner as though he were born, gives the same capacity to an unborn infant to take property as such infant has under the law governing its right to take by inheritance or devise, which is from the time of conception. *Mackie v. Mackie*, 152.

Child is rebuttably presumed to be *in esse* 280 days prior to birth. *Ibid.*

DEEDS—*Continued.*

§ 3. Execution, Acknowledgment and Private Examination.

A married woman may attack the certificate of her acknowledgment and privy examination for (1) fraud, duress or undue influence known to or participated in by the grantee, G.S. 39-11, (2) nonappearance before the officer and no examination had, (3) forgery, (4) mental incapacity or infancy. *Lee v. Rhodes*, 190.

The attack by a married woman of the certificate of her acknowledgment and privy examination must be by direct action. *Ibid.*

Where the appearance of a married woman before the probate officer is admitted or established, the certificate of the probate officer as to the acknowledgment and privy examination of the married woman is conclusive, when regular in form, as to all matters which the officer is required to certify. *Ibid.*

Where a married woman admits her appearance before the probate officer, and the certificate of her probate and privy examination are regular in form, her testimony that the officer did not comply with the formalities required by statute is insufficient to justify the submission of an issue in regard thereto, and in this case where the issue was submitted upon such evidence, it was error for the court to refuse appellant's motion for a directed verdict thereon in his favor. *Ibid.*

Want of proper acknowledgment is affirmative defense upon which grantors have burden of proof, and therefore a directed verdict in favor of grantee is not peremptory instruction in favor of party having burden of proof. *Ibid.*

Acknowledgment is not necessary to validity of deed as between parties and their privies, the grantor not being married woman. *Ballard v. Ballard*, 629.

§ 5. Signing, Sealing and Delivery.

The requisites to the valid delivery of a deed are (1) an intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some word or act disclosing that the grantor has put the instrument beyond his legal control; and (3) acquiescence by the grantee in such intention. *Ballard v. Ballard*, 629.

Manual possession of the instrument by the grantee is not essential to delivery, delivery to some third person for his benefit being sufficient. *Ibid.*

The recording of the instrument by the grantor or his leaving it with the proper officer for recording with the intention that it shall thereby pass title to the grantee according to its purport and tenor, if followed by the assent of the grantee, constitutes an effective delivery, and, until the contrary is shown, assent of the grantee in such instance will be presumed if the conveyance be beneficial to him, even though he has no knowledge of the transaction. *Ibid.*

Whether deed has been delivered is mixed question of law and fact and witness cannot testify that deed was not delivered. *Ibid.*

§ 6½. Revocation of Conveyance of Future Interests in Deeds of Gift.

Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. *Held:* The child was *in esse* at the time of the attempted revocation and therefore the revocation was ineffectual. G.S. 39-6. *Mackie v. Mackie*, 152.

DEEDS—*Continued.*

§ 11. General Rules of Construction.

In construing a deed, the order and historic importance of the several parts and clauses have been given less emphasis in applying the rule that the intention of the grantor must be gathered from the four corners of the instrument. *Edgerton v. Harrison*, 158.

Settled rules of law or of property as well as established public policy will be given effect when properly applicable regardless of intent or even in contravention of it. *Ibid.*

§ 13a. Estates and Interests Created by Construction of the Instrument.

The granting clause and the *habendum* of the deed in question conveyed a fee simple and the warranty clause was in harmony therewith. Following the description and just before the *habendum* was inserted a paragraph reserving a life estate to grantors and providing that upon their death the conveyance should be in full force to the grantees "their lifetimes then to their children" with provision that if any of them should die without children, his share should go back to the "family." *Held:* The deed conveyed a fee simple. *Pilley v. Smith*, 62.

The granting clause is the very essence of the contract. *Ibid.*

§ 13b. Estates Created—Rule in Shelley's Case.

The rule in *Shelley's case* is a rule of property and not of construction, and the rule will be applied where there is a limitation over after a freehold estate to the heirs general or heirs of the body of the first taker unless it is apparent that the word "heirs" is used to describe a class to take by purchase. *Edgerton v. Harrison*, 158.

The deed in question conveyed to husband and wife a life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the *feme* grantee. *Held:* The husband took only a life estate, and the conveyance being to the wife and then to the heirs of her body, the rule in *Shelley's case* applies, and the estate in fee tail conveyed to the wife is converted by G.S. 41-1 into a fee simple absolute. *Ibid.*

§ 14b. Conditions Subsequent.

A mere statement of the purpose for which the property conveyed is to be used is not sufficient to constitute a condition subsequent, there being no clause of re-entry, nor limitation over, nor other provision to become effective upon condition broken, and nothing in the instrument to indicate that the grantor intended to convey a conditional estate. *Shaw University v. Ins. Co.*, 526.

DESCENT AND DISTRIBUTION.

§ 3c. Time From Which Person Is In Esse.

Child is rebuttably presumed *in esse* 280 days prior to birth. *Mackie v. Mackie*, 152.

§ 6. Adopted Children.

Proof of adoption under laws of another state *held* conclusive in absence of attack on constitutionality of statute of such other state under which adoption was had, since courts must act under presumption of constitutionality, and it

DESCENT AND DISTRIBUTION—*Continued.*

was error for lower court to hold adoption was invalid and respondent not entitled to distributive share. *Hunter v. Nunnamaker*, 384.

DIVORCE AND ALIMONY.

§ 12. Alimony Pendente Lite.

In an action under G.S. 50-16 for alimony without divorce, the amount of attorneys' fees allowable to plaintiff's counsel is for the determination of the trial court in its discretion, with reference to the condition and circumstances of the defendant, among other things, and the amount allowed is subject to review only for abuse of discretion. *Stadiem v. Stadiem*, 318.

The fact that after the institution of the action the client abandons the suit instituted in this State and institutes another suit for divorce in another state, and counsel employed here are permitted to withdraw since no further services could be performed, does not affect such counsel's right to an order allowing them counsel fees out of the property of defendant for the services performed here in good faith. *Ibid.*

The fact that an order allowing counsel fees has been entered in an action under G.S. 50-16 does not preclude the court from thereafter entering a second order allowing additional counsel fees for subsequent services. *Ibid.*

On this appeal from an order allowing additional counsel fees under G.S. 50-16, the amount *is held* not so unreasonable as to constitute an abuse of discretion when viewed in the light of the circumstances under which made. *Ibid.*

In a wife's action for alimony without divorce in which defendant's answer sets up the defense of adultery, it is error for the court to order temporary alimony to plaintiff without finding the facts with respect to the plea of adultery. G.S. 50-16. *Williams v. Williams*, 660.

§ 13. Alimony Upon Divorce From Bed and Board.

Where in the husband's action for divorce *a vinculo*, the wife sets up a cross-action for divorce *a mensa*, the court has the power to make an order for the payment of alimony upon the jury's determination of the issues in favor of the wife. *Norman v. Norman*, 61.

§ 17. Jurisdiction and Procedure to Determine Custody of Children of Marriage.

Decree for absolute divorce which awarded the custody of the child of the marriage was entered in another state and the parties thereafter moved to this State. *Held:* The proper procedure for either party to determine the right to the custody of the child is by a special proceeding under G.S. 50-13. *Hardee v. Mitchell*, 40.

Resident judge has concurrent jurisdiction with judge holding courts of district to hear and determine applications for custody of children; but neither may enter order outside the district except by consent. *Patterson v. Patterson*, 481.

§ 18. Hearings and Determination of Right to Custody of Children.

Findings that the parties had been married and divorced, that the wife was a person of good character, resident in this State, that the husband is financially responsible, and that the best interest of the minor child of the marriage

DIVORCE AND ALIMONY—*Continued.*

would be promoted by awarding its custody to the wife, is sufficient to sustain decree awarding its custody to her and requiring him to make contributions for the support of the child. *Hardee v. Mitchell*, 40.

The welfare of the child at the time of the contest is controlling in determining the right to the custody of the child as between its divorced parents. *Ibid.*

§ 19. Conclusiveness and Effect of Decree Awarding Custody of Children.

A decree awarding custody of the child of the marriage as between its divorced parents is determinative of the present rights of the parties, but is not permanent and may be later modified by the court upon change of conditions. *Hardee v. Mitchell*, 40.

§ 20. Enforcement of Decree Awarding Custody of Children.

Where decree awarding custody of children is rendered outside the district, violation of decree cannot form basis of contempt proceedings, since such decree is void. *Patterson v. Patterson*, 481.

DOWER.

§ 2. Lands to Which Dower Attaches.

An unacknowledged deed bars the claim of dower of the widow of the grantor if the signing, sealing and delivery of the instrument occurs before marriage. *Ballard v. Ballard*, 629.

DRAINAGE DISTRICTS AND CORPORATIONS.

§ 5. Nature and Validity of Assessments.

In order to constitute a valid drainage assessment it is necessary that the land assessed drain or flow into the canal, G.S. 156-43, and therefore on appeal to the Superior Court on a landowner's exceptions to order of the clerk confirming assessments as proposed by the commissioners, the drainage corporation has the burden of proving the number of acres of land the exceptor owns which drain into the canal and what amount said land should be assessed per acre. *Westover Canal, In re*, 91.

EASEMENTS.

§ 2. Easements by Necessity or Appurtenant.

Plaintiffs instituted this action to obtain a judicial declaration of their right to an easement appurtenant and by necessity over lands of defendants. *Held:* The action is authorized by G.S. Chap. 1, Art. 26, and the Superior Court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. *Carver v. Leatherwood*, 96.

In an action to declare plaintiffs entitled to an easement appurtenant or an easement by necessity, allegations that plaintiffs' land was cut off and isolated from any public road and praying that defendants be enjoined from blocking the only means of ingress and egress, is a sufficient allegation that plaintiffs have no other way of ingress and egress if such allegation be deemed essential. *Ibid.*

Allegations that defendants sold a parcel of a larger tract owned by them, that at the time a roadway existed to such smaller tract over the remaining

EASEMENTS—*Continued.*

land of defendants, that the parties contracted with a view to this condition and that the purchaser, who conveyed to plaintiffs, used the cartway without objection, with further allegations that the smaller tract was isolated from any public road, are sufficient to establish, as against demurrer, plaintiffs' right to an easement appurtenant and by necessity. *Ibid.*

ELECTION OF REMEDIES.

§ 2. Between Rescission and Damages for Fraud.

Where the purchaser is induced to buy certain property by the actionable fraud of the seller, the purchaser within a reasonable time after the discovery of the fraud must elect between the inconsistent remedies of repudiating the sale or affirming it, and the purchaser's voluntary act in recognition of the validity of the contract after discovery of the fraud constitutes an election and terminates his power to repudiate his purchase. *Hutchins v. Davis*, 67.

EMINENT DOMAIN.

§ 2. Necessity of Compensation.

Upon the taking of private property for a public use, the owner is entitled to just compensation for the property appropriated, measured by the loss occasioned to him by the taking. *Proctor v. Highway Com.*, 687.

§ 6. Delegation of Power.

State Highway and Public Works Commission has been delegated the power of eminent domain. *Proctor v. Highway Com.*, 687.

§ 8. Amount of Compensation in General.

The measure of damages for the taking of a part of a tract of land for highway purposes is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the portion left immediately after the taking, which difference embraces compensation for the part taken and compensation for injury to the remaining portion, less general and special benefits resulting to the landowner by the utilization of the property for a highway. G.S. 136-19. *Proctor v. Highway Com.*, 687.

If the State Highway and Public Works Commission elects to condemn a part of a tract of land upon which are located buildings, such buildings are a part of the real estate upon which they stand and must be taken into account in determining the amount of compensation in so far as they add to the market value of the land. *Ibid.*

But the commission is not entitled to coerce the owner into removing such buildings, or have the cost thereof taken out of the award. *Ibid.*

§ 14. Petition and Proceedings for Ascertainment of Amount of Compensation.

If the owner and the State Highway and Public Works Commission are unable to agree as to the amount of compensation for taking of property under eminent domain, either party may institute proceedings to have the matter determined. G.S. Chap. 40, G.S. 136-19. *Proctor v. Highway Com.*, 687.

§ 18. Trial Upon Appeal From Appraisers.

Upon appeal from the award of the appraisers in condemnation proceedings the trial in the Superior Court is *de novo*, and must proceed so far as the

EMINENT DOMAIN—*Continued.*

question of damages is concerned as though no commissioners of appraisal had ever been appointed, and therefore the court properly enters judgment upon the verdict of the jury regardless of whether it is greater or smaller than the award of the commissioners and regardless of which party took the appeal. G.S. 40-20. *Proctor v. Highway Com.*, 687.

§ 19. Judgment and Decree.

In the absence of an agreement between the parties, the condemnor has no right to compel the owner to remove buildings standing on the part of the tract condemned to the remaining lands of the owner, and the court properly refuses to coerce the owner to remove the buildings by impounding a part of the recovery, but commits error in adjudging that the recovery includes the cost of removing the buildings. *Proctor v. Highway Com.*, 687.

§ 21a. Actions to Recover for Damage—Limitations.

Plaintiffs alleged that the construction by defendant of a dam caused the retardation of the current of streams draining plaintiffs' land, which resulted in progressive injury to plaintiffs' land from improper drainage, the first substantial damage having occurred seventeen years prior to the institution of the action. It was alleged that the dam required no maintenance but that its mere construction was the cause of the injury. *Held:* The action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being to recover for an appropriation of plaintiff's property or an easement therein by reason of the operation of the dam, the action is barred by the three-year statute of limitations pleaded by defendant. *Tate v. Power Co.*, 256.

§ 21½a. Releases and Right-of-Way Agreements.

Release signed by husband does not bar wife's action for compensation upon subsequent reformation of deed to husband and wife by decree declaring her the sole owner of land, the release not having been registered. *Bailey v. Highway Com.*, 116.

§ 26. Nature and Extent of Title or Right Acquired.

Where private property is taken for a highway under the power of eminent domain, the fee remains in the owner, who may subject the land to any use not inconsistent with the easement appropriated, but the Highway and Public Works Commission acquires the right to use the entire right of way for highway purposes whenever it deems such action conducive to the interest of the public, including the right to remove from the right of way any obstructions to the free passage of the traveling public. *Proctor v. Highway Com.*, 687.

EQUITY.

§ 2. Laches.

The doctrine of laches follows the applicable statute of limitations. *Jarrett v. Green*, 104.

EVIDENCE.

§ 2. Judicial Notice of Political Subdivisions.

The courts will take judicial notice of the judicial district in which a specified county is located. *Patterson v. Patterson*, 481.

EVIDENCE—*Continued.*

§ 7e. Prima Facie Case—Burden of Going Forward With Evidence.

The making out of a *prima facie* case does not change the burden of proof, but merely places the burden of going forward with the proof upon the adverse party unless he would run the risk of an adverse verdict. *In re Westover Canal*, 91.

When plaintiff makes out a *prima facie* case, the burden of going forward with the evidence shifts to defendant, but if defendant elects to offer no evidence he merely assumes the risk of an adverse verdict. *Precythe v. R. R.*, 195.

§ 8. Burden of Proof—Defenses.

The burden of proof on an affirmative defense is on defendants. *Lee v. Rhodes*, 190.

§ 26. Similar Facts and Transactions.

Evidence of condition of floor of defendant's store some six months prior to plaintiff's fall, *held* incompetent, since condition was temporary and could raise no inference of condition at subsequent date. *Fanelty v. Jewelers*, 694.

§ 27½. Facts Within Knowledge of Witness.

A witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it. *Ballard v. Ballard*, 629.

§ 32. Transactions or Communications With Decedent.

Personal letters written by decedent to his granddaughter, one of the propounders, are competent upon the issue of mental capacity, the prohibition of G.S. 8-51 in caveat cases applying only to evidence of undue influence. *In re Will of McDowell*, 259

§ 39. Parol Evidence Affecting Written Instrument.

Parol testimony as to conversations or declarations of the parties at or before the execution of a written contract is incompetent to alter, add to, or contradict the writing in an action on the contract between the parties or persons claiming under them. *Potter v. Supply Co.*, 1.

The evidence tended to show that plaintiff entered into a contract with a shipbuilder for a boat equipped with an engine of certain specifications, but that plaintiff negotiated directly with the manufacturer for the engine and entered into a contract with the manufacturer for an engine of different specifications. *Held:* The manufacturer was not a party to the contract between plaintiff and the shipbuilder, and therefore the parol evidence rule does not preclude plaintiff from introducing evidence of verbal negotiations with the manufacturer for an engine of greater power. Further, the contract between plaintiff and the manufacturer for the engine became effective subsequent to the effective date of plaintiff's contract with the shipbuilder although the negotiations with the manufacturer antedated such contract. *Ibid.*

§ 42d. Admissions by Agent.

In order for an admission of the agent to be competent against the principal, the admission must be relevant to the issue, the agent must have been acting within the scope of his authority in making the admission, and the admission must relate to a transaction pending at the time it was made. *Fanelty v. Jewelers*, 694.

EVIDENCE—*Continued.*

An admission by the manager of a store as to the condition of the entrance, made some thirty days after plaintiff's fall at the store entrance, is incompetent in the absence of evidence that the agent had any independent authority to speak for the defendant store as to the subject of the declaration. *Ibid.*

§ 45. Opinion Evidence in General.

A witness may not give his conclusion as to a matter which involves his opinion of another person's intention in a particular transaction. *Ballard v. Ballard*, 629.

Testimony of a statement by the manager of defendant store that the store had "a very dangerous front" is incompetent as an expression of opinion rather than a statement of fact. *Fanelty v. Jewelers*, 694.

§ 46b. Expert and Opinion Evidence—Handwriting.

A granddaughter of deceased, who had lived in his house and had received numerous letters from him, is competent to testify as to his handwriting, and her testimony that the letters in question were in his handwriting is sufficient authentication, and objection that she did not testify that she knew his handwriting is too attenuate. *In re Will of McDowell*, 259.

§ 49. Opinion Evidence—Invasion of Province of Jury.

Testimony of the driver of a car that he would have passed defendant's truck several feet before reaching a highway intersection if the truck had not pushed him off the road, *is held* competent as a "shorthand statement of fact" and not objectionable as a conclusional assertion invading the province of the jury. *Tarkington v. Printing Co.*, 354.

§ 49½. Opinion Evidence—Conclusions Embodying Question of Law.

Whether a deed has been delivered presents a mixed question of law and fact, and therefore the conclusion of a witness that a deed "was never delivered" embodies an opinion as to law, and is incompetent. *Ballard v. Ballard*, 629.

EXECUTION.

§ 7. Attachment of Lien Under Execution.

A lien against the personal property of the judgment debtor is acquired upon seizure of the property by an officer under authority of an execution. *Finance Corp. v. Hodges*, 580.

§ 8. Priority of Liens.

An automobile purchased by a nonresident in another state and subject to a conditional sale contract, registered in accordance with the laws of such other state, was brought into this State by the nonresident while on a temporary visit. The automobile was seized under execution of a judgment obtained here against the nonresident. *Held:* The lien of the conditional sale contract is superior to the lien obtained by levy under execution. *Credit Corp. v. Walters*, 443.

An automobile of the judgment debtor was seized under execution prior to the registration of a chattel mortgage executed by him subsequent to the judgment but before the issuance of execution thereon. *Held:* The lien of execution has priority over the lien of the subsequently registered chattel mortgage. *Finance Corp. v. Hodges*, 580.

EXECUTORS AND ADMINISTRATORS.

§ 13a. Nature and Grounds of Remedy of Selling Property to Make Assets.

Beneficiary is entitled to pay debts of estate in order to prevent sale of unique property to make assets. *Jarrett v. Green*, 104.

§ 13f. Distribution of Proceeds of Sale.

Where land is sold to make assets to pay the debts of the deceased, the proceeds of sale retain the quality of real property to the extent necessary to discharge all liens thereon, and only the surplus, if any, becomes personal property and is payable to the personal representative as personal assets of the estate. *Williams v. Johnson*, 338.

Proceeds of sale, if insufficient to pay liens in full, may not be charged with any part of costs of administration, although court, in its discretion may tax part of referee's fee against proceeds of sale. *Ibid.*

§ 15g. Widow's Allowance.

Upon petition for allotment of widow's year's allowance, allegations in answer that widow was financially independent, that deceased's parents, beneficiaries of the estate, were aged and infirm and dependent, and that deceased's will evidenced his desire that widow receive no part of the estate, are irrelevant and were properly stricken on motion. *Edwards v. Edwards*, 176.

§ 17. Filing and Proof of Claims Against the Estate.

If the judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, G.S. 28-111, and to protect himself against the running of the statute of limitations as against the debt, G.S. 1-22, he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 338.

§ 24½. Distribution to Effect Desires or Direction of Deceased Not Having Force of Testamentary Disposition.

Where a contract of survivorship between tenants in common is ineffective because having no words of conveyance, deed executed by the administrator of the deceased tenant to the survivor under supposed authority of the contract, is without effect. *Pope v. Burgess*, 323.

