NORTH CAROLINA REPORTS

VOLUME 180

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NORTH CAROLINA REPORTS

VOL. 180

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1920

ROBERT C. STRONG
REPORTER

RALEIGH
MITCHELL PRINTING COMPANY
STATE PRINTERS
1920

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1920

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WALTER CLARK.

ASSOCIATE JUSTICES:

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GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

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ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
O. H. Guion	Fifth	Craven.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
C. C. Lyon	Ninth	Columbus.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
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T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
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EASTERN DIVISION

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Geo. M. Pritchard	Nineteenth	Madison.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

FALL TERM, 1920

The following were licensed to practice law by the Supreme Court, Fall Term, 1920:

ALEXANDER, LOUISE BREVARD	Greensboro.
AUSTIN, CLARENCE MOORE	Charlotte.
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WEBSTER, FELIX LITAKER	Wilkesboro.
WHITE, RUFUS JENNINGS	Conway.
WILLIAMS, VIRGINIUS FAISON	Faison.
UMSTEAD, WILLIAM BRADLEY	Bahama.
YOUNCE, GEORGE ALEXANDER	Spencer.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1921

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	SPRING TERM, 1921
First District	February 8
Second District	February 15
Third and Fourth Districts	February 22
Fifth District	March 1
Sixth District	March 8
Seventh District	March 15
Eighth and Ninth Districts	March 22
Tenth District	March 29
Eleventh District	April 5
Twelfth District	April 12
Thirteenth District	April 19
Fourteenth District	April 26
Fifteenth and Sixteenth Districts	May 3
Seventeenth and Eighteenth Districts	May 10
Nineteenth District	May 17
Twentieth District	May 24

SUPERIOR COURTS, SPRING TERM, 1921

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Allen.*

Camden—Mar. 14 (1).
Beaufort—Jan. 17* (1); Feb. 21 (2); April 11† (1); May 9 (2).
Gates—Mar. 28 (1).
Tyrrell—April 25 (2).
Currituck—Jan. 31† (1); Mar. 7 (1).
Chowan—April 4 (1).
Pasquotank—Jan. 3† (2); Feb. 14 (1); Mar. 21 (1).
Hyde—May 23 (1).
Dare—May 30 (1).
Perquimans—Jan 24 (1); April 18 (1).

SECOND JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Calvert.*

Washington—Jan. 10 (2); April 18† (2).
Nash—Jan. 24 (1); Mar. 14† (1); May 2 (2); May 30 (1).
Wilson—Feb. 7 (2); May 16 (2); June 27† (1).
Edgecombe—Mar. 7 (1); April 4† (2); June 6 (2).
Martin—Mar. 21 (2); June 20 (1).

THIRD JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Cranmer.*

Northampton—April 4 (2).
Hertford—Feb. 28 (1); April 18 (2).
Halifax—Jan. 31 (2); Mar. 21 (2); June 6 (2).
Bertie—Feb. 14 (1); May 9 (2).
Warren—Jan. 17 (2); May 23 (2).
Vance—May 7 (2); June 20 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Lyon.*

Lee—Mar. 28 (2); May 9 (1).
Chatham—Jan. 17 (1); Mar. 21† (1); May 16 (1).
Johnston—Feb. 21 (2); Mar. 14 (1); April 25† (2).
Wayne—Jan. 24 (2); April 11† (2); May 30 (2).
Harnett—Jan. 10 (1); Feb. 7 (2); May 23 (1).

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Devin.*

Pitt—Jan. 17† (1); Jan. 24 (2); Feb. 21† (1); Mar. 21 (2); April 18† (1); April 25 (1); May 23† (2).
Craven—Jan. 10* (1); Feb. 7† (2); April 11 (1); May 16† (1); June 6* (1).
Carteret—Mar. 14 (1); June 13 (2).
Pamlico—May 2 (2).
Jones—April 4 (1).
Greene—Feb. 28 (2); June 27 (1).

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Bond.*

Onslow—Mar. 7 (1); April 18 (2).
Duplin—Jan. 10 (2); Jan. 31* (1); Mar. 28† (2).
Sampson—Feb. 7 (2); Mar. 14† (2); May 2 (2).
Lenoir—Jan. 24* (1); Feb. 21† (2); May 23* (1); April 11 (1); June 13† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Connor.*

Wake— Jan. 10* (1); Jan. 31† (1); Feb. 7* (1); Feb. 14† (1); Mar. 7* (1); Mar. 14† (2); Mar. 28† (2); April 11* (1); April 18† (2); May 2† (1); May 9* (1); May 23† (2); June 6* (1); June 13† (2).
Franklin—Jan. 17 (2); Feb. 21† (2); May 16 (1).