Where will charges executors with carrying out wishes of testatrix, but wishes of testatrix are not expressed within the four corners of the will, a deed executed by the executors to an eleemosynary corporation purporting to effectuate the known wishes of testatrix, is ineffectual. *Saint Mary's School v. Winston*, 326.

§ 29. Costs, Commissions and Attorney's Fees.

Where the proceeds of sale of land to make assets to pay debts of the decedent are insufficient to pay all liens in full, the proceeds must be used exclusively for the payment of the liens, G.S. 28-105 (5), and no part of the proceeds may be taxed with costs of administration. *Williams v. Johnson*, 338.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Cause of Action.

Ordinarily an officer is protected in serving a warrant for the arrest of an accused named therein even though the warrant is defective, but he may be held liable for a forcible arrest when it appears on the face of the warrant

FALSE IMPRISONMENT—*Continued.*

that the offense is beyond the jurisdiction of the magistrate issuing the warrant or that the charge does not constitute a criminal offense. *Alexander v. Lindsey*, 663.

A warrant charging that the person therein named "did unlawfully and willfully trespass against the form of the statute," etc., while defective, is not void, and is insufficient to constitute a basis for an action for false imprisonment against either the officers executing the writ or the person swearing out the warrant. *Ibid.*

§ 2. Actions for False Imprisonment.

The evidence disclosed that a municipal policeman arrested plaintiff at the request of the sheriff of the county, and that the warrant remained in the possession of the sheriff at the time the officer made the arrest some fourteen miles away. *Held:* Nonsuit was improperly entered in plaintiff's action for false arrest and false imprisonment as to the sheriff and the officer making the arrest, but was properly granted as to the person who swore out the warrant. *Alexander v. Lindsey*, 663.

Good faith of the officers in making the arrest cannot be considered on the question of the lawfulness or unlawfulness of the arrest, but only on the question of damages. *Ibid.*

Defendant was arrested by an officer not having the warrant in his possession, and was turned over to the sheriff who had possession of the warrant. *Held:* Plaintiff in his action for false arrest and false imprisonment is entitled to recover only such actual or compensatory damages as he sustained from the time of his arrest until he was placed in custody of the sheriff. *Ibid.*

FALSE PRETENSE.

§ 2. Prosecution and Punishment.

A sentence upon a plea of *nolo contendere* in a prosecution for false pretense that defendant be confined in the State Prison for a period of not less than five nor more than six years, to be assigned to hard labor under the supervision of the State Highway and Public Works Commission, conforms to that authorized by G.S. 14-100 and is within constitutional limitations. *S. v. Stansbury*, 589.

FIREMEN'S RELIEF FUND.

§ 2. Right to Sue State Association.

A fireman may not sue the State Firemen's Association on a claim for benefits under the Act. G.S. 118-12. *Carroll v. Firemen's Asso.*, 436.

§ 3. Benefits Under State Association.

A claim for hospital expenses incurred as a result of an injury received by a fireman in the course of his duties does not come within the benefits provided for members of the State Firemen's Association. *Ibid.*

§ 11. Actions Against Local Funds.

Where a claimant states no cause of action against the local Firemen's Pension Fund, it is not necessary to consider his challenge of the validity of the act creating the local pension fund as successor to the Relief Fund theretofore existing under the general law, and the judgment that he recover nothing

against the trustees of the pension fund will be affirmed, and the appeal dismissed. *Ibid.*

§ 12. Benefits Under Local Funds.

A fireman may not accept benefits afforded by Ch. 26, Private Laws of 1937, and then assert that he is entitled to recover benefits for a single item covered by the general law, Ch. 41, Laws of 1925, which the private law supersedes in his community. *Ibid.*

FIXTURES.

§ 1. Determination of Whether Chattels Affixed Become Part of Realty.

Ordinarily, a building becomes a part of the realty, and though this rule is subject to the exception that the parties may provide to the contrary by express or implied contractual stipulation, the burden of proof is upon the party claiming that a builing is personalty to show that under the contract it retained that character. *Ingold v. Assurance Co.*, 142.

At the time of the lease there were two brick walls standing on the land. Lessee extended the walls and constructed a roof to provide a building for his business. The lease provided that if lessee discontinued his business and vacated the building before the expiration of the term, the building should automatically be turned over to lessor. Lessee joined as co-insurer with lessor in a policy of fire insurance on the premises. *Held:* It is apparent that the structure was erected for the better enjoyment of the premises and not as a trade fixture, and upon trial by the court under agreement of the parties, the court was not required to assume that the parties intended the structure to retain the character of personalty. *Ibid.*

FORNICATION AND ADULTERY.

§ 1. Nature and Elements of the Offense.

The statutory offense of fornication and adultery is the lascivious cohabitation by a man and a woman who are not married to each other, which implies habitual intercourse. *S. v. Ivey*, 172.

§ 2. Prosecution and Punishment.

The offense of fornication and adultery is statutory, and therefore the essential elements of the offense must be set forth in the warrant or bill of indictment. G.S. 14-184. *S. v. Ivey*, 172.

A warrant charging that defendant did lewdly and lasciviously associate with a woman to whom he was not married and "did engage in an act of intercourse" with her, fails to charge the statutory offense of fornication and adultery, and judgment against defendant is arrested by the Supreme Court *ex mero motu*. *Ibid.*

FRAUD.

§ 2. Misrepresentation.

Seller's statement as to time goods would arrive by independent carrier was no more than expression of opinion; and there being no evidence that goods were not loaded at time stated by seller or that delay was due to causes under seller's control, nonsuit was proper in buyer's action for misrepresentation as to time of shipment and delivery. *Straus Co. v. Economys*, 316.

FRAUD—*Continued.*

§ 4. Knowledge and Intent to Deceive.

President of corporation who signs bill of sale in a large amount five days after inventory will be held to have constructive knowledge of material misrepresentation therein. *Mills v. Mills*, 286.

§ 9. Pleadings.

While the constituent facts constituting fraud must be pleaded, no set formula nor precise technical language is required, but the pleading is sufficient if, upon a liberal construction, proof of the constitutive facts alleged would entitle the pleader to relief. *Mfg. Co. v. Taylor*, 680.

Plaintiff instituted action on a note. Defendant alleged that the note was given for balance due on the purchase price of a tractor, that prior to the sale defendant paid plaintiff to make an inspection of the tractor and report its condition, and that plaintiff's sales agent made false and fraudulent statements as to the condition of the tractor which induced defendant to make installment payments on the machine, and that when delivered the machine had basic defects amounting to a total failure of consideration. *Held:* The answer sufficiently alleges a counterclaim for fraud as against demurrer. *Ibid.*

FRAUDS, STATUTE OF.

§ 10. Contracts to Convey.

The fact that the assignment by the purchaser of a contract to convey is by parol is no defense to an action on the contract by the assignee against the vendor, since the statute of frauds is a personal defense which may be set up only *inter partes*. *Cadillac-Pontiac Co. v. Norburn*, 23.

GUARDIAN AND WARD.

§ 14. Collection of Assets.

A guardian is entitled, and is under duty, to hold to all security; and therefore where a guardian has obtained judgment against a prior guardian and later has obtained judgment for the same debt against the prior guardian and his wife, in his action to renew the judgments, a holding that he was not entitled to renew the second judgment is error, since the effect is to release the *feme* defendant of liability. *Grady v. Parker*, 166.

HEALTH.

§ 3. Creation, Powers and Duties of District Boards of Health.

A district board of health is a creature of the Legislature and has only such powers and authority as are given it by the Legislature, G.S. 130-66, as rewritten in Chap. 1030, Session Laws 1945. *S. v. Curtis*, 169.

A district board of health established pursuant to G.S. 130-66 is without authority to prescribe criminal punishment for the violation of its rules and regulations promulgated under subsection 4 of the statute, since such district is without power and authority to make laws, and if the statute be deemed sufficiently broad to grant it such authority, the delegation of such power is unconstitutional. *Ibid.*

HIGHWAYS.

§ 8. State Highway Commission—Ordinances and Regulations.

Plaintiffs sued the State Highway and Public Works Commission to enjoin it from enforcing its ordinance restricting the placing of advertising signs along the State highways, alleging that the ordinance is in excess of the authority vested in the commission and is unconstitutional. *Held:* Defendant's demurrer was properly sustained, since injunction will not lie against a State agency to prevent it from committing a wrong. *Schloss v. Highway Com.*, 489.

§ 16. Proceedings to Establish Cartway.

Proceeding to establish cartway must be instituted before clerk, but action to establish easement appurtenant or by necessity over lands of defendant is not such a proceeding and may be maintained in Superior Court. *Carver v. Leatherwood*, 96.

HOMESTEAD.

§ 4a. Nature of Right and Title to Homestead.

Right and title to homestead is created by the Constitution, Art. X, sec. 2, and a resident may have his homestead allotted even though he is solvent, G.S. 1-386, and while the sheriff must lay off homestead before levy and sale under execution upon real property against a resident debtor, G.S. 1-371, the allotment of the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead and does not create the right or vest title in the debtor. *Williams v. Johnson*, 338.

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. G.S. 1-369. *Ibid.*

§ 4b. Right to Homestead—Residence.

Homestead interest in land is terminated by the owner's removal from the State. *Scott & Co. v. Jones*, 74.

Evidence *held* insufficient to support finding that judgment debtor was resident of this State. *Ibid.*

§ 8. Continuance, Preservation, Waiver and Abandonment of Homestead.

When the homestead is once allotted, the only way the property embraced therein may lose its homestead character is by death, abandonment, or alienation. *Williams v. Johnson*, 338.

Payment of the judgment under which homestead was allotted does not extinguish the homestead. *Ibid.*

§ 9. Appraisal and Allotment of Homestead.

The registration of a certified copy of the report of the appraisers is indispensable only when the allotment is made on petition of the homesteader and when the homestead is laid off by the sheriff, failure to register report of the appraisers is an irregularity insufficient to invalidate the allotment. For statutory change on this aspect, see Chap. 912, Session Laws of 1945. *Williams v. Johnson*, 338.

HOMICIDE.

§ 16. Presumptions and Burden of Proof.

In a prosecution for homicide, the State has the burden of showing that deceased died by virtue of a criminal act and that such act was committed by the prisoner. *S. v. Palmer*, 205.

§ 19. Admissions.

Flight of a defendant may be considered with other circumstances as an implied admission of guilt, but it is not evidence of premeditation or deliberation in a homicide prosecution. *S. v. Blanks*, 501.

§ 20. Evidence of Motive and Malice.

Evidence of motive is competent, but is insufficient, standing alone, to sustain conviction of murder. *S. v. Palmer*, 205.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to sustain conviction of murder in the first degree. *S. v. Cockrell*, 110.

Circumstantial evidence as to the identity of defendants as perpetrators of crime *held* insufficient to be submitted to jury. *S. v. Palmer*, 205.

Evidence tending to show that defendant had animosity toward deceased, that he approached him armed with a gun and ordered him to "Stick 'em up" several times, and shot his unarmed victim when he had raised his hands as high as his head, *is held* sufficient to sustain conviction of murder in the first degree, and objection that there was no sufficient evidence of premeditation and deliberation is untenable. *S. v. Blanks*, 501.

§ 27a. Form and Sufficiency of Instructions in Homicide Prosecutions in General.

The court merely recited testimony that after the offense, defendant went to the city and surrendered to the officers. The failure of the court to charge upon the law of flight is not error, since in no place in the charge did the court instruct the jury that it should consider flight as evidence of guilt, much less that it might be considered as evidence of guilt of first degree murder. *S. v. Blanks*, 501.

§ 27b. Instructions on Presumptions and Burden of Proof.

The omission of the word "intentional" in stating the presumptions arising from an intentional killing with a deadly weapon will not be held for prejudicial error when the fact that the killing was intentional is not controverted and it appears from defendant's own testimony that he intentionally shot deceased but claimed that he did so in self-defense. *S. v. Suddreth*, 239.

Where the State's evidence shows an intentional killing with a deadly weapon, the failure of the court to reiterate the *quantum* of proof resting upon the State in one instance while stating the facts upon which the jury might find the defendant guilty of manslaughter upon defendant's evidence in mitigation, does not constitute reversible error, the charge being construed contextually. *Ibid.; S. v. Tyndall*, 174.

§ 27f. Instructions on Defenses.

An instruction limiting the right of self-defense to actual danger of death or great bodily harm, *held* error. *S. v. Anderson*, 54.

The court's charge upon murder in the second degree will not be held for error as taking away from the jury the right to consider defendant's plea of

HOMICIDE—*Continued.*

self-defense when immediately after giving the charge complained of the court gave a full and proper charge on the plea of self-defense. *S. v. Suddreth*, 239.

§ 27h. Form and Sufficiency of Instructions on Less Degrees of the Crime.

Defendant pleaded not guilty and did not testify personally or make any admission. Defendant's counsel did not admit that the gun with which deceased was shot was in the hands of defendant, but did offer to plead guilty of murder in the second degree. The court charged that defendant contended he was not guilty of any of the degrees of homicide, *seriatim*, and that he contended that the jury should have a reasonable doubt of his guilt and acquit him of any offense. *Held:* The charge was not prejudicial to defendant. *S. v. Blanks*, 501.

HUSBAND AND WIFE.

§ 4. Marital Rights, Privileges and Disabilities in General.

The common law rights and disabilities of husband and wife are in force in this State except in so far as they have been abrogated or repealed by statute. *Scholtens v. Scholtens*, 149.

§ 6. Wife's Separate Estate.

Where deed to husband and wife is reformed by striking out name of husband and declaring wife sole owner of property, husband is mere tenant by curtesy initiate, and his release and right-of-way agreement signed prior to reformation does not bar her action for compensation for taking under eminent domain, the release not being registered. *Bailey v. Highway Com.*, 116.

§ 11. Right to Maintain Action in Tort Against Spouse.

A husband may not maintain an action against his wife for a personal tort committed by her against him during coverture, since this common law disability has not been abrogated or repealed by statute. *Scholtens v. Scholtens*, 149.

§ 23. Instructions in Prosecutions for Abandonment.

In a prosecution of defendant for willful abandonment and nonsupport of his wife, an instruction which omits the element of willful abandonment as a necessary predicate for a verdict of guilty must be held for reversible error. *S. v. Gilbert*, 64.

INDICTMENT AND WARRANT.

§ 10. Identification of Person Charged.

A count in an indictment which does not name the person charged is insufficient to support a verdict and judgment. *S. v. Camel*, 426.

§ 13. Quashal.

Where the warrant upon which defendant is tried contains two counts, and one of them is sufficient to empower the court to render judgment, defendant's motion to quash is properly denied. *S. v. Camel*, 427.

A motion to quash will lie only for fatal defect appearing on the face of the warrant or indictment and matter *aliunde* the record may not be considered in determining the motion. *S. v. Cochran*, 523.

§ 15. Amendment.

The trial court has authority to permit the solicitor to amend a warrant charging defendant with willful failure to support his illegitimate child by

INDICTMENT AND WARRANT—*Continued.*

inserting the word "maintain" so as to charge his willful failure to support and maintain his illegitimate child. *S. v. Bowser*, 330.

INFANTS.

§ 12. Appointment of Guardian Ad Litem.

Where the appointment of a general guardian for infants is so incomplete and irregular that it is doubtful that such guardian had authority to represent the minors, the subsequent appointment of a guardian *ad litem* for the minors is not so defective as to render the appointment of the guardian *ad litem* invalid. *Whitehurst v. Hinton*, 16.

INJUNCTIONS.

§ 1a. Nature and Grounds of Remedy in General.

Injunction will not lie to restrain an act which has already been done at the time of the institution of the action. *Branch v. Board of Education*, 505.

§ 1b. Parties Who May Be Enjoined.

Injunction will not lie against an agency of this State to restrain it from committing a tort. *Schloss v. Highway Com.*, 489.

If officers of the State commit or threaten to commit a tort in the purported performance of their official duties they are individually subject to be sued or enjoined, and if they seek to defend on the ground of sovereign immunity, they must show their authority. *Ibid.*

§ 2. Inadequacy of Legal Remedy.

Injunction is available in proper instances to preserve the *status quo* and protect the parties from irreparable injury pending the final determination of the action provided there is no full, complete and adequate remedy at law. *Armstrong v. Armstrong*, 201.

Injunction will not lie to restrain tenant in common from cultivating lands, since possession alone is controverted and adequate remedy by ejectment exists. *Ibid.*

§ 4c. Subjects of Injunctive Relief—Trespass.

Injunction will not lie to restrain tenant in common from cultivating land, since tenant in common in possession is not a trespasser; but tenant may be enjoined from cutting trees. *Armstrong v. Armstrong*, 201.

§ 9. Hearings Upon the Merits.

The findings of fact made upon the hearing of an order to show cause why a temporary restraining order should not be continued are not binding upon the hearing of the cause upon its merits. *Branch v. Board of Education*, 505.

INSURANCE.

§ 19a. Fire Insurance—Statutory Form.

The provisions of the standard form of fire insurance policy are valid, and the rights and liabilities of both parties under the policy must be ascertained and determined in accordance with its terms. G.S. 58-177. *Gardner v. Ins. Co.*, 750.

INSURANCE—*Continued.*

§ 24a. Fire Insurance—Notice and Proof of Loss.

Ordinarily, plaintiff in an action on a policy of fire insurance must allege and prove that he filed proof of loss with insurer within sixty days after the occurrence of fire, as required by the policy, or waiver of such proof, and in the absence of allegation and evidence to this effect insurer's motion to nonsuit is properly allowed. *Gardner v. Ins. Co.*, 750.

§ 24b (4). Fire Insurance—Amount of Loss—Interest.

Where a fire policy provides that loss thereunder should be paid sixty days after proof of loss and ascertainment of the loss by agreement of the parties or by an award as provided in the policy, interest on the recovery cannot begin to run until sixty days after proof of loss was filed, and judgment awarding interest from date of the fire is error. *Ingold v. Assurance Co.*, 142.

Where lessor and lessee are jointly insured, interest on recovery will be computed as of date either files proof of loss, and insurer's contention that it was necessary for both to file proof is untenable. *Ibid.*

§ 24d. Fire Insurance—Persons Entitled to Payment of Loss.

Lessor and lessee were jointly insured in a fire policy. Upon destruction of the premises by fire, lessee was unwilling to have the fund used to replace the building, but instead, abandoned his lease. *Held:* Lessee was entitled out of the proceeds of the insurance to the amount representing the use of the building during the remainder of the term. *Ingold v. Assurance Co.*, 142.

§ 34d. Occurrence of Disability During Life of Certificate Under Group Policy.

The evidence in this case *is held* sufficient to be submitted to the jury upon the question of whether plaintiff, by reason of silicosis, became totally and permanently disabled within the terms of a disability clause in a group insurance policy prior to the date the disability provisions of the policy were terminated. *Ingram v. Assurance Society*, 10.

§ 60. Actions on Theft Policies.

The findings of the trial court that the diamond ring in question was property pertaining to the business or profession of insured and was also an article carried or held for sale, or for delivery after sale, by insured, *held* sustained by the record and to support judgment that its loss by theft was not covered by a residence and outside theft policy. *Orren v. Ins. Co.*, 618.

INTOXICATING LIQUOR.

§ 2. Construction and Operation of Control Statutes.

Even though the Alcoholic Beverage Control Act, G.S. Chap. 18, Art. 3, is of Statewide operation, it does not repeal the Turlington Act, G.S. Chap. 18, Art. 1, but the Turlington Act remains in full force and effect except as modified by the later law, and as thus modified is the primary law in territory which has not elected to come under the A.B.C. Act. *S. v. Barnhardt*, 223.

§ 4a. Possession in General.

The possession of nontax-paid liquor in any quantity anywhere in the State is unlawful. G.S. 18-48, G.S. 18-50. *S. v. Barnhardt*, 223.

The provisions of the Turlington Act making the possession of any quantity of intoxicating beverage *prima facie* evidence that the possession is unlawful,

with the burden on accused to show that such possession is legal within the exceptive provisions of G.S. 18-11, has been modified by the A.B.C. Act so that the possession in one's dwelling even in dry territory of not more than one gallon of liquor upon which the tax has been paid raises no presumption that the possession is unlawful. G.S. 18-49. *Ibid.*

Upon proof of defendant's possession of more than one gallon of tax-paid liquor in his dwelling in territory which has not elected to come under the A.B.C. Act, the burden is upon defendant to rebut the *prima facie* evidence by showing that such possession not only comes within the exceptive provisions of G.S. 18-11, but also that it was legally acquired and transported to his dwelling and kept there for family uses only, G.S. 18-49, G.S. 18-58. *Ibid.*

Testimony that defendant frequently slept in the house in which officers found more than one gallon of intoxicating liquor is insufficient to show that the house was defendant's private dwelling within the meaning of G.S. 18-11 and G.S. 18-58. *Ibid.*

Evidence tending to show that more than one gallon of intoxicating liquor upon which the tax had not been paid was found in a house owned by defendant in dry territory justifies an instruction to the effect that it is unlawful to possess at any one time more than one gallon of intoxicating liquor even in the possessor's home when defendant offers no evidence tending to show that the liquor was acquired from an A.B.C. Store in this State or was purchased in another state and legally transported to his residence in quantities of not more than one gallon at any one time. *Ibid.*

In a prosecution for possession of nontax-paid liquor the court will not take judicial notice that "white liquor" means nontax-paid liquor. *S. v. Wolf*, 267.

§ 6. Sale and Purchase.

It is unlawful to purchase in this State any alcoholic beverage except from an A.B.C. Store; a person may purchase outside the State and transport herein for his own personal use not more than one gallon of alcoholic beverage at a time. G.S. 18-49, G.S. 18-58. *S. v. Barnhardt*, 223.

Defendant was convicted of the unlawful sale of a bottle of tax-paid beer in a trial free from error, G.S. 18-126. The solicitor formally admitted that at the time of the sale, defendant possessed and displayed licenses for the sale of beer from the city, county and State, which "were then in full force and effect," and the officer-witness for the State testified that the licenses were owned and displayed at defendant's place of business. *Held:* Notwithstanding that the trial was free from error, the Supreme Court will stay the judgment, since, upon the record, it would be a manifest injustice to permit the imposition of sentence on the verdict rendered. *S. v. Cochran*, 523.

§ 8. Forfeitures.

Defendant admitted ownership of the car he was driving when arrested by the officers. Two bottles of nontax-paid whiskey were found in the car, but defendant denied that he had put any liquor in the car or had knowledge of its presence therein. *Held:* Verdict of the jury that defendant was guilty of unlawful transportation of intoxicating liquor is sufficient to sustain the court's order confiscating his car and ordering it sold in conformity with statute. G.S. 18-6, 18-48. *S. v. Vanhoy*, 162.

§ 9a. Warrant and Indictment.

A warrant which, stripped of nonessential words, charges defendant with unlawful possession of a quantity of nontax-paid whiskey, *is held* sufficient to survive a motion to quash. *S. v. Camel*, 426.

INTOXICATING LIQUOR—*Continued.*

§ 9d (1). Sufficiency of Evidence and Nonsuit—Possession—Variance.

Where there is no evidence that liquor found in defendant's possession did not have revenue stamps on containers, nonsuit on warrant charging illegal possession of nontax-paid liquor must be allowed, although evidence might have sustained conviction if warrant had charged illegal possession of intoxicating liquor. *S. v. Wolf*, 267.

Evidence of defendant's illegal possession of quantity of nontax-paid liquor *held* sufficient for jury on that count. *S. v. Camel*, 426.

§ 9d (2). Sufficiency of Evidence and Nonsuit—Illegal Transportation.

Evidence that officers found two full bottles of nontax-paid whiskey in defendant's car upon their search immediately after arresting defendant for driving the car recklessly and at excessive speed, is sufficient to overrule defendant's motion to nonsuit and support conviction of illegal transportation of intoxicating liquor. *S. v. Vanhoy*, 162.

§ 9d (3). Sufficiency of Evidence and Nonsuit—Illegal Possession of Equipment for Manufacture.

Circumstantial evidence disclosing that tools and materials appropriate for the construction of a still were found in defendant's barn, that a beaten path led from his house to the edge of the woods where a newly constructed still, with like material, was found, and that fermenting mash was found about 300 yards from his house, with vehicle tracks leading therefrom to the still, *is held* sufficient to be submitted to the jury upon a charge of unlawful possession of material and equipment for the manufacture of whiskey. *S. v. Medlin*, 302.

JUDGES.

§ 2a. Rights, Authority and Duties of Resident Judges.

In an action for divorce, the resident judge has concurrent jurisdiction with the judge holding the courts of the district to hear and determine an application for the custody of the children of the marriage, but may not hear matter outside district except by consent. *Patterson v. Patterson*, 481.

JUDGMENTS.

§ 17a. Form and Requisites in General.

While formal recitals in a judgment are not required by statute they are, nevertheless, not improper and are not to be regarded as unimportant. *Williams v. Trammell*, 575.

§ 17b. Conformity to Verdict.

A judgment must be supported by and conform to the verdict in all substantial particulars, and therefore where the verdict contains no finding sufficient to impose liability upon one of the parties, such party's exception to the signing of the judgment will be sustained. *Hutchins v. Davis*, 67.

§ 18. Process and Service as Jurisdictional Prerequisites.

In determining whether jurisdiction is acquired by the court rendering a judgment, the entire record is to be considered, and jurisdictional recitals in the judgment will not prevail over recitals in other parts of the judgment roll establishing facts to the contrary. G.S. 1-232. *Williams v. Trammell*, 575.

JUDGMENTS—*Continued.*

The judgment roll in a tax foreclosure suit contained one summons with endorsement thereon showing personal service on the president of the defendant corporation and another summons of precisely similar form and import with defective affidavit upon which service by publication was had. The judgment recited service by publication. *Held:* It appearing from the judgment roll that valid service on the corporation was had by personal service on its president, the judgment roll establishes jurisdiction notwithstanding the subsequent attempt of service by publication or the recital thereof in the judgment, and such judgment is not subject to collateral attack in an action to remove cloud on title. *Ibid.*

Motion to set aside judgment for want of proper service *held* correctly denied, the return of process having been amended to show proper service, and it being the service and not the return which confers jurisdiction on the court. *S. v. Moore*, 648.

A *prima facie* presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter. *Henderson County v. Johnson*, 723.

The findings of fact by the trial judge and the presumption of regularity arises from the fact that a court of general jurisdiction had acted in the matter, *is held* sufficient to sustain judgment denying motion to vacate a prior decree of foreclosure of a tax sale certificate on the ground that no valid service was obtained against the defendants therein. *Ibid.*

§ 19. Time and Place of Rendition.

A judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside the district in which the action is pending, unless authorized to do so by statute or by consent of parties appearing of record. *Patterson v. Patterson*, 481.

§ 21d. Lien of Void and Irregular Judgments.

Void judgment does not constitute lien on realty of judgment debtor. *Scott & Co. v. Jones*, 74.

Judgment by default final on open account instead of by default and inquiry is merely irregular, and the judgment constitutes lien on property of judgment debtor. *Ibid.*

§ 22a. Property Upon Which Lien Attaches.

A docketed judgment is a lien upon the realty of the judgment debtor and is also evidence of a personal debt of the judgment debtor, but creates no lien against the personalty. *Williams v. Johnson*, 338.

A judgment does not constitute a lien against the personal property of the judgment debtor. *Finance Corp. v. Hodges*, 580.

§ 23. Life of Lien and Limitations.

Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not renew the running of the statute against judgments then of record or thereafter docketed. *Williams v. Johnson*, 338.

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. G.S. 1-369. *Ibid.*

§ 25. Procedure to Attack—Direct and Collateral Attack.

Fatal defect in service of process which renders a judgment absolutely void must appear positively on the face of the record and not by evidence *aliunde* in order for the judgment to be subject to collateral attack on that ground. *Williams v. Trammell*, 575.

A judgment in *retraxit* was entered in a prior action between the parties. Plaintiff alleged that the judgment was entered in reliance upon the oral promise of defendant to convey to plaintiff a one-half interest in the land in controversy, and that the oral promise was afterwards breached. *Held:* In the absence of allegation of fraud, the complaint is insufficient to constitute the second action a direct proceeding to set aside the prior judgment for intrinsic fraud or other equitable cause collateral to that proceeding, and the prior judgment being *res judicata*, judgment on the pleadings for defendant in the second action was proper. *Yancey v. Yancey*, 719.

§ 27a. Attack and Setting Aside—For Surprise and Excusable Neglect.

Movant must show not only excusable neglect but also a meritorious defense in order to be entitled to have a judgment against him set aside for excusable neglect. G.S. 1-220. *Hanford v. McSwain*, 229.

Upon motion to set aside a judgment under G.S. 1-220, the findings of the court as to excusable neglect and meritorious defense are conclusive when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. *Ibid.*

Movant sought to have a judgment obtained against him on a partnership liability set aside for surprise and excusable neglect upon allegations in his answer and his motion that the creditor had actual notice of his withdrawal from the business prior to the extension of the credit sued on. *Held:* The conclusion of the trial court that movant had failed to show a meritorious defense was made under a misapprehension of the law and the facts, and the cause is remanded for further proceedings. *Ibid.*

§ 27b. Attack and Setting Aside—Void Judgments.

Where judgment has been rendered upon an insufficient publication of notice of summons and attachment, the judgment is void and does not constitute a lien upon the lands of the judgment debtor. *Scott & Co. v. Jones*, 74.

§ 27c. Attack of Erroneous Judgments.

The remedy against an erroneous judgment or order is by appeal, and a motion made before another Superior Court judge to set aside an order on the ground that the court was without authority to enter the order, is properly denied. *Norman v. Norman*, 61.

§ 27d. Irregular Judgments.

Where a judgment by default final instead of by default and inquiry has been rendered for goods sold and delivered on open account, the judgment is not void but is merely irregular, G.S. 1-211, G.S. 1-212, and when no attack is made upon it at the hearing, it constitutes a valid lien upon the lands of the judgment debtor. *Scott & Co. v. Jones*, 74.

§ 32. Operation of Judgment as Bar to Subsequent Action in General.

A former decision specifically adjudicating that minors had been properly made parties and were properly represented by guardian *ad litem*, affirmed

on appeal, is *res judicata* and precludes the raising of the identical question in a subsequent action between the parties involving the efficacy and effect of the former judgment. *Whitehurst v. Hinton*, 16.

The owner and driver of a car recovered judgment against the driver and owner of a truck for damages sustained in a collision upon verdict of the jury establishing, *inter alia*, that the plaintiff therein was not guilty of contributory negligence. Thereafter the passengers in the car sued the owner and driver of the truck for injuries sustained in the same collision. *Held:* As between the parties thereto the prior judgment was *res judicata* on the question of whether the driver of the car was guilty of negligence contributing to the collision, and bars the right of the owner and driver of the truck from joining the driver of the car as a joint *tort-feasor* in the second action, G.S. 1-240, notwithstanding that the plaintiffs in the second action were not parties thereto or bound by the judgment, and could have joined the driver of the car as a party defendant had they so elected. *Tarkington v. Printing Co.*, 354.

§ 33c. Operation of Judgments as Bar to Subsequent Action—Judgments of Retraxit.

Where plaintiff makes it appear to the court that the matters in controversy had been "settled," and thereupon the court adjudges that the plaintiff be nonsuited, *held* the judgment is not a judgment of involuntary nonsuit but a judgment in *retraxit*, and is a determination of the cause on its merits which will bar a subsequent action between the same parties on the identical cause. *Yancey v. Yancey*, 219.

§ 39. Actions on Judgments.

A successor guardian obtained judgment against the prior guardian and the surety on his bond, and at a later date recovered another judgment in a smaller amount against the prior guardian and his wife on a note signed by both and secured by deed of trust. *Held:* In a later action to renew the judgments, the holding of the trial court that plaintiff was not entitled to renew the second judgment because it and the first judgment represented one and the same indebtedness, must be held for error, since the effect is to release and relieve the *feme* defendant from any liability, and the guardian is entitled and is under duty to hold to all security. *Grady v. Parker*, 166.

JURY.

§ 1. Competency, Qualifications and Challenges for Cause.

One of the jurors, while the prosecution for homicide was pending, had the sister of the dead man as one of his passengers in a four mile automobile trip. Defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. *Held:* Exception to the refusal of the motion is not reviewable, since the court's ruling upon the competency of jurors is conclusive unless accompanied by some imputed error of law. G.S. 9-14. *S. v. Suddreth*, 239.

§ 3. Challenges to the Array.

Ordinarily, counsel must be prepared to support challenge to the array, but when court orders special venire from another county after convening of term without notice, counsel should be given time to investigate and procure evidence in support of their challenge to the array. *S. v. Speller*, 345.

JURY—*Continued.*

Ordinarily, court's findings that members of Negro race were not excluded because of race in preparing jury list, are conclusive, but findings are not conclusive when defendant's counsel are not given reasonable time to procure evidence in support of challenge to the array, and therefore findings are based on incomplete evidence. *Ibid.*

Findings of trial court on challenge to array that persons of defendant's race were not excluded from jury on account of race, *held* supported by evidence and conclusive on appeal. *S. v. Reid*, 561.

§ 8. Jury Lists and Rolls.

Exclusion of Negroes from jury solely because of race denies Negro defendants equal protection of laws. *S. v. Speller*, 345.

LANDLORD AND TENANT.

§ 1. Creation and Existence of Relationship.

Evidence tending to show that plaintiffs purchased the premises and took possession of the residence some 100 yards from the barn, but as a part of the consideration, permitted defendant grantor to retain possession to the end of the year of the land on which there were growing crops, and to store crops in the barn, but that plaintiffs also used the barn, *is held* insufficient to establish the relationship of landlord and tenant in respect to the barn, and nonsuit was properly granted in plaintiffs' action to recover on an implied warranty in the supposed lease. *Bason v. Smith*, 537.

LARCENY.

§ 5. Presumptions and Burden of Proof.

The finding of stolen property in defendants' possession some three months after it was stolen, under the circumstances of this case, *is held* too remote to raise a presumption of guilt of larceny, and the court's charge thereon *is held* for error upon exception. *S. v. Absher*, 598.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that all of the defendants were riding in the car with their victim when he discovered his money was gone, and direct and circumstantial evidence tending to show that defendants robbed him pursuant to a plan and conspiracy and thereafter divided the loot between them and sought by devices and maneuvers to baffle pursuit, two of them fleeing across several states, *is held* sufficient as to each defendant to be submitted to the jury upon the charges of larceny and receiving. *S. v. Flynn*, 293.

Evidence of defendant's guilt of larceny and receiving and guilt of highway robbery *held* sufficient to overrule his motions to nonsuit as to each charge. *S. v. Braxton*, 312.

Circumstantial evidence of defendant's guilt of larceny from the person *held* sufficient to be submitted to the jury and overrule defendant's motion to nonsuit. *S. v. Skipper*, 387.

Circumstantial evidence of defendants' guilt of larceny of car *held* sufficient. *S. v. Absher*, 598.

LARCENY—*Continued.*

§ 8. Instructions in Larceny Prosecutions.

A charge correctly defining larceny will not be held for error for failing to refer to larceny from the person even though the State's evidence tends to show this offense, since larceny from the person is but an aggravation of the offense. *S. v. Flynn*, 293.

A charge to the effect that the taking must be with criminal purpose and intent at the time to deprive the prosecuting witness of his property and to appropriate it to the accused's own permanent use, defines the felonious intent constituting an element of the offense of larceny, and objection thereto on the ground that it did not require the jury to find that the taking was with a felonious intent is untenable, certainly where the court had theretofore defined larceny as a felonious or criminal taking, etc. *S. v. Braxton*, 312.

LIMITATION OF ACTIONS.

§ 2a. Actions Barred in Ten Years.

An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within ten years from the date of the accrual of the cause of action. *Jarrett v. Green*, 104.

§ 3. Statutory Changes in Periods of Limitation.

While the General Assembly may not revive a remedy which has become barred by a statute of limitations, it may, at any time prior to the effectiveness of the bar, enlarge the time within which the remedy may be invoked. *Waldrop v. Hodges*, 370.

§ 6b. Accrual of Right of Action—Continuing and Intermittent Trespass.

In action to recover for "damage" to land caused by construction of dam and resulting progressive interference with drainage, complaint alleging that mere construction of dam caused injury and not alleging injury from dam's operation or taking of easement, states cause for continuous trespass barred by three-year statute. *Tate v. Power Co.*, 256.

§ 9. Fiduciary Relationships and Trusts.

In an action to establish a resulting trust instituted shortly after the guardian's death upon evidence that the lands were conveyed to the guardian personally but were paid for with guardianship funds, it is error to enter nonsuit upon the plea of laches and the statutes of limitation upon evidence that the guardian remained in possession for over forty years and devised same to plaintiffs by will when defendants offer evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there is no evidence of disavowal of the trust or adversary holding during the life of the guardian. *Cassada v. Cassada*, 607.

§ 10. Death and Administration.

If the judgment creditor wishes to share in the distribution of the personal estate of his deceased judgment debtor, G.S. 28-105, *et seq.*, and to protect himself against the running of the statute of limitations as against the debt, G.S. 1-22, he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 338.

MALICIOUS PROSECUTION.

§ 1a. Nature and Essentials of Right of Action in General.

The elements of a cause of action for malicious prosecution are (1) the institution of the criminal prosecution, (2) want of probable cause, (3) malice, and (4) termination of the prosecution in favor of the plaintiff. *Alexander v. Lindsey*, 663.

§ 5. Termination of Prosecution.

Withdrawal of criminal prosecution by compromise brought about by the defendant in the criminal prosecution is not such termination of the prosecution as will support an action by him for malicious prosecution. *Alexander v. Lindsey*, 663.

§ 9d. Competency of Evidence as to Termination of Prosecution.

In an action for malicious prosecution against the complainant who swore out the warrant, the policeman who made the arrest and the sheriff at whose request the arrest was made, evidence as to the withdrawal of the prosecution upon payment of the costs by complainant, is competent as against all three defendants, and it was error to strike out such evidence as against the sheriff and the policeman. *Alexander v. Lindsey*, 663.

§ 10. Sufficiency of Evidence and Nonsuit.

Plaintiff's evidence tended to show that he was arrested for trespass when he visited the estranged wife of complainant, that the arrest was made by a police officer without the warrant, that the sheriff refused to allow plaintiff bond because of personal animosity, and that the warrant was withdrawn by consent of the issuing magistrate upon the payment of costs by complainant. *Held:* In plaintiff's action for malicious prosecution, the evidence was sufficient to overrule nonsuit as against the sheriff and complainant, but was insufficient as against the officer making the arrest, there being no evidence that the officer had anything to do with the case except to make the arrest at the request of the sheriff. *Alexander v. Lindsey*, 663.

MASTER AND SERVANT.

§ 2a. Requisites and Validity of Contract of Employment.

A contract of employment must be definite and certain as to the nature and extent of the services to be performed, the compensation to be paid, and the person to whom and the place where the services are to be rendered. *Kirby v. Board of Education*, 619.

§ 4a. Distinction Between Employee and Independent Contractor.

An independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the results of his work. *Cooper v. Ice Co.*, 43.

§ 14a. Nature and Extent of Liability of Employer for Injuries to Employee in General.

The charge of the court as to the duties of an employer to his employee and the liability of the employer for negligent injury to the employee, *held* without error. *Martin v. Currie*, 511.

MASTER AND SERVANT—*Continued.*

§ 38c. Employers Liable for Compensation—Contractors and Subcontractors.

Where a contractor sublets a part of the contract to a sub-contractor without requiring from the sub-contractor certificate that he had procured compensation insurance or had satisfied the Industrial Commission of his financial responsibility as a self-insurer, G.S. 97-19, such contractor is properly held secondarily liable for compensation to an employee of the sub-contractor, even though the contractor regularly employs less than five employees. G.S. 97-2 (a). *Withers v. Black*, 428.

§ 39b. Compensation Act—Independent Contractors.

The evidence disclosed that intestate sold ice in his territory at defendant's regular retail price and thereafter paid defendant a stipulated sum for each block sold, that defendant turned over to him all orders received by it within his territory, furnished intestate a horse and wagon and feed for the horse, which were kept at defendant's place of business, that defendant required him to report at the plant at a stipulated time six days a week and that defendant delivered ice to the wagon upon request and did not permit intestate to haul on the wagon more than six blocks of ice at a time, with evidence that at times intestate was on defendant's pay roll, *is held* sufficient to support the finding of the Industrial Commission that intestate was an employee within the coverage of the Workmen's Compensation Act and not an independent contractor. G.S. 97-2 (b). *Cooper v. Ice Co.*, 43.

§ 40b. Whether Injury Results From "Accident."

An assault on an employee is an "accident" within the meaning of the Workmen's Compensation Act. *Withers v. Black*, 428.

§ 40c. Whether Accident "Arises Out of the Employment."

There must be some causal relation between the employment and the injury in order for the injury to arise out of the employment, but it is not necessary that the injury could have been foreseen or expected, it being sufficient if, after the event, the injury may be seen to have had its origin in the employment. *Withers v. Black*, 428.

Where the evidence discloses that the two employees had no personal contacts outside of the employment, and there is evidence that the dispute between them arose over the work they were performing for their common employer, the evidence is sufficient to sustain the finding by the Industrial Commission that an assault made by the one upon the other arose out of the employment, even though there be evidence *contra* that the dispute grew out of matter entirely foreign to the employment. *Ibid.*

§ 40d. Whether Accident "Arises in Course of Employment."