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Kerr.*

New Hanover—Jan. 17* (1); Mar 28* (1); April 4† (3); May 9* (1); May 23† (2); June 13* (1).
Brunswick—Mar. 21 (1); June 20† (1).
Columbus—Jan. 31 (1); Feb. 21† (2); April 25 (2).
Pender—Jan. 24 (1); Mar. 7† (2); June 6 (1).

NINTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Daniels.*

Robeson—Jan. 31* (1); Feb. 7† (1); Feb. 28† (2); April 4† (2); May 16† (2).
Bladen—Jan. 10‡ (1); Mar. 14* (1); April 25† (1).
Hoke—Jan. 24 (1); April 18 (1).
Cumberland—Jan. 17* (1); Feb. 14† (2); Mar. 21† (2); May 2† (2); May 30* (1).

TENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Guion.*

Granville—Feb. 14 (2); April 11 (2).
Person—Feb. 7 (1); April 25 (1).
Alamance—Jan. 24† (1); Mar. 7* (1); May 30† (2).
Durham—Jan. 10† (2); Feb. 28* (1); Mar. 14† (2); May 2† (1); May 23* (1); June 20† (1).
Orange—April 4 (1); May 9† (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Webb.*

Ashe—April, 11 (2).
Forsyth—Jan. 10 (2); Feb. 14† (2); Mar. 14† (2); Mar. 28* (1); May 23† (3).
Rockingham—Jan. 24* (1); Feb. 28† (2); May 16 (1); June 20† (1).
Caswell—April 4 (1).
Surry—Feb. 7 (1); April 25 (2).
Alleghany—May 9 (1).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Finley.*

Davidson—Feb. 28 (2); May 9† (1); May 30 (1).
Guilford—Jan. 17† (2); Jan. 31* (1); Feb. 14† (2); Mar. 14† (2); Mar. 28† (1); April 18† (2); May 2* (1); May 16†(2); June 13† (1); June 20* (1).
Stokes—April 4* (1); April 11† (1).

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Ray.*

Stanly—Feb. 7† (1); April 4 (1); May 16† (1).
Richmond—Jan. 10* (1); Mar. 21† (1); April 11* (1); May 30† (1); June 20† (1).
Union—Jan. 31 (1); Feb. 21† (2); Mar. 28 (1); May 9† (1).
Moore—Jan. 24* (1); Feb. 14† (1); May 23† (1).
Anson—Jan. 17* (1); Mar. 7† (1); April 18 (2); June 13† (1).
Scotland—May 14† (1); May 2 (1); June 6 (1).

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge McElroy.*

Mecklenburg—Jan. 10* (1); Feb. 7† (3); Feb. 28* (1); Mar. 7† (2); April 4† (2); May 2† (2); May 16* (1); May 23† (2); June 13* (1); June 20† (2).
Gaston—Jan. 17* (1); Jan. 24† (2); April 18* (1); June 6* (1).

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Bryson.*

Montgomery—Jan. 24* (1); April 11† (2).
Randolph—Mar. 21† (2); April 4* (1).
Iredell—Jan. 31 (2); May 23 (2).
Cabarrus—Jan. 10 (2); April 25 (2).
Davie—Feb. 28 (2).
Rowan—Feb. 14 (2); Mar. 14† (1); May 9 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Lane.*

Lincoln—Jan. 31 (1).
Cleveland—Mar. 28 (2).
Burke—Mar. 14 (2).
Caldwell—Feb. 28 (2); May 23 (2).
Polk—April 18 (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Shaw.*

Avery—April 25 (2).
Catawba—Feb. 7 (2); May 9† (2).
Mitchell—April 11 (2).
Wilkes—Mar. 14 (2); May 30 (1).
Yadkin—Mar. 7 (1).
Watauga—Mar. 28 (2).
Alexander—Feb. 21 (1)

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Adams.*

McDowell—Jan. 24† (2); Feb. 21 (2).
Rutherford—Feb. 7† (2); May 2 (2).
Henderson—Mar. 7 (3); May 30† (2).
Yancey—Mar. 28 (2).
Transylvania—April 18 (2).

NINETEENTH JUDICIAL DISTRIC.

SPRING TERM, 1921—*Judge Harding.*

Buncombe—Jan. 10 (3); Jan. 31† (3); Mar. 7 (3); April 4 (2); May 2 (3); June 6 (3).
Madison—Feb. 28 (1); Mar. 28 (1); April 25 (1); May 23 (1).