An injury suffered by an employee during the hours of employment while he is at the place of employment and is actually engaged in the performance of the duties of his employment, necessarily arises in the course of his employment. *Withers v. Black*, 428.

§ 41. Actions Against Third Person Tort-Feasors Under Compensation Act.

In action by subrogated insurance carrier in name of personal representative of deceased employee, third person tort-feasor may allege award of compensation as basis for his plea of contributory negligence of employer, which would

MASTER AND SERVANT—*Continued.*

defeat recovery of insurance carrier, but cross-action on employer's indemnity contract is properly stricken, since party may not contract against his own negligence. *Eledge v. Light Co.*, 584.

§ 53b (1). Amount Recoverable—Loss of Vision.

Upon evidence showing that claimant had suffered permanent loss of 95% of the vision of each eye, an award for permanent and total loss of vision of each eye is proper. G.S. 97-31 (q); G.S. 97-31 (t), as amended. *Withers v. Black*, 428.

§ 53e. Insurers Liable for Payment of Award.

The carrier of the insurance during the employee's last thirty day period of exposure to the hazards of an occupational disease is solely liable for compensation allowed for total disability from the occupational disease, even though employee was suffering from silicosis prior to the time the insurance company became the carrier, and had been notified as to compensation and rehabilitation provisions prior thereto, but had not been ordered to quit the occupation. *Bye v. Granite Co.*, 334.

§ 55d. Compensation Act—Review of Award.

Findings of fact of the Industrial Commission are conclusive when supported by evidence, even though the evidence permit an inference *contra*, but conclusions of law deduced from the facts found under a misapprehension of law are reviewable. *Cooper v. Ice Co.*, 43.

Where the findings of the Industrial Commission essential to the validity of its award are supported by competent evidence, such findings are binding on the courts on appeal. *Bye v. Granite Co.*, 334.

The findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence *contra* upon which the courts might have reached a different conclusion. *Withers v. Black*, 428.

§ 58. Employers and Employees Subject to Unemployment Compensation Act.

The provisions of the Employment Security Act classifying and designating those persons who are subject to the provisions of the Act, rather than the common law definition of the relationship of master and servant, are controlling when not capricious or unreasonable. *Employment Security Com. v. Distributing Co.*, 464.

Evidence *held* to support finding that defendant's salesmen were "employees" within definition of Employment Security Act. *Ibid.*

§ 60. Right to Unemployment Compensation.

Evidence that during a period of six months, claimant's efforts to obtain employment, in addition to reporting to employment service office, were limited to two occasions at one mill and one occasion at each of two other mills, is sufficient to sustain the Commission's finding that he had failed to show he had been actively seeking work within the purview of G.S. 96-13 (c). *Employment Security Com. v. Roberts*, 262.

§ 61. Hearings Before Employment Security Commission.

The burden is upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services come within the

MASTER AND SERVANT—*Continued.*

exceptions enumerated in subsections A, B and C. G.S. 98-8 (g) (6). *Employment Security Com. v. Distributing Co.*, 464.

§ 62. Appeals from Determination of Right to Unemployment Compensation.

The Chairman of the Employment Security Commission is vested with all authority of the Commission when the Commission is not in session, G.S. 96-4 (a), and where it appears that the claim was heard on appeal by the Chairman, and that claimant appealed therefrom "to the full Commission or to the Superior Court," the hearing of the appeal by the Superior Court is accordant with statute. *Employment Security Com. v. Roberts*, 262.

The findings of fact by the Employment Security Commission as to the eligibility of a claimant to benefits under the Act, are conclusive when supported by any competent evidence. *Ibid.; Employment Security Com. v. Distributing Co.*, 464.

MONOPOLIES.

§ 2. Agreements and Combinations Unlawful.

Lessee alleged that lessor covenanted not to sell any petroleum products other than those of lessee within a radius of 2,000 feet of the demised premises or from the demised premises. *Held:* There being no allegation that lessor agreed to purchase petroleum products from anyone, the provisions of G.S. 75-5 (2) are not applicable, and, upon the pleadings, lessee is entitled to the continuance to the hearing of the temporary order restraining lessor or its successor from selling competing products in the prescribed territory, and demurrer was improvidently sustained. *Oil Co. v. Garner*, 499.

MORTGAGES.

§ 2c. Equitable Mortgages.

The jury found that the paper writing at issue was not executed for the purpose of securing a debt, and at the same time found that a defeasance clause was omitted therefrom by mutual mistake. *Held:* The action of the trial court in setting aside the finding that the instrument was not executed for the purpose of securing a debt is error entitling appellant to a new trial when his rights are not precluded by answers to the other issues, since the court has no power to remove the irreconcilable repugnancy in the verdict, this being a matter for the jury exclusively. *Lee v. Rhodes*, 190.

Evidence tending to show that trustor, threatened with foreclosure, made an agreement with a third person under which such third person was to loan trustor an amount sufficient to discharge the deed of trust, and take a mortgage to secure the loan, that trustor signed an instrument upon representations by such third person that it embodied this agreement, but that in fact the instrument was a deed, *is held* sufficient to be submitted to the jury in a suit to have equity declare the instrument a mortgage. *Curry v. Andrews*, 531.

§ 24. Transfer of Equity of Redemption to Mortgagee or Trustee or Cestui.

There is no fiduciary relationship between trustor and the *cestui que trust* so that a conveyance of the property by trustor to the *cestui* would be presumed fraudulent in law, and therefore a conveyance by trustor to a third person who has purchased the note secured by the deed of trust will not be presumed fraudulent, and an instruction that the burden rested upon such

MORTGAGES—*Continued.*

third person to prove the *bona fides* of the transaction is error. *Curry v. Andrews*, 531.

§ 33b. Upset Bids and Resales.

The mortgagor or trustor is entitled to procure resales through advance bids made in conformity with the statute. *In re Sale of Land of Sharpe*, 412.

The fact that the trustor repeatedly procures resales through the making of advance bids in compliance with the statute works no legal wrong upon the *cestui* and is within the trustor's right, even though he procures such upset bids for the purpose of delaying foreclosure and the recovery by the *cestui* of the indebtedness. *Ibid.*

The clerk of the Superior Court is required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid is made in accordance with the statute, regardless of how often an upset bid may be placed. *Ibid.*

The provision of G.S. 45-28 that the clerk shall make such orders as may be just and necessary to safeguard the interests of all parties does not authorize him to enter orders abrogating rights conferred by the statute. *Ibid.*

The clerk has no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. *Ibid.*

§ 35e. Persons Who May Purchase at Foreclosure—Mortgagor or Trustor.

The mortgagor or trustor is entitled to purchase at the foreclosure sale under the power contained in the instrument. *In re Sale of Land of Sharpe*, 412.

§ 40. Agreements to Purchase at Sale for Benefit of Mortgagor.

An alleged parol agreement entered into by the parties just prior to foreclosure sale, which amounts to nothing more than an oral option to the mortgagor to repurchase, is insufficient to charge the purchaser at the sale as trustee or to impress a trust upon his title. *Gunter v. Gunter*, 662.

MUNICIPAL CORPORATIONS.

§ 6. Distinction Between Governmental and Private Powers.

All lawful enterprises of a municipal corporation must be engaged in for a public purpose, and the fact that a particular enterprise is for a public purpose does not determine whether such enterprise is a corporate or proprietary function, in the exercise of which the municipality is subject to tort liability, or a governmental function immune from such liability. *Rhodes v. Asheville*, 134.

Activity of a municipality in the exercise of judicial, discretionary or legislative authority conferred by its charter for the better government of that portion of the people of the State who reside within its limits, is a governmental function, in the exercise of which no tort liability exists unless expressly provided by statute, while a commercial activity or one engaged in by the municipality in its ministerial or corporate character for the private advantage of the compact community, is a ministerial or proprietary function in the exercise of which it is subject to tort liabilty. *Ibid.*

Operation of municipal airport is proprietary or corporate function. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

The distinction between a governmental and proprietary function of a municipal corporation is a judicial and not a legislative question, and legislative declaration as to the nature of the authority delegated by the statute is not controlling. *Rhodes v. Asheville, Appendix,* 759.

§ 8b (2). Private Powers—Public Utilities—Service to Nonresidents.

A city may not compel owners of property outside its limits to avail themselves of water and sewerage services, and on the other hand the city may prescribe such rules and regulations and impose such fees as in its discretion are reasonable and proper as conditions precedent to the right of those living outside its limits to connect with its sewer and water mains, the matter being entirely contractual. *Construction Co. v. Raleigh,* 365.

An ordinance imposing a connection fee on residents outside the city who avail themselves of the privilege of using the city's sewerage system after the effective date of the ordinance will not be held invalid as discriminatory because no fee was imposed on those who had made such connections prior thereto. *Ibid.*

A fee imposed upon residents outside the city limits for the privilege of connecting with the city's sewerage system is not a tax. *Ibid.*

Plaintiff's predecessor in title had executed a contract with the municipality under which the owners of land in the subdivision were to be permitted to connect with the municipality's water and sewer mains "in accordance with the laws, ordinances, rules and regulations" of the municipality. *Held:* The contract does not preclude the municipality from charging such owners a connection fee under an ordinance later enacted imposing such fee on all persons living outside its limits who avail themselves of the municipal facilities. *Ibid.*

§ 12. Liability for Torts—Exercise of Governmental or Private Powers.

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and G.S. 63-50, declaring such activity to be a public, governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability. *Rhodes v. Asheville,* 134.

§ 13a. Municipality's Liability for Acts of Officers and Agents in General.

Where a night watchman at a municipal airport kills a person on the property at nighttime, the question of whether he was acting in his capacity as servant or agent of the airport or in his capacity as a police officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. G.S. 63-53 (b), G.S. 63-58. *Rhodes v. Asheville,* 134.

§ 37. Zoning Ordinances.

The operation of a restaurant or a public dining room for profit is a commercial activity. *Kinney v. Sutton,* 404.

A zoning ordinance proscribing commercial activities within a residential district unless carried on by members of the immediate family and employing not more than two persons, excludes the operation of a public dining room employing nine persons in such district. *Ibid.*

G.S. 160-172 authorizes municipalities to enact zoning ordinances prohibiting the use of property within a residential district for business or commercial purposes. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

A zoning ordinance covering all land within the municipality and separating commercial and industrial districts of the city from those set apart for residences, schools, parks, libraries, churches, etc., and which is uniform and operates alike on all territory within the respective zones, bears a reasonable relation to the health, safety, morals and general welfare of the entire community and is a valid and constitutional exercise of the delegated police power of the municipality. *Ibid.*

Provision of a zoning ordinance which permits commercial and industrial activities within a residential district provided such activities are carried on by members of the immediate family and not more than two persons are employed therein, does not render the ordinance void as being discriminatory, since the commercial activities permitted thereunder in a residential district are so intrinsically different from unlimited commercial and industrial activities in general as to permit their separate classification. *Ibid.*

Fact that property would be more valuable for nonconforming use does not affect validity of zoning ordinance. *Ibid.*

§ 38. Regulations Relating to Public Morals.

The power to enact Sunday ordinances has been delegated to the municipalities of the State. *S. v. Trantham*, 641.

§ 39. Police Power—Regulations Relating to Public Safety and Welfare.

The Legislature has delegated to municipalities the power to license, regulate and control the operators and drivers of taxicabs. *S. v. Stallings*, 252.

Where the governing authority of a municipality has enacted an ordinance regulating operators and drivers of taxicabs within the municipality in the exercise of police power delegated to it, the wisdom and expediency of the regulation is solely for it, and the ordinance will be presumed valid and the courts cannot hold its terms unreasonable except for discrimination between persons in a like situation. *Ibid.*

An ordinance of a municipality, enacted pursuant to its delegated police power, requiring the drivers of taxicabs to wear distinctive caps, *is held* for the reasonable protection of the public against unlicensed drivers or operators, and is not invalid as having no relation to the public safety or welfare. *Ibid.*

§ 40. Enforcement, Validity and Attack of Regulations Under Police Power.

A party attacking the constitutionality of an ordinance enacted by a municipality in the exercise of its delegated police power, has the burden of showing that the restrictions bear no substantial relation to the public health, safety, morals or general welfare of the community. *Kinney v. Sutton*, 404.

A defendant in a prosecution for violation of a municipal ordinance may not attack the constitutionality of the ordinance on the ground of discrimination unless he makes it appear that the alleged discriminatory provisions operate to his hurt or adversely affect his rights or put him to a disadvantage, and when there is no discrimination within the class to which defendant belongs he may not raise the objection that it discriminates against another class or denies other persons equal protection of the law. *S. v. Trantham*, 641.

NEGLIGENCE.

§ 1. Acts and Omissions Constituting Negligence in General.

Actionable negligence is the failure to exercise proper care in the performance of some legal duty which defendant owes plaintiff under the circumstances in which they are placed, which is the proximate cause or one of the proximate causes of injury. *Wilson v. Motor Lines*, 551.

§ 4d. Repair and Condition of Buildings.

A person taking over possession of an elevator in a building for the purpose of repair is chargeable with the duty of exercising due care for the safety of those who rightfully use or attempt to use it. *McIntyre v. Elevator Co.*, 539.

§ 4f (2). Liability of Store for Fall of Patron on Floor.

The mere fact that a patron slips and falls on a waxed or polished floor is insufficient to impose liability upon the proprietor, since *res ipsa loquitur* does not apply and the mere waxing or polishing of a floor is not *ipso facto* evidence of negligence, but in order to justify recovery it must be made to appear that the proprietor either placed or permitted a harmful substance to be on the floor, or that a harmful substance had been there for a sufficient length of time to constitute constructive notice to him of its presence. *Harris v. Montgomery Ward & Co.*, 485.

Plaintiff's evidence tended to show that she slipped and fell on a small greasy place on the floor of defendant's store, that a few days theretofore a commercial preparation had been used on the floor which was slick if not properly applied, and that after its application on Saturdays the floor was always gone over each Monday morning in order to be sure there were no slick places left. *Held:* Considering the evidence in the light most favorable to plaintiff and giving her the benefit of every reasonable inference therefrom, it was sufficient to be submitted to the jury upon the issue of negligence. *Ibid.*

The fact that, subsequent to the fall of a patron on the entrance of defendant's store, defendant covered the entryway with rubber matting, is not an implied admission of negligence and is incompetent. *Fanelty v. Jewelers*, 694.

Testimony of a witness as to the slippery condition of defendant's store some six months prior to the injury in suit is incompetent to show the condition of the floor at the time of the injury, since such condition is of temporary character and could raise no inference as to the floor's condition at the subsequent date. *Ibid.*

It is the legal duty of a store proprietor to exercise ordinary care to keep the entryway to its shop in a safe condition for the use of customers entering or leaving the premises, and to warn them of hidden perils in the entryway known to it or ascertainable by it through reasonable inspection and supervision. *Ibid.*

No inference of actionable negligence on the part of a store proprietor arises from mere fact that a patron suffers personal injury from a fall occasioned by stepping on some slippery substance on the premises. *Ibid.*

Evidence that plaintiff stepped in some substance of an oily, greasy or slippery nature upon the entryway to defendant's store, without evidence as to the size or dangerous character of such substance, or that defendant placed or permitted it to be in the entryway, and without evidence as to the length of time it had been there prior to plaintiff's injury, is insufficient to overrule defendant's motion to nonsuit. *Ibid.*

The fact that a recessed entryway to a store is floored with terrazzo, sloping from the entrance door to the sidewalk at a rate not exceeding one-half inch

per foot, is insufficient of itself to show negligent construction of the entryway. *Ibid.*

Plaintiff customer fell into an open stairway while in a part of a store which was not open for the accommodation of customers. *Held:* Judgment of nonsuit was properly entered. *Francis v. Drug Co.*, 753.

§ 5. Proximate Cause in General.

Negligence need not be the sole proximate cause in order to support recovery, it being sufficient if defendant's negligence is the proximate cause or one of the proximate causes thereof. *Harris v. Montgomery Ward & Co.*, 485.

Proximate cause is that cause which produces the injury in continuous sequence without any new or intervening cause, and without which the injury would not have occurred, under circumstances from which injury is reasonably foreseeable. *McIntyre v. Elevator Co.*, 539.

Proximate cause is that cause which produces the injury in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Wilson v. Motor Lines*, 551.

§ 6. Concurring Negligence.

Where there is evidence of concurring negligence, the negligence of a person sought to be charged need not be the sole proximate cause of the injury but is sufficient to support recovery if it be one of the proximate causes thereof; but in the absence of evidence of concurring negligence, the negligence of defendant must be the proximate cause of the injury, since if plaintiff is also guilty of negligence, plaintiff's contributory negligence would bar recovery. *Harris v. Montgomery Ward & Co.*, 485.

§ 7. Intervening Negligence.

If original negligence would not have caused injury except for intervention of distinct wrongful act or omission on part of another or others, original negligence is insulated by such intervening act or omission. *Banks v. Shepard*, 86.

§ 9. Foreseeability and Anticipation of Injury.

While foreseeability is an essential element of proximate cause, it is not necessary that the particular injury should have been foreseen, but it is sufficient if in the exercise of ordinary care the wrongdoer could have foreseen in the light of attendant circumstances as they were known or ought to have been known by him, that some injury was likely to result from his negligence. *McIntyre v. Elevator Co.*, 539.

§ 10. Last Clear Chance.

A guest passenger not amenable to the charge of contributory negligence is not under necessity of invoking the principle of last clear chance. *Hensley v. Briggs*, 114.

§ 11. Contributory Negligence in General.

It is not required that plaintiff's negligence be the sole proximate cause of his injury in order to bar his recovery, but it is sufficient to bar recovery if it be one of the proximate causes of the injury. *Wilson v. Motor Lines*, 552.

NEGLIGENCE—*Continued.*

§ 18. Competency and Relevancy of Evidence.

Where there is evidence warranting the inference that marks on the ground at the scene where defendant's tractor overturned, causing the death of the driver, plaintiff's intestate, testimony as to such marks is competent. *Martin v. Currie*, 511.

§ 19a. Questions of Law and of Fact in General.

Foreseeability and proximate cause are ordinarily for the determination of the jury, and it is only when all the facts are admitted and only one inference may be drawn therefrom that the court will declare whether an act was the proximate cause of the injury. *McIntyre v. Elevator Co.*, 539.

§ 19b (1). Nonsuit on Issue of Negligence in General.

Plaintiff's evidence tended to show that defendant gave plaintiff's mother a can of a nationally advertised brand of glue to mend a table that his mother had bought from him, that when plaintiff undertook to open the can, there was a violent explosion when the contents of the can came in contact with the air, and the lid of the container flew up and hit him in the eye causing serious injury. *Held:* Judgment of nonsuit was properly entered. *Marler v. Salvage Co.*, 121.

Nonsuit on the issue of negligence is proper only when the evidence is free from material conflict and the only inference which reasonably can be drawn therefrom is either that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury. *Thomas v. Motor Lines*, 122.

Evidence *held* for jury on questions of negligence and proximate cause in action for injuries in fall down elevator shaft. *McIntyre v. Elevator Co.*, 540.

Evidence *held* for jury on question of defendant's negligence in striking co-worker's hand with axe. *Grant v. Bartlett*, 658.

§ 19c. Nonsuit on Issue of Contributory Negligence.

Since the burden of proof on the issue of contributory negligence is upon defendant, nonsuit on the ground of contributory negligence should be allowed only when plaintiff's evidence, taken in the light most favorable to him, so clearly establishes this defense that no other reasonable inference or conclusion can be drawn therefrom. *Dawson v. Transportation Co.*, 36; *Winfield v. Smith*, 392; *Dalrymple v. Sinkoe*, 453; *Brown v. Bus Lines*, 493; *McIntyre v. Elevator Co.*, 539.

Whether plaintiff placed hand under descending axe in hand of co-worker *held* for jury. *Grant v. Bartlett*, 658.

§ 20. Instructions in Actions for Negligence.

An instruction upon the question of intervening negligence to the effect that if the injury was a natural and probable consequence of the original negligence and could have been foreseen as a probable consequence thereof, it would not be insulated by intervening negligence, must be held for reversible error in failing to charge that the original negligence would be insulated if it would not have caused injury except for the intervention of some distinct wrongful act or omission on the part of another or others. *Banks v. Shepard*, 86.

In this action against a single defendant there was no evidence of concurring negligence. *Held:* An instruction that defendant's negligence need not be the sole and only proximate cause of the injury but that the burden is on

NEGLIGENCE—*Continued.*

plaintiff to show by the greater weight of the evidence that negligence on the part of defendant was a proximate cause, or one of the proximate causes of the injury, constitutes reversible error. *Harris v. Montgomery Ward & Co.*, 485.

Instruction that acts of four-year-old boy would have to be sole proximate cause of injury to absolve plaintiff, and that jury would have to further find that defendant was not guilty of any negligence in the respects pointed out, *held* error as omitting element of proximate cause. *Green v. Bowers*, 651.

NUISANCES.

§ 3a. Acts or Conditions Constituting Private Nuisance.

Fish scrap factory is not nuisance *per se*, but may constitute nuisance only in regard to the situation, environment or manner of operation. *Pake v. Morris*, 424.

§ 4. Actions to Abate Private Nuisances.

In an action to enjoin the operation of a lawful business on the ground that it constituted a nuisance, an issue as to whether the business was operated in a manner so as to create a nuisance is proper. *Pake v. Morris*, 424.

A fish scrap factory is a lawful business and does not constitute a nuisance *per se*, but may constitute a nuisance only in regard to the situation, environment and manner of its operation, and in plaintiffs' action to enjoin its operation an instruction to this effect and that its operation must create some substantial annoyance materially affecting plaintiffs' health, comfort or property in order to constitute a nuisance, is without error. *Ibid.*

In an action to enjoin the operation of a lawful business on the ground that it constitutes a nuisance, verdict establishing that its past manner of operation did not constitute a nuisance would not preclude plaintiffs from instituting subsequent suit if in the future the plant should be so operated as to create a nuisance. *Ibid.*

PARENT AND CHILD.

§ 2. Proof of the Relationship and Presumption of Paternity.

When conception occurs during the marriage of its mother, the child is presumed to be the legitimate offspring of the then husband of the mother, notwithstanding it is born after the termination of the marriage. *S. v. Bowman*, 203.

The presumption of legitimacy arising from conception during wedlock is not conclusive, but may be rebutted by evidence of impotency of the husband or nonaccess at the time the child was begotten. *Ibid.*

Neither the husband nor the wife is competent to testify as to nonaccess of the husband to rebut the presumption of legitimacy arising from the fact of conception during wedlock. *Ibid.*

§ 5. Liability of Parent for Support of Child.

An illegitimate child may not maintain an action against its father to require its father to provide for its support. *Allen v. Hunnicutt*, 49.

§ 9. Nature and Elements of Offense of Abandonment.

G.S. 14-322 relates only to legitimate children and an illegitimate child is not protected thereby. *Allen v. Hunnicutt*, 49.

PARENT AND CHILD—*Continued.*

§ 16. Judgment and Sentence for Abandonment.

Upon conviction of abandonment, court may suspend judgment upon condition that defendant support child. *S. v. Johnson*, 743.

PARTIES.

§ 9. Defect of Parties and Objection.

If there is want of parties necessary to a final determination of the cause, the trial court should not grant a nonsuit, but should order a continuance so that they may be brought in and plead. *Plemmons v. Cutshall*, 595.

§ 10a. Joinder of Additional Parties in General.

Consumer sued a power company for alleged negligence resulting in burning of consumer's property. The power company alleged that consumer's negligence caused fire and that consumer had executed indemnity agreement, and that insurers which had paid consumer's loss were real prosecutors of consumer's action. *Held:* Power company was *prima facie* entitled to joinder of named insurers. *Fleming v. Power Co.*, 65.

PARTNERSHIP.

§ 6c. Liability of Members for Partnership Debt—Notice of Dissolution or Withdrawal From Firm.

Where a partnership exists or there has been a course of dealing leading the creditor to believe a partnership exists, actual notice to the creditor prior to the extension of the credit sued on that the person upon whose credit he had theretofore relied had withdrawn from the business, relieves such person of liability thereon. *Hanford v. McSwain*, 229.

§ 6d. Liability for Torts Committed by Member of Firm.

Each partner is jointly and severally liable for a tort committed by one partner in the course of the partnership business, and the injured person may sue all members of the partnership or any one of them at his election. *Dwiggins v. Bus Co.*, 234.

§ 7. Actions Against Partners.

Where one partner is sued individually for a tort committed by him in the course of the partnership business, a judgment would be binding upon him individually, and as to the partnership property, but not as against the other partner individually, but the court at any time before judgment may direct that such other partner be brought in and made a party. *Dwiggins v. Bus Co.*, 234.

PERJURY.

§ 1. Nature and Essentials of Offense in General.

Perjury as defined by common law and enlarged by G.S. 14-209, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. *S. v. Smith*, 198.

A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order

PERJURY—*Continued.*

to be material to the issue and constitute a basis for a prosecution for perjury. *Ibid.*

§ 7. Sufficiency of Evidence and Nonsuit.

Proof of falsity of defendant's statement, made in prosecution for willful failure to support illegitimate child, as to number of times he had visited prosecutrix, *held* insufficient to support prosecution for perjury, since the testimony did not relate to matters determinative of that prosecution, and nonsuit should have been granted. *S. v. Smith*, 198.

PHYSICIANS AND SURGEONS.

§ 14. Degree of Care and Negligence in General.

Dentists, in their particular fields, are subject to the same rules of liability as physicians and surgeons. *Grier v. Phillips*, 672.

In an action for malpractice, the fact that defendant practiced dentistry without a license is immaterial upon the question of due care. G.S. 90-29, G.S. 90-40. *Ibid.*

§ 15. Knowledge and Skill Required.

A person practicing dentistry without a license is required to exercise the care and skill of a licensed dentist. *Grier v. Phillips*, 672.

§ 20. Sufficiency of Evidence and Nonsuit in Actions for Malpractice.

In an action for malpractice, the burden is upon plaintiff to show not only negligence but that such negligence was the proximate cause or one of the proximate causes of the injury or death. *Grier v. Phillips*, 672.

Plaintiff's evidence was to the effect that her intestate went to the office of a licensed dentist, that the dentist was out and that the dentist's wife, who had no license, extracted three of intestate's teeth, that thereafter intestate's gums became swollen and inflamed and that intestate died some ten days later of advanced nephritis. *Held:* There was no sufficient evidence to be submitted to the jury of negligence in the way or manner in which the teeth were extracted. *Ibid.*

Plaintiff's evidence tended to show that her intestate went to the office of a licensed dentist, that he was out, and that the dentist's wife, the defendant, who had no license, extracted three of intestate's teeth, and that intestate died some ten days thereafter of advanced nephritis. There was evidence that there is danger in pulling teeth in the presence of Vincent's disease and that intestate had this disease some four days after the extraction, but plaintiff's expert testimony raised only a surmise as to whether intestate had this disease at the time of the extraction. *Held:* Defendant's motion to nonsuit was properly allowed. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

The word "transaction" as used in G.S. 1-123 (1) means something which has taken place whereby a cause of action has arisen, either *ex contractu* or in tort; and the term "subject of action" as used in this statute means the thing in respect to which plaintiff's right of action is asserted. *Smith v. Gibbons*, 600.

A cause of action to recover the balance of compensation due plaintiff under an express contract of employment is improperly united with a cause of action

PLEADINGS—*Continued.*

to recover damages for assault committed by defendant upon plaintiff when he visited the office of the defendant to discuss the matter, and a cause of action to recover damages for false imprisonment of plaintiff by defendant growing out of the assault, since the action *ex contractu* is asserted in respect to the contract of employment and arose out of the wrongful breach thereof by defendant, while the causes of action in tort are addressed to the violation of right of liberty and security of person, constituting a different subject of action and arising out of a different transaction, *i.e.*, the infliction of personal injuries; but the causes of action in tort may be properly joined since they arose at the same time out of the same transaction, and further, relate to injuries to the person. *Ibid.*

Plaintiff instituted action to recover for breach of contract by defendant to purchase a shipment of prunes. Upon defendant's allegation that plaintiff was merely broker, a third party was brought in on plaintiff's motion, which third party alleged that it was vendor and entitled to recover against defendant for breach of the contract. *Held:* Defendant's demurrer for misjoinder of parties and causes should have been sustained, since defendant was confronted with two parties plaintiff each of which asserted that it was the vendor, and the validity of the claim of either one of them against defendant would render the claim of the other untenable. *Foote v. Davis & Co.*, 422.

§ 3a. Contents and Form of Complaint in General.

The function of the complaint is to state the ultimate and decisive facts which constitute the cause of action but not the evidence necessary to prove such issuable facts. *Long v. Love*, 535.

§ 10. Counterclaims, Set-Offs and Cross-Actions.

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, that the consumer had executed an agreement to indemnify, save harmless and defend the power company against all liability or loss due to defective construction, wiring or appliances on consumer's property, and that certain named insurance companies had made payments to consumer on account of his loss. *Held:* The power company was *prima facie* entitled to the joinder of the named insurers as parties to the action. *Fleming v. Light Co.*, 65.

A counterclaim may not be founded upon damages arising subsequent to the institution of the suit, and when it is so founded demurrer to the counterclaim is proper. *Credit Corp. v. Roberts*, 654.

§ 15. Office and Effect of Demurrer.

A demurrer presents the sole question whether the complaint is fatally defective in any respect set forth in the demurrer, admitting for the purpose the truth of the allegations of the complaint, and in passing upon the question neither the defenses alleged in the answer nor evidence offered at the hearing may be considered. *Carver v. Leatherwood*, 96.

Upon demurrer, the pleading must be construed liberally in favor of the pleader, giving him every reasonable intendment and presumption therefrom, and the pleading must be fatally defective before it will be wholly rejected. *Wilson v. Chastain*, 390.

PLEADINGS—*Continued.*

A demurrer admits the truth of factual averments and relevant inferences for the purpose of testing the sufficiency of a pleading, taking the allegations as written. *Oil Co. v. Garner*, 499.

Plaintiff demurred to defendant's counterclaim. The court reserved ruling thereon, heard evidence in the absence of the jury, and granted motion for nonsuit on the counterclaim. *Held:* The peculiar form of the proceeding taken under the supervision of the court does not forfeit defendant's right to be heard on any aspect of his pleading which, by liberal construction, presents a cause of action upon which he may be entitled to relief. *Mfg. Co. v. Taylor*, 680.

§ 17c. Defects Appearing on Face of Pleading and "Speaking Demurrers."

Where a complaint alleges that plaintiff's intestate was shot and killed by a night watchman employed by a municipal airport, demurrer on the ground that the watchman was an airport guard and at the time was exercising police powers conferred by G.S. 63-53 (b), is bad as a "speaking demurrer" since the defect does not appear on the face of the complaint. *Rhodes v. Asheville*, 134.

§ 19b. Demurrer for Misjoinder of Parties and Causes. (What causes may be joined, see *supra*, § 2.)

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. *Smith v. Gibbons*, 600.

Amendment of pleading allowed by trial court *held* to have obviated objection of misjoinder of parties and causes. *Sparks v. Sparks*, 715.

§ 22b. Amendment by Permission of Trial Court.

Plaintiff sued to recover a truck purchased by him which he permitted his brother to drive under a rental agreement. Plaintiff's evidence was to the effect that the truck plus certain rent money and money belonging to plaintiff were used in the swap of the truck for another vehicle. *Held:* The trial court had discretionary power to allow plaintiff to amend to assert his right to recover the new vehicle by virtue of a resulting or a constructive trust, since the amendment does not change the nature of the case or add any cause of action. *Baker v. Baker*, 108.

An application for leave to amend a pleading after time for filing has expired is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of discretion. *Hooper v. Glenn*, 570.

In an action to quiet title, the court has authority to permit plaintiff to amend by striking from the complaint a paragraph setting up an estoppel as a further ground for relief, G.S. 1-163, since the amendment does not effect a substantial change in the claim. *Sparks v. Sparks*, 715.

§ 24c. Proof Without Allegation.

Evidence in support of an agreement not alleged in the pleadings is properly excluded, since proof without allegation is unavailing. *Ingold v. Assurance Co.*, 142.

§ 31. Motions to Strike.

Upon petition for allotment of a widow's year's allowance, allegations in the answer to the effect that the widow did not need an allotment for her support, that deceased's will evidenced a desire that the widow should receive no part

PLEADINGS—*Continued.*

of the estate, and that defendants were the aged and infirm parents of deceased dependent upon the estate left them by the will, are irrelevant to the issues and could not be shown in evidence, and were properly stricken upon motion, since even the reading of the pleadings would be highly prejudicial to petitioner. *Edwards v. Edwards*, 176.

In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, motion to strike allegations that the injury was willful, wanton or malicious, is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. *Long v. Love*, 535.

PRINCIPAL AND AGENT.

§ 7e. Acts of Agent for Undisclosed Principal.

Where the president of a corporation executes a contract to purchase realty in his own name, but acts throughout the transaction as undisclosed agent of the corporation, the corporation has the right to sue thereon in its own name. *Cadillac-Pontiac Co. v. Norburn*, 23.

PROCESS.

§ 6. Service by Publication and Attachment.

Service of process by publication and attachment is valid only when the provisions of the statute have been strictly complied with. *Scott & Co. v. Jones*, 74.

The statutory requirement that service of summons by publication be not less than once a week for four successive weeks requires that the publication be spaced substantially at seven day intervals for four successive weeks, and therefore, while it is not required that twenty-eight days elapse between the first and fourth publication, a publication on Saturday of one week and on Monday of each of the following three weeks, is insufficient to meet the requirements of the statute. *Ibid.*

§ 7. Service on Domestic Corporations.

Service of the *sci. fa.* on the local agent of a bonding company who had executed the bond in behalf of the corporate surety is service upon the corporation. G.S. 1-97. *S. v. Moore*, 648.

§ 12. Service and Return, and Proof of Service.

It is the service of process and not the return of the officer which confers jurisdiction on the court, G.S. 1-101, and the return merely perfects the record and furnishes proof of service for the guidance of the court. *S. v. Moore*, 648.

While it is a better practice for officers to make their returns of process show with particularity upon whom and in what manner the process was served, their endorsement "served" implies service as the law requires and such return signed by the officer in his official capacity is sufficient to show *prima facie* service at least, and error in the date of service is immaterial. *Ibid.*

§ 14. Amendment, Correction and Waiver of Defects.

The court has discretionary power to permit an officer to amend his return by adding certain specifications as to the manner of service or the acts done in compliance with the statute, by including the names of the persons served and the capacity in which they were served, by adding or correcting the signa-

PROCESS—*Continued.*

ture of the officer, or in any other manner to disclose full compliance with the law. *S. v. Moore*, 648.

§ 16. Actions for Abuse of Process.

Where, in an action for abuse of process, the complaint alleges that the process was null and void, demurrer is properly sustained, since a cause of action for abuse of process lies only for the malicious misuse or misapplication of valid process. *McCartney v. Appalachian Hall*, 60.

PUBLIC OFFICERS.

§ 5b. Acts of de Jure Officers.

The presumption is in favor of the regularity of acts of public officers with the burden on the party asserting irregularity to prove it. *Kirby v. Board of Education*, 619.

QUIETING TITLE.

§ 2. Proceedings to Remove Cloud on Title.

Where in processioning proceedings, respondents deny title of petitioners and claim title in themselves by adverse possession, the proceeding is assimilated into an action to quiet title, and should be transferred by the clerk to the civil issue docket. *Simmons v. Lee*, 216.

In this action to quiet title, the evidence *is held* not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor. *Morris v. Tate*, 29.

Where, in an action to remove cloud from title, defendants have established superior record title to the land in dispute, the court should give defendants' requested instruction that plaintiff is not entitled to recover unless he establishes title by adverse possession by the greater weight of the evidence. *Lee v. McDonald*, 517.

An action by a father alleging that he owns the fee simple in a described tract of land and that his son and daughter claim that they own the land in fee as tenants in common by inheritance from their mother subject to the father's life estate as tenant by the curtesy, states a cause of action to quiet title and remove an adverse claim as a cloud thereon, G.S. 41-10, and the spouses of the children being necessary to a complete adjudication of the cause, their joinder cannot constitute a misjoinder of parties G.S. 1-69. *Sparks v. Sparks*, 715.

RAILROADS.

(As carriers see Carriers.)

§ 4. Accidents at Crossings.

Evidence in this action for wrongful death resulting from a collision at a railroad grade crossing *is held* sufficient to be submitted to the jury and overrule the railroad company's motion to nonsuit. *Hanks v. R. R.*, 179.

Judgments of nonsuit in actions on behalf of occupants of a truck involved in a collision with a locomotive at a railroad grade crossing upheld on authority of *Jeffries v. Powell*, 221 N.C. 415. *Hensley v. R. R.*, 617.

§ 7. Fires.

Evidence tending to show that defendant railway company permitted the accumulation of dry brush, trash, leaves and grass on its right of way, with

RAILROADS—*Continued.*

testimony of witnesses that fire broke out on the right of way immediately after defendant's engine had passed and within 12 or 15 feet of where the engine had been, and that the fire spread from the right of way to plaintiffs' adjoining land, *is held* sufficient to overrule motion to nonsuit in an action against the railroad company for damages for the fire. *Betts v. R. R.*, 609.

RAPE.

§ 3. Relevancy and Competency of Evidence in Rape Prosecutions.

Articles of clothing identified as those worn by the accused and the prosecutrix at the time of the crime, bearing tears and stains corroborative of the State's theory of the case, are properly admitted in evidence. *S. v. Speller*, 345.

§ 4. Sufficiency of Evidence and Nonsuit.

Evidence *held* sufficient to sustain conviction of capital crime of rape. *S. v. Speller*, 345.

§ 19. Instructions in Prosecutions for Carnal Knowledge of Female Under Sixteen.

In this prosecution of defendant for carnal knowledge of a female child over twelve and under sixteen years of age, defendant offered evidence of the immoral character of prosecutrix and her sister and aunt. *Held:* A charge that such testimony was not competent upon the question of defendant's guilt or innocence, but that it was material as bearing upon the likelihood of defendant to indulge in such conduct, is prejudicial error. *S. v. Sutton*, 244.

Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chasity of prosecutrix as elements of the offense fails to meet the mandatory requirements of G.S. 1-180, and an exception thereto will be sustained. G.S. 14-26. *Ibid.*

REFERENCE.

§ 2. Consent Reference.

Where there is no objection to the court's order of reference it is a reference by consent in legal contemplation. *Griffin v. Jones*, 612.

§ 4. Pleas in Bar.

Where in an action to redeem land sold under foreclosure under order of court and for an accounting, defendants plead estoppel, laches and title by adverse possession for seven years under color, G.S. 1-38, it is error for the court to resolve the pleas in bar against defendant and order a compulsory reference, since defendants are entitled to an adequate hearing on their pleas in bar before reference can properly be ordered, G.S. 1-189. *Grady v. Parker*, 166.

§ 7. Hearings and Proceeding Before Referee.

It is discretionary with the referee whether or not he should view the premises in an action involving conflicting claims of title. *Griffin v. Jones*, 612.

REFERENCE—*Continued.*

§ 14a. Preservation of Right to Jury Trial.

In order to preserve right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Simmons v. Lee*, 216.

A party should not tender issues as to questions of fact presented by his exceptions to the findings of the referee, but should tender issues of fact arising on the pleadings and relate his issues of fact to his exceptions and to the findings of fact by number, and demand a jury trial as to each of such issues. *Ibid.*

§ 17. Taxing of Costs.

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, G.S. 6-21 (6), and order of the court pro rating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. *Williams v. Johnson*, 338.

REFORMATION OF INSTRUMENTS.

§ 13. Title, Rights and Remedies of Third Parties.

At the time respondent entered upon the land, registered title thereto was in the name of husband and wife. The husband executed a release for all damages by reason of the taking of a right of way by respondent. The release and right of way agreement was not registered. Thereafter the deed to the husband and wife was reformed by judgment striking out the name of the husband and declaring the wife the sole owner of the land. *Held:* The sole interest of the husband in the land originally and at the time of signing the release was that of tenant by the curtesy initiate, and the release signed by him does not bar the wife's action for compensation. *Bailey v. Highway Com.*, 116.

REGISTRATION.

See, also, Mortgages and Chattel Mortgages.

§ 1. Instruments Required to Be Registered.

Where personal property subject to a conditional sales contract or chattel mortgage is brought into this State by the nonresident purchaser while he is on a temporary visit, the personalty does not acquire a *situs* here within the meaning of our registration statute, and such lien is not required to be registered in any county of this State. *Credit Corp. v. Walters*, 443.

Claims in equity resting in parol do not come within purview of registration statutes; but unregistered chattel mortgage creates no equity in the mortgagee. *Finance Corp. v. Hodges*, 580.

§ 5c. Rights of Parties Under Unregistered Instrument.

Where exclusive right to sell property is not registered, third parties have the right to deal with property as if there were no contract, and broker may not maintain an action against them for interference with his contract. *Eller v. Arnold*, 418.

REMOVAL OF CAUSES.

§ 4b. Fraudulent Joinder.

The allegations of a petition for the removal of the cause from the State to the Federal Court will be taken as true for the purpose of the motion. *Mills v. Mills*, 286.

In order to be entitled to removal from the State to the Federal Court on the ground of fraudulent joinder, the facts alleged in the petition must compel the conclusion as a matter of law, aside from the deductions of the pleader, that the joinder is fraudulent. *Ibid.*

Where plaintiff has a joint and separable cause of action against a resident and a nonresident, the joinder of the resident will not be held fraudulent even though the joinder be made for the sole purpose of preventing removal to the Federal Court. *Ibid.*

Upon facts alleged in petition, cause existed against resident corporate president, and therefore his joinder was not fraudulent. *Ibid.*

ROBBERY.

§ 3. Prosecution and Punishment.

Evidence of defendant's guilt of highway robbery *held* sufficient for jury. *S. v. Braxton*, 312.

SALES.

§ 6. Condition and Quality of Goods—Caveat Emptor.

Where the circumstances are such that it is the duty of the seller to appraise the buyer of defects in the subject matter of the sale, known to the seller but not to the buyer, the doctrine of *caveat emptor* does not apply, and in such instance *suppressio veri* is as much fraud as *suggestio falsi*. *Mfg. Co. v. Taylor*, 680.

§ 10. Time and Place of Delivery.

Evidence *held* not to show misrepresentation by seller as to time of shipment or that delay was due to causes under his control. *Straus Co. v. Economys*, 316.

§ 14. Express Warranties.

An express warranty is any affirmation or promise by the seller which has the natural tendency to induce the buyer to purchase the goods and upon which the buyer relies in making the purchase. *Potter v. Supply Co.*, 1.

§ 15. Implied Warranties.

Where a buyer purchases goods for a particular purpose, known to the seller, in reliance upon the skill, judgment, or experience of the seller in regard to the suitability of the goods, the seller, regardless of whether he is the manufacturer of the goods or not, impliedly warrants that the goods are reasonably fit for the contemplated purpose, and this rule applies even though the purchaser purchases for resale to others for the contemplated use. *Stokes v. Edwards*, 306.

§ 17. Parties to Warranties—Manufacturer, Selling Agent, Retailer.

Evidence that manufacturer sold marine engine to plaintiff rather than to shipbuilder who installed it, *held* sufficient. *Potter v. Supply Co.*, 1.

SALES—*Continued.*

§ 18. Waiver of Breach of Warranty.

A buyer does not waive his right to sue his seller for damages for breach of warranty by mere acceptance and retention of goods not fulfilling the warranty. *Potter v. Supply Co.*, 1.

§ 22. Remedies of Seller—Action for Breach of Contract.

Where in action for breach of contract to purchase merchandise, third party is joined on plaintiff's motion after defendant had alleged that original plaintiff was mere broker, and such third party alleges that it was seller and entitled to recover, defendant's demurrer for misjoinder of parties and causes should be sustained. *Foote v. Davis & Co.*, 422.

§ 25. Remedies of Purchaser—Recovery of Purchase Price.

Ordinarily, the purchaser will not be allowed to repudiate the contract of purchase unless he is in a position to restore to the seller what he has received under it. *Hutchins v. Davis*, 67.

Where the purchaser elects to repudiate the sale for fraud, he is entitled to be placed in *statu quo ante*, and therefore he should return or offer to return to the seller the property received by him, and he is then entitled to recover the purchase price, which he may do either by independent action or by counterclaim in the seller's action for the purchase price or any part thereof remaining unpaid. *Ibid.*

§ 27. Actions or Counterclaims for Breach of Warranty.

Evidence that seller expressly warranted engine would turn specified propeller 600 r.p.m. *held* sufficient for jury. *Potter v. Supply Co.*, 1.

Evidence of appellants' breach of implied warranty that the goods were reasonably fit for the purpose for which sold, and breach of the contract under which appellants accepted return of the merchandise and promised to replace the goods or give the purchasers their money back, *is held* sufficient to overrule appellants' motion to nonsuit. *Stokes v. Edwards*, 306.

§ 28. Action or Counterclaim for Fraud of Seller.

Where the purchaser, after discovery of the fraud, elects to retain the property, he is entitled to set up by way of counterclaim in the seller's action to recover the balance of the purchase price, the damages sustained by him by reason of the fraud, which ordinarily is the difference between the value of the property sold and its value if it had been as represented. *Hutchins v. Davis*, 67.

In the seller's action on a note given for the balance of the purchase price, the purchaser admitted the execution and nonpayment of the note and set up a counterclaim for fraud. *Held:* Judgment for the purchaser for the amount of damages resulting from the fraud as ascertained by the jury must be modified so as to permit recovery by the seller of the amount of the note with interest. *Ibid.*

Where the seller for a fee makes an inspection of the article at the buyer's request and thereafter represents that the condition of the article is "o.k.," it is immaterial whether the seller consciously misrepresents its condition or was merely recklessly reporting something to be true of which he had no knowledge. *Mfg. Co. v. Taylor*, 680.

Defendant's evidence on his counterclaim was to the effect that he watched a tractor at work, advised plaintiff's sales agent that he knew nothing about

SALES—*Continued.*

tractors but would buy the tractor if plaintiff would take the machine back to its plant and check its condition, that this was done upon the payment of a fee by defendant, that upon inquiry by defendant, plaintiff's sales agent represented the condition of the tractor to be good, and that when delivered the block of the engine was bursted and the piston rods of the cylinders operating the hoist had pulled out. *Held:* Whether defendant might reasonably rely upon the representations as to the tractor's condition under the circumstances was a question for the jury, there being a reasonable inference that such defects existed at the time the machine left plaintiff's plant. *Ibid.*

§ 29. Actions on Seller's Agreement to Make Good Defect or Return Purchase Price.

Where, after making complaint that the goods were not fit for the purpose for which sold, the buyer returns the goods and refrains from instituting legal proceedings in consideration of the seller's oral promise to replace the goods or give the buyer his money back, the oral agreement to make reparation is a new contract supported by sufficient consideration and the buyer may recover for its breach. *Stokes v. Edwards*, 306.

§ 30. Actions for Damages Resulting From Defects or Inherent Danger.

Plaintiff's evidence tended to show that defendant gave plaintiff's mother a can of a nationally advertised brand of glue to mend a table that his mother had bought from him, that when plaintiff undertook to open the can, there was a violent explosion when the contents of the can came in contact with the air, and the lid of the container flew up and hit him in the eye causing serious injury. *Held:* Judgment of nonsuit was properly entered. *Marler v. Salvage Co.*, 121.

Where the seller represents that the article sold is suitable for a particular use when in fact it is eminently dangerous when so used, the seller is liable for injury resulting from such use to the same extent as if he had sold the article knowing it to be dangerously defective. *Dalrymple v. Sinkoe*, 453.

Evidence *held* for jury on issues of negligence and contributory negligence in this action by purchaser to recover for injuries sustained when burner exploded when used with liquid gas, the seller having represented that burner was constructed to use liquid gas, notwithstanding warning in small letters on metal plate on burner that burner was not to be used with this type of fuel. *Ibid.*

SCHOOLS.

§ 8a. Election, Appointment and Tenure of Teachers.

Contract to teach in public schools of district is not contract to teach in any particular school of the district. *Kirby v. Board of Education*, 620.

And when offer is to teach "in public schools of the district," acceptance to teach "in Danbury public school" of the district, is such variation of offer that it does not constitute an agreement. *Ibid.*

Notice of acceptance of a teacher contract or an extension thereof must be given within the time prescribed by statute. G.S. 115-354. *Ibid.*

Where a letter containing notification of the rejection of a teacher is registered and mailed to her prior to the close of the school term during which she was employed, there is a compliance with G.S. 115-359 and it is sufficient to terminate the contract even though not received by the teacher until after the expiration of the school term. *Davis v. Moseley*, 645.

SCHOOLS—*Continued.*

§ 8d. Actions on Teachers' Contracts.

G.S. 115-45 authorizes actions against county boards of education on teachers' contracts; and this provision was not repealed by the School Machinery Act. *Kirby v. Board of Education*, 619; *Davis v. Moseley*, 645.

§ 10c. Requisites and Limitations on Issuance of Bonds.

Under the provisions of Chap. 599, P.L.L. 1935, an action questioning the validity of a bond election under the Act must be instituted within thirty days after the publication of the result of the election, but this limitation does not bar an action subsequent to the thirty day period seeking to enjoin the issuance of the bonds on the ground that the time within which the bonds must be issued had elapsed, or on the ground that the proceeds from the sale of the bonds were to be used for unauthorized purposes. *Waldrop v. Hodges*, 370.

Conceding that G.S. 153-102, prescribing that bonds must be issued within three years after the bond order takes effect, is applicable to the issuance of bonds under Chap. 599, P.L.L. 1935, the Legislature has extended the time within which such bonds may be issued to 1 July, 1949. Chap. 325, Session Laws 1943; Chap. 402, Session Laws 1945; Chap. 510, Session Laws 1947. *Ibid.*

§ 10h. Allocation and Expenditure of Funds.

The allocation of the proceeds of a bond election by the board of commissioners of a school district is a matter resting within its sound discretion, with which the courts will not interfere so long as their action is not arbitrary, capricious or in disregard of law. *Waldrop v. Hodges*, 370.

The board of commissioners of a school district has authority to divert the proceeds of a bond issue to other projects within the general purpose for which the bonds were authorized provided the board finds in good faith that conditions have so changed since the bonds were authorized that the proceeds are no longer needed for the original purpose. *Ibid.*

In the absence of a *bona fide* finding of changed conditions, the proceeds of a bond issue must be used for the purposes stipulated in the bond order. *Ibid.*

SEARCHES AND SEIZURES.

§ 2. Requisites and Validity of Search Warrants.

The complainant, B.W., signed the warrant in the name of a deputy sheriff "by B.W." The warrant stated the complaint was made "on oath." *Held:* The warrant is valid, since it was signed under oath by the person named in the body of the instrument as complainant. *S. v. Gross*, 734.

A search warrant need not aver that an examination of complainant was had or what such examination revealed, it being presumed, nothing else appearing, that the requirements of the statute had been observed. G.S. 15-27. *Ibid.*

STATE.

§ 3. Actions Against State or State Agencies.

Where a statute creates a corporate State agency with capacity to sue and be sued, but expressly limits actions which may be brought against it, the limitation on the right to sue the agency is effective. *Carroll v. Firemen's Asso.*, 436.

STATE—*Continued.*

The State may not be sued in its own courts or elsewhere, in the absence of consent or waiver. *Schloss v. Highway Com.*, 489; *Kirby v. Board of Education*, 619.

The State Highway and Public Works Commission is an agency of the State and as such is not subject to suit save in a manner expressly provided by statute. *Schloss v. Highway Com.*, 489.

Action will not lie against State agency for damages in tort or to restrain it from committing a tort. *Ibid.*

Action against county boards of education are authorized by statute. *Kirby v. Board of Education*, 619.

§ 5b. Jurisdiction and Powers of State Agencies and Officers.

An agency of the State is powerless to exceed the authority conferred upon it, and therefore cannot commit an actionable wrong. *Schloss v. Highway Com.*, 489.

But officers who exceed authority are subject to individual liability. *Ibid.*

STATUTES.

§ 6. Construction in Regard to Constitutionality.

When the language of the statute permits, the courts must adopt that construction which would render the statute valid. *Rhodes v. Asheville, Appendix*, 759.

§ 13. Repeal by Implication and Construction.

School Machinery Act discloses that it was not intended to repeal G.S. 115-45 which authorizes actions against county boards of education, particularly in view of the fact that G.S. 115-45 was brought forward in almost identical language in the code. G.S. 164-8. *Kirby v. Board of Education*, 619.

TAXATION.

§ 23½. Construction of Taxing Statutes in General.

The administrative interpretation of a tax statute, acquiesced in over a long period of time, should be given consideration in the construction of the statute. *Comr. of Revenue v. Speizman*, 459.

§ 29. Assessment of Income Taxes—Capital Gains.

A gain resulting from the involuntary conversion of a capital asset by fire is taxable under the State law as income, notwithstanding that the proceeds of the fire insurance, plus additional cash, are necessary for and are used in the restoration of the building. *Comr. of Revenue v. Speizman*, 459.

G.S. 105-142 (1) stipulating that the Commissioner of Revenue shall follow the Federal practice as nearly as practicable in instances where the method of accounting of the taxpayer does not clearly reflect the income of the taxpayer, does not require the Commissioner of Revenue to apply the provisions of sec. 112 (f), 26 U.S.C.A. 95, in computing the income of a taxpayer from involuntary conversion of a capital asset. *Ibid.*

The act amending sec. 1, Art. 4, schedule D, subchap. 1 of Chap. 105 (G.S. 105-144.1), adopting the Federal rule for determining income tax upon the involuntary conversion of a capital asset, does not authorize the Commissioner of Revenue to refund income tax legally assessed and collected upon such

TAXATION—*Continued.*

capital gain prior to the enactment of the 1949 statute, even though the tax was paid under protest. *Ibid.*

§ 34½. Garnishment.

Where the Commissioner of Revenue has garnisheed a bank deposit for taxes due by the depositor, and the garnishee bank, in refusing to comply with the order, asserts no defense or setoff against the taxpayer, the bank, in the Commissioner's action to compel compliance, will be held liable also for the costs. G.S. 105-242.2 (3). *Comr. of Revenue v. Bank*, 118.

§ 38a. Action to Determine Validity of Bond Issue—Enjoining Issuance of Bonds.

Under the provisions of Chap. 599, P.L.L. 1935, an action questioning the validity of a bond election under the Act must be instituted within thirty days after the publication of the result of the election, but this limitation does not bar an action subsequent to the thirty day period seeking to enjoin the issuance of the bonds on the ground that the time within which the bonds must be issued had elapsed, or on the ground that the proceeds from the sale of the bonds were to be used for unauthorized purposes. *Waldrop v. Hodges*, 370.

Conceding that G.S. 153-102, prescribing that bonds must be issued within three years after the bond order takes effect, is applicable to the issuance of bonds under Chap. 599, P.L.L. 1935, the Legislature has extended the time within which such bonds may be issued to 1 July, 1949. Chap. 325, Session Laws 1943; Chap. 402, Session Laws 1945; Chap. 510; Session Laws 1947. *Ibid.*

TENANTS IN COMMON.

§ 2. Creation and Existence of Tenancy in Common.

The testator devised to his minor granddaughter a certain number of acres out of the larger tract, and devised the balance thereof to his son and daughter. His widow was named executrix and trustee for the minor devisee. *Held:* The widow, as trustee, was a tenant in common in the said tract pending division thereof. *Armstrong v. Armstrong*, 201.

§ 3. Survivorship.

While G.S. 41-2 may not preclude tenants in common from providing for survivorship by adequate contract *inter sese*, an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. *Pope v. Burgess*, 323.

§ 4. Possession and Mutual Rights.

Tenant in common in possession cannot be a trespasser and cannot be enjoined from cultivation of lands. *Armstrong v. Armstrong*, 201.

TENDER.

§ 1. Acts or Transactions Constituting Tender.

Where tender of the amount due is made more than six months after the amount becomes payable, and interest on the amount from due date to date of tender is not included therein, the tender is ineffectual. *Ingold v. Assurance Co.*, 142.

In order to constitute a valid tender, the party making the tender must not only allege his continuous readiness to pay the amount, but must also bring or deposit the amount into court. *Ibid.*

TORTS.

§ 1. Definition and Essentials of Tort.

Acts which are lawful in themselves cannot be rendered tortious by mischievous motives. *In re Sale of Land of Sharpe*, 412.

Agreement to do a lawful act cannot constitute a wrongful conspiracy. *Eller v. Arnold*, 418.

§ 6. Contribution and Joinder of Additional Parties as Joint Tort-Feasors.

Fact that plaintiff might have joined another as defendant gives original defendant no right to force such joinder. *Tarkington v. Printing Co.*, 354.

Judgment of nonsuit was entered against plaintiff upon motion of the original defendant, and the original defendant's cross-action against a party joined on the original defendant's motion as a joint tort-feasor was thereupon dismissed. *Held:* Upon the reversal of the judgment of nonsuit, the cross-action for contribution is reinstated, the original defendant being entitled to a day in court to establish its cross-action if it can. *McIntyre v. Elevator Co.*, 539.

TRESPASS.

§ 1a. Acts Constituting Trespass in General.

A trespass is a wrongful invasion of the possession of another, and therefore a tenant in common in possession cannot be a tresspasser. *Armstrong v. Armstrong*, 201.

TRIAL.

§ 7. Argument and Conduct of Counsel.

Argument of plaintiff's counsel outside of evidence will be held harmless when it appears that defendant's counsel also brought out identical matter in hearing of jury in argument upon motion and in pleadings read to jury. *Tarkington v. Printing Co.*, 354.

§ 13. Order of Proof.

The order of developing the case on trial in the Superior Court is largely addressed to the discretion of the trial judge. *In re Westover Canal*, 91.

Ordinarily, the party having the burden of proof first introduces his evidence, and then the opposing party introduces his, and then the first party introduces his evidence in rebuttal, but this is a rule of practice and not of law, and may be departed from whenever the court considers it necessary to promote a fair trial. *Ibid.*

§ 21. Office and Effect of Motion to Nonsuit.

Nonsuit on the ground of want of necessary parties is improper, but if other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. *Plemmons v. Cutshall*, 595.

§ 22a. Consideration of Evidence on Motion to Nonsuit in General.

Upon motion to nonsuit, the evidence tending to support plaintiff's claim will be taken as true. *Potter v. Supply Co.*, 1; *Thomas v. Motor Lines*, 122; *Gladden v. Setzer*, 269; *Stokes v. Edwards*, 306.

And plaintiff is entitled to every reasonable inference to be drawn therefrom. *Winfield v. Smith*, 392; *Grier v. Phillips*, 672.

TRIAL—*Continued.*

§ 22b. Consideration of Defendant's Evidence on Motion to Nonsuit.

Upon motion to nonsuit, defendant's evidence in conflict with that of plaintiff will not be considered. *Potter v. Supply Co.*, 1; *Chesser v. McCall*, 119; *Gladden v. Setzer*, 269.

On motion to nonsuit, defendants' evidence will not be considered except when not in conflict with that of plaintiff; it may be used to explain or make clear that of plaintiff. *Winfield v. Smith*, 392.

§ 22c. Nonsuit—Discrepancies and Contradictions in Plaintiff's Evidence.

Inconsistencies or contradictions in the testimony of one of plaintiffs' witnesses does not justify nonsuit, the credibility of the witnesses and the weight to be given their testimony being in the exclusive province of the jury. *Betts v. R. R.*, 609.

§ 23a. Sufficiency of Evidence to Overrule Nonsuit in General.

Evidence which raises a mere surmise or conjecture as to the existence of a fact essential to the cause of action is insufficient to be submitted to the jury. *Grier v. Phillips*, 672.

§ 23b. Sufficiency of Evidence—Prima Facie Case.

A *prima facie* case takes the question to the jury and permits but does not compel a finding for plaintiff. *Precythe v. R. R.*, 195.

§ 28. Form and Distinctions of Directed Verdict and Peremptory Instructions.

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. G.S. 1-180. *Morris v. Tate*, 29.

§ 29. Directed Verdict for Plaintiff.

A directed verdict for plaintiff upon an affirmative defense is not in favor of party having burden of proof on the issue, since defendant has burden of proving affirmative defense. *Lee v. Rhodes*, 190.

§ 30. Directed Verdict for Defendant.

Upon defendants motion for a directed verdict, plaintiff's evidence will be taken as true, and all conflict in the evidence resolved in plaintiff's favor. *Potter v. Supply Co.*, 1.

§ 31b. Instructions—Statement of Evidence and Application of Law Thereto.

Ordinarily the trial court is required by G.S. 1-180 to state the evidence to which he applies the law, and while this requirement may be dispensed with when the facts are simple, yet, even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury and therefore a recapitulation of the evidence may be necessary. *Morris v. Tate*, 29.

The failure of the court to give instructions on subordinate features of the case will not be held for error in the absence of request for instructions. *Grant v. Bartlett*, 658.

TRIAL—*Continued.*

§ 31c. Instructions—Conformity to Pleadings and Evidence.

It is error for the court to submit to the jury evidence which merely raises a possibility or conjecture as to a fact in issue. *Lunsford v. Marshall*, 610.

An instruction which submits to the jury a mixed question of law and of fact when there is no evidence in support thereof must be held for reversible error. *Clement v. Clement*, 636.

§ 31d. Instructions on Burden of Proof.

A charge that the burden of proof resting on plaintiff required her to introduce evidence tending to prove "the allegation," must be held for reversible error, since the burden of proof relates to the issues rather than the allegations out of which they arise, and the burden is on plaintiff to prove by the greater weight of the evidence the affirmative of the issues forming the basis of her cause of action. *Banks v. Shepard*, 86.

The use of figurative scales by the court in its charge to the jury upon the burden of proof will not be held for reversible error, nor did the charge in this case, construed contextually, confine the jury's consideration to evidence offered by appellant but included all testimony favorable to appellant to be considered on its side of the scale. *Tarkington v. Printing Co.*, 354.

§ 31e. Expression of Opinion in Instructions on Weight or Credibility of Evidence.

Manner of stating contentions *held* not to constitute expression of opinion on evidence. *Shipping Lines v. Young* 80.

The charge in this case construed contextually *is held* not to have assumed that a controverted fact had been established. *Ibid.*

In a caveat proceeding, reference in the charge to the paper-writing as the "will" of deceased will not be held for reversible error when it appears that the jury understood the nature of the proceeding and could not have been misled thereby. G.S. 1-180. *In re Will of McDowell*, 259.

§ 31f. Instructions—Statement of Contentions.

Construing the charge from its four corners, *it is held* that the method and manner of arraying the contentions of the parties did not amount to an expression of opinion by the court. *Shipping Lines v. Young*, 80.

§ 32. Requests for Instructions.

Where the trial court substantially complies with plaintiff's oral request for instructions in respect to evidence of previous statements made by plaintiff tending to contradict plaintiff's evidence on the stand, the failure to give more particular instructions on this aspect will not be held for error. G.S. 1-180 as amended by Chap. 107, Session Laws of 1949. *Grant v. Bartlett*, 658.

§ 36. Form and Sufficiency of Issues.

Where the issues submitted present to the jury proper inquiries as to all the determinative facts in dispute, objection thereto is untenable, especially where appellants do not ask for or tender any specific issues. *Stokes v. Edwards*, 306.

The failure to submit an issue is not error when there is no evidence tending to justify an affirmative answer to such issue. *Ibid.*

TRIAL—*Continued.*

Where the issue submitted arises on the pleadings and is determinative of the controversy, appellant's objection thereto on the ground of insufficiency is untenable. *Pake v. Morris*, 424.

It is not error for the court to refuse to submit issues tendered which relate only to evidentiary matter. *Ibid.*

The refusal to submit an issue tendered is not error when there is no evidence in support of such issue adduced at the trial. *Hooper v. Glenn*, 570.

§ 39. Form and Sufficiency of Answers to Issues.

Answers to issues held not inconsistent when construed in light of pleadings and testimony. *Stokes v. Edwards*, 306.

§ 42. Acceptance or Rejection of Verdict by Court.

Trial court may not accept part of verdict and set aside a part thereof in attempting to remove irreconcilable repugnancy of in the verdict. *Lee v. Rhodes*, 190.

§ 44½. Correction of Verdict.

The trial court may not correct the verdict of the jury by setting aside the answer to one of the issues in its attempt to remove an irreconcilable repugnancy in the verdict. *Lee v. Rhodes*, 190.

§ 48½. Power of Court to Set Aside Verdict in General.

While the trial court may set aside a verdict and may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues, the trial court may not remove an irreconcilable repugnancy in the verdict by vacating a part thereof. *Lee v. Rhodes*, 190.

Where a party's motion to set aside the verdict involves no question of law or legal inference, such motion is addressed to the sound discretion of the trial court and its ruling thereon is not subject to review in the absence of abuse of discretion. G.S. 1-207. *Puitt v. Ray*, 322.

Where court sets aside verdict in favor of defendant in the exercise of its discretion, plaintiff's appeal from refusal to set it aside as matter of law will be dismissed. *Privette v. Allen*, 662.

An order of the trial court setting aside the verdict in the exercise of its discretion is not reviewable in the absence of abuse of discretion. *In re Blair*, 753.

TRUSTS.

§ 3a. Requisites and Validity of Private Trusts—Rule Against Perpetuities.

The rule against perpetuities which prescribes that title must vest within the life or lives of persons in being and twenty-one years and ten lunar months thereafter, applies to private trusts. *Mercer v. Mercer*, 102.

Where a private trust violates the rule against perpetuities, the court will not limit the duration of the trust but will declare the whole trust invalid. *Ibid.*

§ 4b. Resulting Trusts.

The fact that a guardian, in the sale of guardianship lands for reinvestment, purchased the new lands before the sale of the guardianship lands does not

TRUSTS—*Continued.*

defeat the establishment of a resulting trust in the new lands when it appears from the guardian's annual report that the proceeds from the sale of the guardianship lands were disbursed in making payment on the balance due on the new lands secured by a mortgage or deed of trust. *Cassada v. Cassada*, 607.

§ 5c. Actions to Establish Constructive Trusts.

Action by beneficiary to set aside sale of stock in close corporation by executor-trustee, which sale was made contrary to expressed wishes of testator and after beneficiary had offered to pay debts of estate, *held* action to establish constructive trust and was governed by 10 year statute of limitations. *Jarrett v. Green*, 104.

§ 5d. Constructive Trusts—Right to Follow Property in Hands of Third Persons.

In this action to establish a constructive or a resulting trust in certain stock sold by executor, to recover the property and have an accounting, the evidence *is held* sufficient as against demurrer to show that the purchasers of the stock were not innocent purchasers for value without notice. *Jarrett v. Green*, 104.

A purchaser for value who takes free from claims in equity resting in parol is one who has advanced some new consideration or incurred some new liability on the faith of apparent ownership, and an antecedent debt will not suffice for this purpose. *Finance Corp. v. Hodges*, 580.

§ 20. Power of Trustee to Sell or Mortgage.

Under terms of trust, executor-trustee was enjoined not to sell stock in close corporation unless necessary; and beneficiary had the right to pay debts of the estate to prevent such sale. *Jarrett v. Green*, 104.

Ordinarily the power given a trustee to sell does not confer authority to mortgage the property, but where the trustees themselves purchase the property for a valuable consideration and have deed made to them in fee for use of an educational institution, with authority to rent or sell and use the proceeds for the purposes of the trust, the authority to mortgage for the purpose expressed in the writing will be inferred, there being nothing in the instrument to indicate an intention to the contrary. *Shaw University v. Ins. Co.*, 526.

The land was conveyed to grantees for use of an educational institution with mandatory requirement that the grantees apply for charter incorporating the educational institution, and upon its incorporation to convey the property to such institution upon the same uses. The corporation was created with charter authority to execute mortgages and deeds of trust on its property in order to carry out the purposes of its creation. *Held*: There being nothing in the deeds or in the charter of the corporation to the contrary, such corporation has the power of mortgaging the property to further the purposes of its creation. *Ibid.*

VENDOR AND PURCHASER.

§ 2c. Form and Requisites of Agreement—Signature.

After the purchaser had signed the contract, the seller made material changes therein in the purchaser's presence, and signed it. *Held*: The fact that the purchaser did not re-sign the agreement after the alterations does not change the instrument from a contract of sale to a mere option, since the

VENDOR AND PURCHASER—*Continued.*

purchaser's acceptance of the agreement as changed with knowledge that it was to be notarized and recorded, is a ratification and adoption of his signature without affixing another. *Cadillac-Pontiac Co. v. Norburn*, 23.

§ 5c. Assignment of Contract to Convey.

A contract to convey is assignable, and the assignee may maintain an action thereon against the seller for specific performance. *Cadillac-Pontiac Co. v. Norburn*, 23.

The contract to convey in suit stipulated that one-half the purchase price should be paid in cash and the remainder thereof secured by purchase money deed of trust securing two notes of equal amount payable one and two years after execution of the instrument. *Held:* The contention that the contract was executed in reliance upon the personal credit of the purchaser and therefore was unassignable, is untenable in the absence of some provision in the instrument against assignment or some circumstance judicially recognizable *dehors* the agreement. *Ibid.*

§ 18. Payment or Tender of Purchase Price Within Time Stipulated.

Ordinarily, a mere provision in a contract to convey that it should be completed by a specified date is insufficient to constitute time the essence of the contract, and evidence in this case that the failure of the purchaser to make payment within the time stipulated was due to the fact that the seller made himself inaccessible, and, further, that the seller's attorney advised that a later date would serve, *is held* insufficient to sustain the seller's motion to nonsuit on the ground that the contract was not completed on the day specified. *Cadillac-Pontiac Co. v. Norburn*, 23.

§ 27b. Title and Rights of Third Parties Under Unregistered Instrument.

Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by statute, G.S. 47-18, third parties may deal with the *locus* as if there were no contract, since no notice, however full and formal, will take the place of registration. *Eller v. Arnold*, 418.

WAIVER.

§ 1. Matters Which May Be Waived.

A person *sui juris* may waive practically any right he has unless forbidden by law or public policy, and therefore a waiver may relate to procedure and remedy as well as to substantive rights. *Clement v. Clement*, 636.

A waiver sometimes partakes of the nature of estoppel and sometimes of contract. *Ibid.*

§ 3. Necessity for and Adequacy of Consideration.

Whether a waiver must be supported by consideration in order to be enforceable depends upon the nature and the occasion of the particular waiver. *Clement v. Clement*, 636.

A waiver of interest on a note, which waiver is made subsequent to execution and prior to maturity or suit and before any negotiation between the parties after demand for payment, requires consideration to support it in the same manner as any other contract. *Ibid.*

WAIVER—*Continued.*

Consideration for a promise to forego interest on a note, which promise is made subsequent to the execution of the note and before maturity, cannot be supplied by the mutual considerations in the execution of the note. *Ibid.*

§ 4. Pleading and Proof.

The burden of establishing an alteration of a contract by valid waiver is upon the party asserting the defense of such alteration. *Clement v. Clement*, 636.

WILLS.

§ 12. Revocation by Testator.

A will expressly declaring void all other wills left by testatrix revokes a prior codicil as well as any will such codicil was intended to modify, explain or supplement. *Saint Mary's School v. Winston*, 326.

§ 23b. Caveat Proceedings—Evidence of Mental Capacity.

Witness was asked his opinion of the mental capacity of deceased to make a will on the date the paper-writing was executed. Witness replied he did not know the decedent at that date and then gave his opinion as to his mental capacity on a date some four years thereafter. There were no circumstances to show that the latter date was too remote in point of time. *Held:* The admission of the testimony will not be held for reversible error, since no prejudice is made manifest. *In re Will of McDowell*, 259.

Personal letters written by decedent to his granddaughter, one of the propounders, are competent upon the issue of mental capacity, the prohibition of G.S. 8-51 in caveat cases applying only to evidence of undue influence. *Ibid.*

§ 25. Caveat Proceedings—Instructions.

In a caveat proceeding, reference in the charge to the paper-writing as the "will" of deceased will not be held for reversible error when it appears that the jury understood the nature of the proceeding and could not have been misled thereby. *In re Will of McDowell*, 259.

§ 31. General Rules of Construction.

The intent of testator is his will. *Jarrett v. Green*, 104.

§ 32. Presumption Against Partial Intestacy.

Presumption against partial intestacy does not justify courts in supplying testamentary disposition lacking in the instrument. *Saint Mary's School v. Winston*, 326.

§ 33a. Estates and Interests Created in General.

A clause in a will that "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes a devise in fee simple. *Buckner v. Hawkins*, 99.

The will in suit bequeathed and devised all the residue of the estate, including the land in controversy, to B. for life, and then appointed B. and another executor to execute the will "as I know they will carry out my wishes," the executors "to take entire charge of my estate." *Held:* The executors were to take solely for the purpose of carrying out the wishes of testatrix, and no beneficial interest in remainder was devised to them personally, and B. takes a life estate only, with the remainder undisposed of. *Saint Mary's School v. Winston*, 326.

WILLS—*Continued.*

§ 33b. Rule in Shelley's Case.

The rule in *Shelley's case* applies when the word "heirs," used in reference to the remainder after a freehold estate to the first taker, refers to heirs general as takers *qua* heirs in an indefinite line of succession, and nothing else appears; but the rule does not apply when "heirs" refers to a restricted class or particular persons of whom the term is merely *description personarum*. *Tynch v. Briggs*, 603.

The will in question devised to testator's wife a life estate with remainder over to testator's son for life "in remainder to his lawful heirs," with provision that in the event the son should die without lawful heirs, then to testator's daughter for life with remainder to her heirs, with further provision that if she should die without "heirs of her body lawfully begotten" then the lands to be sold and the proceeds divided *per stirpes* among testator's heirs. *Held:* It is apparent from the will that the words "lawful heirs" used in connection with the devise to testator's son were used to describe a restricted class and not to refer to heirs general of the son, and the rule in *Shelley's case* does not apply. *Ibid.*

§ 33d. Estates in Trust.

Where the instrument fails to name a beneficiary, the asserted trust would be void for uncertainty. *Saint Mary's School v. Winston*, 326.

Construing the will and codicil in suit to ascertain the testator's intent, *it is held* that the provision of the will that testator's son should be paid all or any part of the principal that he should request in writing, interpolated parenthetically in the provision setting up a trust with the net income to be paid the son, does not authorize the transfer of testator's residence to the said son upon his request in fee unaffected by the limitations of the trust. *Green v. Green*, 700.

§ 33h. Rule Against Perpetuities.

The common law rule against perpetuities, which is a mandate of law to be obeyed irrespective of the question of intention, is recognized and enforced in this State. *Mercer v. Mercer*, 101.

Private trust, under terms of which fee might not vest within life or lives of persons in being and twenty-one years and ten lunar months thereafter, *held* void; and court will not limit duration of trust but will declare whole trust invalid. *Ibid.*

§ 33i. Restraints on Alienation.

A stipulation annexed to a devise in fee that the devisee should not sell, mortgage or dispose of the realty during his natural life, is void, since a restraint upon alienation annexed to a devise in fee, even though the restraint be for a limited time, is void as contrary to public policy. *Buckner v. Hawkins*, 99.

Where a will devises the fee in lands and by later item expresses testator's intent that all the real estate be kept intact for a period of 35 years and then equally divided between the beneficiaries, and that no part of the lands should be sold or encumbered during that period, *held*, the attempted restraint on alienation, annexed to the devise in fee, is void. *Johnson v. Gaines*, 653.

WILLS—*Continued.*

§ 34b. Designation of Beneficiary.

Where will devises lands to executors to carry out testatrix' wishes, but fails to name beneficiary, the will is ineffective, and deed of executors to eleemosynary corporation purporting to effectuate known wishes of testatrix, does not convey fee. *Saint Mary's School v. Winston*, 326.

§ 34d. Time From Which Person is in Esse.

For the purpose of capacity to take under a deed and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary that a child is *in esse* 280 days prior to its birth. *Mackie v. Mackie*, 152.

§ 34e. Designation of Amount or Share of Beneficiary.

Testator left certain property in trust with direction that specified beneficiaries be paid a designated sum monthly from the income, with the balance of the net income to be paid to another trust. *Held:* The courts may not enlarge the stipulated monthly income so as to net the beneficiaries the amount stated after payment of income taxes levied under change of the law made after testator's death. *Board of Trustees v. Trust Co.*, 264.

§ 44. Doctrine of Election.

A devisee or legatee is put to his election when the will purports to devise or bequeath to another property belonging to the benficiary, and at the same time devises or bequeaths to the beneficiary property belonging to testator. *Trust Co. v. Burrus*, 592.

The doctrine of election does not apply unless it clearly appears from the will that testator intended to dispose of property belonging to the beneficiary. *Ibid.*

The doctrine of election does not apply when the testator purports to devise or bequeath to the beneficiary her own property and at the same time leaves other property owned by testator to the beneficiary, since, in such event, it will be presumed that testator intended the beneficiary to have both. *Ibid.*

Testator devised to his wife a life estate in lands owned by them by entireties and devised the remainder after the life estate to another, and also devised to his wife a life estate in other lands actually owned by him which had a value in excess of her rights had she dissented from the will. *Held:* the widow was put to her election, and her acceptance of the life estates with knowledge of the nature of her title in the lands theretofore held by entireties estops her heirs from claiming the remainder therein, the intent of the testator to limit her interest in the land theretofore held by entireties and to devise the remainder to another being apparent from the will. *Ibid.*

§ 46. Nature of Title and Rights of Devisees, Legatees and Heirs.

Beneficiary is entitled to pay debts of estate in order to prevent sale of unique personal property. *Jarrett v. Green*, 104.

GENERAL STATUTES CONSTRUED.

(For convenience in annotating.)

G.S.

1-40. Upon defendant's plea of adverse possession in processioning proceeding, cause is properly transferred to civil issue docket. *Simmons v. Lee*, 216.

1-52 (3). Action held one in tort for continuing trespass and was barred by three-year statute. *Tate v. Power Co.*, 256.

1-56. Ten year statute and not three year statute governs action by to establish constructive or resulting trust in certain stock sold by executor-trustee, to recover property and for an accounting. *Jarrett v. Green*, 104.

1-69. Where spouses of defendants are necessary to complete determination of controversy respecting land, their joinder cannot be held misjoinder. *Sparks v. Sparks*, 717.

1-73. In action for tort committed by one partner, court may have other partner joined. *Dwiggins v. Bus Co.*, 234.

Nonsuit on ground of want of necessary parties is error, but court should grant continuance to provide time for them to be joined and to plead. *Plemmons v. Cutshall*, 595.

1-86. Where court enters order for special venire without notice, defendant is not required to be prepared to support challenge to array but should be given time to procure evidence. *S. v. Speller*, 346.

1-97. Service on local agent of bonding company who had executed the bond in behalf of corporate surety is service on the corporation. *S. v. Moore*, 648.

1-101; 1-102. Service and not return confers jurisdiction, return being merely record and proof of service. *S. v. Moore*, 648.

1-123(1). Action to recover wages and to recover for assault and false imprisonment occasioned when plaintiff went to defendant to discuss claim of wages, held improperly joined. *Smith v. Gibbons*, 600.

1-123(3). Causes relating to injuries to the person may be joined. *Smith v. Gibbons*, 600.

1-127; 1-133. If pendency of prior action between same parties on same subject of action appears on face of complaint, second action will be dismissed on demurrer; if pendency of prior action does not so appear, second action will be dismissed on answer setting forth facts, treated as plea in abatement. *Dwiggins v. Bus Co.*, 234.

1-127(5); 1-132. Where there is misjoinder of causes alone, court may separate actions for trial and need not dismiss. *Smith v. Gibbons*, 600.

1-153. Where plaintiff invokes ancillary remedy of arrest and bail, he is entitled to plead facts to support his right to this remedy. *Long v. Love*, 535.

1-163. Trial court has power to allow amendment which does not substantially change cause of action. *Sparks v. Sparks*, 715.

In an action to recover truck, court has authority to permit amendment asserting right to recover new truck obtained in swap under theory of resulting or constructive trust. *Baker v. Baker*, 108.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-180. Charge held to comply with statute. *S. v. Vanhoy*, 162.
Correct form of instructed verdict is "if the jury find from the evidence the facts to be as all the evidence tends to show." *Morris v. Tate*, 29.

Exception to charge must be supported by assignment of error. *S. v. Spivey*, 375; *S. v. Muse*, 495.

Exceptions held to have properly presented contention that court failed to charge jury law arising on evidence. *S. v. Sutton*, 244. In prosecution for statutory offense, it is not sufficient for court to read the statute and the indictment. *Ibid.*

When charge is correct when construed as whole, exception thereto will not be sustained. *Tarkington v. Printing Co.*, 354.

As amended by Ch. 107, Session Laws 1949. In view of statute, failure to give more particular instruction held not error. *Grant v. Bartlett*, 658.

1-183. On motion to nonsuit, evidence favorable to plaintiff is taken as true. *Stokes v. Edwards*, 306.

On motion to nonsuit, evidence will be considered in light most favorable to plaintiff. *Grier v. Phillips*, 672.

1-189. Court may not order compulsory reference without hearing of pleas of estoppel, laches and title by adverse possession. *Grady v. Parker*, 166.

Right to jury trial in compulsory reference may be waived by failure to follow appropriate procedure. *Simmons v. Lee*, 216.

1-193. Appeal from overruling of exceptions to referee's report and from denial of motion that entire evidence before referee be stricken because not signed by witnesses, dismissed as premature. *Engineering Co. v. Thomas*, 516.

1-207. Where motion to set aside verdict involves no question of law or legal inference, it is addressed to trial court's discretion, and court's ruling thereon is not reviewable in absence of abuse. *Pruitt v. Ray*, 322.

1-211, 1-212. Judgment by default final instead of by default and inquiry on open account is merely irregular and not void, and constitutes valid lien. *Scott & Co., v. Jones*, 74.

1-220. Movant must show not only excusable neglect but also meritorious defense; but findings of court in regard to meritorious defense are not binding on appeal when they were made under misapprehension of law. *Hanford v. McSwain*, 229.

1-232. In determining whether jurisdiction was acquired, recitals of judgment will not prevail over other recitals in judgment roll. *Williams v. Trammell*, 575.

1-240. Fact that plaintiff might have joined another as defendant gives original defendant no right to force such joinder. *Tarkington v. Printing Co.*, 354.

Upon reversal of judgment of nonsuit against original defendant, he is entitled to reinstatement of cross-action for contribution against party joined as joint tort-feasor. *McIntyre v. Elevator Co.*, 539.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

1-253, *et seq.;* 136-68. Party may maintain action for declaratory judgment of right to easement appurtenant or by necessity, it not being a special proceeding to establish cartway. *Carver v. Leatherwood*, 96.

1-271. Where no error is found on plaintiff's appeal, defendant's appeal on ground that entire proceeding was void will be dismissed, since only party aggrieved may appeal. *In re Westover Canal*, 91.

1-276. Superior court acquires jurisdiction of any special proceeding sent to it on any ground whatever from clerk, with power to remand. *Plemmons v. Cutshall*, 595.

1-283. Where court settles case on appeal, defendant may not complain that court inserted testimony presented at the hearing. *S. v. Johnson*, 743.

1-288. Trial court should ascertain whether affidavit for appeal *in forma pauperis* is made in good faith. *Perry v. Perry*, 515.

1-369. Allotment of homestead suspends running of statute against lien of judgment, but does not toll statute in respect to debt as personal liability of debtor. *Williams v. Johnson*, 338.

1-371. While sheriff must lay off homestead before sale under execution, allotment is merely for purpose of ascertaining if there be excess of property over homestead, and does not create homestead right. *Williams v. Johnson*, 338.

1-386. Resident may have homestead allotted even though not insolvent. *Williams v. Johnson*, 338.

1-399. Upon plea of sole seizin by adverse possession in processioning proceeding, cause is properly transferred to civil issue docket. *Simmons v. Lee*, 216.

1-410(1). Defendant may be arrested in action to recover for willful, wanton or malicious injury to the person. *Long v. Love*, 535.

1-440.7; 1-440.14. Service of process by publication and attachment is valid only when the provisions of the state have been strictly complied with. *Scott & Co. v. Jones*, 74.

1-569, et seq. Application for examination of adverse party to obtain information to file complaint must show nature of action and that information sought is material. *Guy v. Baer*, 748. Order should not be allowed to ascertain whether cause of action exists. *Ibid.*

4-1. *Coram nobis* is available to challenge validity of conviction for matters extraneous the record. *In re Taylor*, 566.

Common law disability of husband to maintain action against wife for personal tort committed during coverture obtains. *Scholtens v. Scholtens*, 149.

6-21 (6). Taxing of referee's fee is in discretion of court. *Williams v. Johnson*, 338.

7-65. 50-13. Resident judge has concurrent jurisdiction with judge holding courts of district to hear application for custody of children of marriage; but he may not hear order to show cause outside of district. *Patterson v. Patterson*, 481.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

7-103; 49-1, *et seq.* Statutes do not authorize illegitimate child to maintain civil action to compel its father to provide for its support. *Allen v. Hunnicutt*, 49.

8-45. Broker has burden of proving contract and each item upon which he asserts right to commission, the statute being inapplicable. *Haines v. Clark*, 751.

8-51. Personal letters written by decedent to granddaughter held competent on issue of mental capacity, but not on issue of undue influence. *In re Will of McDowell*, 259.

8-54. Proper instruction cannot be held for error as calling to jury's attention fact that defendant did not testify. *S. v. Wood*, 740.

9-14. Refusal of motion to set aside verdict for that sister of defendant was passenger in witness' car held not reviewable, since trial court's ruling on competency of jurors is conclusive in absence of error of law. *S. v. Suddreth*, 239.

14-3. Attempt to commit burglary is felony. *S. v. Surles*, 272.

14-26. Instruction omitting questions of age and chastity of prosecutrix held for error. *S. v. Sutton*, 244.

14-32; 15-170. In prosecution for assault with deadly weapon with intent to kill, court properly submits question of defendant's guilt of lesser offense of assault with deadly weapon; but in absence of intent to kill, defendant is entitled to fight in self-defense even though not in fear of death or great bodily harm. *S. v. Anderson*, 54.

14-41. Abduction of female child may be committed by use of inducements as well as through force. *S. v. Ashburn*, 722.

14-44; 14-45. Offenses of destruction of unborn child (requiring that child be quick) and causing miscarriage or injury to woman, are separate and distinct. *S. v. Green*, 381.

14-51; 15-170; 15-171. In prosecution for burglary in first degree, jury may convict of attempt to commit burglary in second degree. *S. v. Surles*, 272.

14-52; 15-171. It is error for court to fail to charge that jury might return verdict of guilty of burglary in first degree with recommendation for imprisonment for life. *S. v. Mathis*, 508.

14-100. Upon plea of nolo contendere in prosecution for false pretense, sentence of 5 to 6 years in State Prison, to be assigned to work under supervision of High Commission, is authorized. *S. v. Stansbury*, 589.

14-107. Offense is not attempted payment of debt but undermining confidence in commercial paper by giving worthless check. *S. v. White*, 513.

14-184. Warrant charging single act of intercourse is insufficient to charge offense. *S. v. Ivey*, 172.

14-209. False statement under oath must have legitimate tendency to prove or disprove fact in issue in order to constitute basis for prosecution for perjury. *S. v. Smith*, 198.

14-278. Whether indictment was sufficient to charge offense under this section, *quœrre? S. v. Freeman*, 725.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

14-322. Instruction that omits element of wilfullness of abandonment is insufficient to support verdict. *S. v. Gilbert*, 64.

Relates only to legitimate children, and an illegitimate child is not protected thereby. *Allen v. Hunnicutt*, 49.

14-324. Statute authorizes suspended judgment on condition that defendant support child. *S. v. Johnson*, 743.

15-4. Appointment of counsel for defendant in capital prosecutions is mandatory. *In re Taylor*, 566.

15-27. It will be presumed that statutory requirements have been met, and warrant itself need not aver that complainant was examined or what such examination disclosed. *S. v. Gross*, 734.

15-153. Warrant held sufficient to charge unlawful possession of nontax-paid whiskey. *S. v. Camel*, 426. Count in warrant which does not name defendant is void. *Ibid.*

15-173. Evidence held sufficient on charge of rape. *S. v. Speller*, 345.

Circumstantial evidence as to identity of defendants as perpetrators of crime held insufficient to be submitted to jury, and nonsuit is sustained in Supreme Court. *S. v. Palmer*, 205.

18-Arts. 1, 3. ABC Act does not repeal Turlington Act, which remains in force except as modified. *S. v. Barnhardt*, 223. Possession of non-taxpaid liquor in any quantity anywhere in State is unlawful. *Ibid.* Person may import into State for own personal use not more than one gallon of alcoholic beverage at time. *Ibid.* Possession of not more than one gallon of liquor, even in dry county, raises no presumption. *Ibid.* Upon proof of possession of more than gallon, defendant has burden of showing legal possession and transportation for personal use. *Ibid.*

18-6; 18-48. Verdict of jury establishing that defendant was guilty of unlawful transportation of intoxicating liquor held sufficient to sustain order of forfeiture of car. *S. v. Vanhoy*, 162.

18-48. Proof of possession of "white liquor" is not proof of possession of nontax-paid liquor. *S. v. Wolf*, 267.

18-126. Where solicitor formally admits that defendant has license to sell beer which was "in full force and effect," conviction of illegally selling beer will not be permitted to stand. *S. v. Cochran*, 523.

20-Art. 2. Power to suspend or revoke driver's license is vested exclusively in Department of Motor Vehicles, subject to review by Superior Court. *S. v. Warren*, 299.

20-38 (cc); 20-138. Filling station "apron" is "highway" within meaning of drunken driving statute. *S. v. Perry*, 361.

20-129. Failure to have rear and clearance lights burning on tractor-trailer operated on highways at night is negligence per se. *Thomas v. Motor Lines*, 122. Even though vehicle is standing on highway and disabled within meaning of G.S. 20-161 (c). *Ibid.*

20-138; 20-140. Evidence held sufficient for jury on charges of drunken driving and reckless driving. *S. v. Sawyer*, 713.

20-140. Motorist is required not to exceed reasonable speed and to give constant attention to road. *Williams v. Henderson*, 707.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

20-140; 20-141. Driver of car is required not to exceed speed which is reasonable and proper under circumstances and to be able to stop within radius of his lights. *Cox v. Lee*, 155. Evidence held sufficient to sustain conviction of speeding and reckless driving. *S. v. Vanhoy*, 162.

20-141; 20-148. Evidence of conditions existing when defendant attempted to pass another vehicle traveling in same direction held sufficient on issue of negligence. *Winfield v. Smith*, 392.

20-141(c). Motorist is required to decrease speed when special hazards exist in regard to pedestrians. *Williams v. Henderson*, 707.

20-146. Evidence held sufficient to support inference that defendant failed to drive vehicle on his right side of highway. *Gladden v. Setzer*, 269.

20-150(c). Passing vehicle at intersection in violation of statute held contributory negligence as matter of law. *Cole v. Lumber Co.*, 616.

20-161; 20-154. Mere stopping of a bus on highway to receive or discharge passenger is not violation of statute provided signal required by statute is given. *Banks v. Shepard*, 86.

20-161(a). Evidence that vehicle was left standing on hardsurface of highway at night without warning lights or flares held sufficient to take case to jury on issue of negligence. *Wilson v. Motor Lines*, 551.

20-174(e). Motorist is required to sound horn when it is apparent that pedestrian is oblivious to his approach. *Williams v. Henderson*, 707.

28-105, *et seq.* If judgment creditor wishes to share in estate of deceased judgment debtor and protect himself against running of statute, G.S. 1-22, he must file claim with personal representative. *Williams v. Johnson*, 338. Proceeds of sale to make assets may not be used to pay costs of administration until all liens have been satisfied. *Ibid.*

28-173. Requirement that action be brought in one year is condition annexed to cause of action and fact must be alleged and proved. *Wilson v. Chastain*, 390.

28-174. In action for wrongful death, evidence of pecuniary state of defendant is incompetent. *Martin v. Currie*, 511.

31-38. "I give, devise and bequeath" to named devisee, described realty, standing alone, constitutes devise in fee simple. *Buckner v. Hawkins*, 99.

38-1, *et seq.* Nonsuit is improper in processioning proceeding upon showing of bona fide dispute as to dividing line between lands of parties. *Brown v. Hodges*, 746.

39-1. Where granting clause and *habendum* convey fee, later clause expressing intent to convey less estate is ineffective. *Pilley v. Smith*, 62.

39-6. Child born less than 280 days after deed of revocation was executed *held in esse* at time of its execution, and therefore revocation was ineffectual. *Mackie v. Mackie*, 152.

39-11. Married woman may attack certificate of acknowledgement for fraud, duress or undue influence known to or participated in by grantee. *Lee v. Rhodes*, 190.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

40-20. Upon appeal from award of appraisers, trial is *de novo*, and judgment should be awarded on verdict of jury regardless of whether it is more or less than award of appraisers and regardless of which party appealed. *Proctor v. Highway Commission*, 687.

41-1. Deed to husband and wife for life and then to heirs of body of *femme* grantee conveys fee simple to wife. *Edgerton v. Edgerton*, 158.

41-2. While tenant in common may provide for survivorship by agreement, such agreement must contain words of conveyance. *Pope v. Burgess*, 323.

41-5. Statute gives same right to unborn child to take by deed as it had to take by inheritance at common law. *Mackie v. Mackie*, 152.

41-10. Father claiming fee may bring action to quiet title against children claiming fee in remainder after father's life estate as tenant by curtesy. *Sparks v. Sparks*, 715.

42-15. Where landlord gives tenant possession of AAA marketing card, landlord cannot hold warehouseman who has paid tenant for tobacco, liable for liens for rents and advancements. *Adams v. Warehouse*, 704.

45-28. Mortgagor or trustor is entitled to procure resales through advance bids as often as statute is complied with, and clerk is without authority to make requirements of cash deposit in excess of that stipulated by the statute. *In re Sale of Land of Sharpe*, 412.

47-18. Office of acknowledgement is merely to entitle instrument to registration, and is not necessary to validity of deed, except deed of married woman. *Ballard v. Ballard*, 629.

Where exclusive brokerage right is not registered, third parties may deal with land as if there were no contract. *Eller v. Arnold*, 418.

47-20. Whether chattel mortgage was registered in county in which mortgagor resided within requirement of laws of state wherein the instrument was executed held question of fact for jury upon the evidence. *Discount Corp. v. McKinney*, 727.

47-20; 47-23. Lien of chattel mortgage will not be given effect under comity when contrary to our registration laws. *Credit Corp. v. Walters*, 443; Auto brought into state on temporary visit does not acquire status here for purposes of registration, and lien of mortgage properly registered in another state has priority over lien of execution under judgment here. *Credit Corp. v. Walters*, 443.

49-2. Offense is willful refusal to support and not begetting of child. *S. v. Bowser*, 330. In prosecution under this section, prosecutrix may not testify as to nonaccess of her husband at time of conception. *S. v. Bowman*, 203.

49-7. Defendant may appeal from verdict establishing his paternity but finding him not guilty of willful nonsupport. *S. v. Clement*, 614.

50-5 (1); 50-7(1). Where wife sets up cross-action for divorce *a mensa* in husband's action for divorce *a vinculo*, court has power to order alimony upon jury's determination of issues in wife's favor. *Norman v. Norman*, 61.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

50-13. Special proceeding under this statute is proper procedure to determine right to custody of child as between resident parents divorced in another state. *Hardee v. Mitchell*, 40.

50-16. Court has power to allow attorney's fees in discretion, and may enter second order for subsequent services, and allowance is not reviewable in absence of abuse. *Stadiem v. Stadiem*, 318.

Where husband sets up defense of adultery, it is error for court to order alimony *pendente lite* without finding facts. *Williams v. Williams*, 660.

52-1, *et seq.* Husband may not maintain action against wife for tort committed during coverture. *Scholtens v. Scholtens*, 149.

58-177. Nonsuit is proper when plaintiff fails to show that notice and proof of loss was filed within time required or that proof was waived by insurer. *Gardner v. Ins. Co.*, 750.

59-43. Each partner is jointly and severally liable for tort committed by one of them. *Dwiggins v. Bus Co.*, 234.

63-50. Maintenance and operation of airport is proprietary function, and municipality is liable for torts committed in exercise of such function. *Rhodes v. Asheville*, 134.

63-53 (b); 63-58. Whether night watchman at airport was acting as employee of airport or in capacity of police officer, held question of fact for determination of jury. *Rhodes v. Asheville*, 134.

63-57. In operating and maintaining airport, a county engages in proprietary function, in exercise of which it is subject to tort liability. *Rhodes v. Asheville*, 134.

75-5(2). Statute not applicable to "lessor's" agreement not to sell any petroleum products other than those of "lessee" in absence of allegation that lessor agreed to purchase petroleum products from anyone. *Oil Co. v. Garner*, 499.

90-29; 90-40. In action for malpractice, fact that defendant is not licensed dentist is irrelevant on issue of negligence, but he is required to exercise degree of skill required of licensed dentist. *Grier v. Phillips*, 672.

94-4(a); 96-15. When commission is not in session, appeal from Chairman to Superior Court is in accord with statute. *Employment Security Com. v. Roberts*, 262.

96-4(m). Findings of Employment Security Commission are conclusive when supported by evidence. *Employment Security Com. v. Distributing Co.*, 464; *Employment Security Com. v. Roberts*, 262.

96-8. Evidence held to support finding that defendant's salesmen were "employees" within meaning of Employment Security Act. *Employment Security Com. v. Distributing Co.*, 464.

97-2(a); 97-19. Contractor who sublets part of contract to one who has not procured compensation insurance or become self-insurer is liable for award of compensation to employee of subcontractor, even though contractor has less than 5 employees. *Withers v. Black*, 428.

97-2(b). Evidence held to sustain finding that deceased was employee and not independent contractor. *Cooper v. Ice Co.*, 43.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

97-10. Third person tort-feasor is entitled to allege payment of award as basis of defense to recovery by employer or its insurance carrier that employer was guilty of contributory negligence. *Eledge v. Light Co.*, 584.

97-31(q); 97-31(t). Loss of 95% of vision is industrial blindness. *Withers v. Black*, 428.

97-57; 97-61. Carrier of insurance during last 30 day period of work is liable for disability from silicosis notwithstanding that Commission had theretofore advised employee he was suffering from disease. *Bye v. Granite Co.*, 334; *Dominey v. Granite Co.*, 337.

97-86. Findings of Industrial Commission are conclusive when supported by evidence even though different conclusion might have been reached. *Withers v. Black*, 428.

105-141; 105-142. Gain resulting from involuntary conversion of capital asset by fire held subject to income tax prior to amendment of 1949, even though more than amount of insurance was required to replace property. *Comr. of Revenue v. Speizman*, 459.

105-242, Subsec. 2(3). Garnishee who refuses to comply with order, and asserts no defense or setoff against taxpayer, will be held liable for costs. *Gill v. Bank*, 118.

110-21. Where willful refusal to support illegitimate child occurs after defendant's 16th birthday, Superior Court has jurisdiction notwithstanding that conception occurred prior to 16th birthday. *S. v. Bowser*, 330.

115-45. Authorizes suit against board of education on teacher's contracts. *Kirby v. Board of Education*, 619; *Davis v. Moseley*, 645.

115-354. Notice of acceptance of teacher contract or extension thereof must be given in time prescribed by statute. *Kirby v. Board of Education*, 619. Notice of rejection, mailed prior to end of school year is compliance with G.S. 115-359, even though not received until after end of school term. *Davis v. Moseley*, 645.

118-12. Fireman may not sue State Association on claim for benefits. *Carroll v. Firemen's Association*, 436.

130-66. District board of health is without power to prescribe punishment for violation of its regulations. *S. v. Curtis*, 169.

136-19. State has delegated power of eminent domain to Highway Commission. *Proctor v. Highway Commission*, 687. Either party may institute proceedings to have damages ascertained. *Ibid.* Where part of tract is taken, measure of damages is difference between market value before taking and market value of remaining portion immediately after taking. *Ibid.* If buildings are located on part condemned, they must be taken into account to extent they enhanced market value before taking, but Commission is not entitled to force owner to remove them. *Ibid.*

Highway Commission is not subject to suit except in manner provided by statute, and injunction will not lie against it to restrain it from enforcing ordinance relating to advertising signs along highways. *Schloss v. Highway Com.*, 489.

GENERAL STATUTES CONSTRUED—*Continued.*

G.S.

153-102. Legislature has extended time bonds may be issued after bond order is effective. *Waldrop v. Hodges*, 370.

156-43. In order to constitute valid drainage assessment it is necessary that land assessed drain into the canal. *In re Westover Canal*, 91.

160-52; 160-200(6), (7), (10). Power to enact Sunday ordinances has been delegated to municipalities. *S. v. Trantham*, 641.

160-172. Municipalities have power to enact zoning ordinances. *Kinney v. Sutton*, 404. Ordinance held valid. *Ibid.*

160-200(7), (36a); 20-37; 160-52. Legislature has delegated to municipalities power to license, regulate and control operators of taxi-cabs; city may require cab drivers to wear distinctive caps. *S. v. Stallings*, 252.

160-249. City may impose reasonable fees for privilege of taping into water and sewerage systems by nonresidents. *Construction Co. v. Raleigh*, 365.

164-8. Statute brought forward and codified held not repealed by implication by latter act. *Kirby v. Board of Education*, 619.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED

(For convenience in annotating.)

ART.

I, sec. 11. Right to counsel contemplates reasonable time to prepare defense. *S. v. Speller*, 345.

I, sec. 14. Sentence within statutory limits cannot be held cruel or unusual in constitutional sense. *S. v. White*, 513; *S. v. Stansbury*, 589.

I, sec. 17. Legislative bodies may make classfications for application of regulations so long as classifications are reasonable and regulations apply equally to all within class. *S. v. Trantham*, 641.

I, sec. 31. Devise in trust for benefit of daughter during her lifetime then for benefit of her surviving children, without provision for final termination of trust, *held* void as contrary to rule against perpetuities. *Mercer v. Mercer*, 101.

IV, sec. 8. Supreme Court has power to entertain application for permission to apply for writ of error *coram nobis*. *In re Taylor*, 566.
Supreme Court will stay judgment, notwithstanding absence of error on trial, to prevent manifest injustice. *S. v. Cochran*, 523.

IV, sec. 13. Jury trial is waived in compulsory reference by failure to follow appropriate procedure. *Simmons v. Lee*, 216.

X, sec. 2. Payment of judgment under which homestead was allotted does not extinguish homestead or renew running of statute of limitations against judgment. *Williams v. Johnson*, 338.

Homestead is terminated by owner's removal from this State, and evidence in this case held insufficient to support finding that judgment debtor was resident. *Scott & Co. v. Jones*, 74.

XI, sec. 1. Sentence for felony of not less than five nor more than six years in State Prison, to be assigned to labor under supervision of Highway Commission, is within constitutional limitations. *S. v. Stansbury*, 589.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

Vth Amendment to Federal Constitution. Legislative bodies may make classifications for application of regulations so long as classifications are reasonable and regulations apply equally to all within class. *S. v. Trantham*, 641.

XIVth Amendment to Federal Constitution. Right to counsel embraces right to reasonable time to prepare defense. *S. v. Speller*, 345.