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1921—*Judge Long.*

Haywood—Jan. 10 (2); Feb. 7 (2); May 9† (2).
Cherokee—Jan. 24 (2); April 4 (2).
Jackson—Feb. 21 (2); May 23† (2).
Swain—May 7 (2).
Graham—Mar. 21 (2); June 6† (2).
Clay—April 18 (1).
Macon—April 25 (2).

NOTE—This calendar is compiled from that of A. B. Andrews, Attorney and Counsellor at Law, Raleigh, N. C.

***Criminal cases. †Civil cases. ‡Civil and jail cases**

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.

EASTERN DISTRICT

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

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. ASHE, Clerk.

Elizabeth City, second Monday in April and October. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. WALTER DUFFY, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. T. M. TURRENTINE, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

J. O. CARR, United States District Attorney, Wilmington.

E. M. GREENE, Assistant United States District Attorney, New Bern.

W. T. DORTCH, United States Marshal, Raleigh.

S. A. ASHE, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

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

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

WILLIAM C. HAMMER, United States District Attorney, Asheboro.

CLYDE R. HOEY, Assistant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1920

F. F. CHERRY v. L. J. UPTON & COMPANY.

(Filed 6 September, 1920.)

1. Evidence—Declarations—Hearsay—Res Inter Alios Acta—Vendor and Purchaser—Contracts—Breach.

In seller's action to recover damages for the purchaser's breach of contract to accept potatoes, wherein the defendant relies upon the ground that the potatoes did not come up to grade and were therefore refused by him, accounts made to the seller by another and subsequent purchaser of the potatoes refused by the defendant, showing they were of the required grade, are incompetent upon the question as hearsay and *res inter alias acta.*

2. Instructions—Contract—Breach—Vendor and Purchaser—Damages.

Where the purchaser of goods, in this case potatoes, has breached his contract to receive and pay for them, so that the seller is forced to sell them upon the market, it is required of the trial judge, in charging the jury upon the question of the measure of damages, to give them some guidance to aid them in their determination, and an instruction to allow such sum as they find the damage to be, subject to the vendor's duty to minimize the loss, is erroneous.

3. Vendor and Purchaser—Contracts—Breach—Measure of Damages—Nominal Damages.

Where the purchaser of goods of a market value, wrongfully refuses to accept them according to his contract, under claim that they were not up to grade, and the vendor could have reasonably sold them at the place and time of delivery for the contract price, or more, the vendor can only recover nominal damages in his action, the measure of damages being the difference between the contract price and the market value at the time and place of delivery.

APPEAL by defendant from *Cranmer, J.,* at the April Term, 1920, of BEAUFORT.

This is an action to recover damages for refusal to accept and pay the contract price for 746 barrels of potatoes.

The plaintiff contracted to sell and deliver at Aurora, and defendant to buy and pay for, at the rate of $3 per barrel, all of the No. 1 and No. 2 potatoes grown on three of plaintiff's farms in the June season of 1916.

Plaintiff alleged and testified in substance that the potatoes were dug, delivered, and paid for according to contract, with the exception of 746 barrels refused by defendant, and which, according to plaintiff, were up to grade, that is, Nos. 1 and 2.

The defendant justified its refusal to take the 746 barrels on the ground that they were not Nos. 1 and 2, being sunburnt to such an extent as to endanger and depreciate the entire lot.

The plaintiff offered evidence tending to prove that the potatoes were up to grade, and that the defendant refused to accept them, and that he shipped them to New York, where they were sold for him at a loss of $944.18.

The defendant offered evidence that the potatoes were sunburned, and not in accordance with the contract, and that he refused to receive them for that reason.

The defendant also offered evidence tending to show that there was a market for potatoes at Aurora, the place where they were to be delivered, and that at the time of the refusal of the defendant to receive the potatoes that No. 1 and No. 2 potatoes were worth there $3 or $3.75 per barrel.

The plaintiff introduced over the objection of the defendant the accounts of the sales from the merchants in New York on which was given the number of barrels, the grade of the potatoes as No. 1 and No. 2, and the prices for which they were sold.

Defendant requested the court to charge the jury:

1. "The court instructs that the invoices or accounts of sale offered by plaintiff in evidence are not to be considered by the jury as any evidence of the grade or condition of the potatoes when offered for delivery to defendant, if you find they were so offered."

The court declined this request, and defendant excepted.

(2) "Upon the second issue I charge you that the damage, if any, which plaintiff may be entitled to recover of the defendant depends upon the price of No. 1 and No. 2 potatoes at Aurora at the time of refusal by defendant to take the potatoes in question. The measure of damages, therefore, is the difference between the contract price of $3 per barrel and the market price of No. 1 and No. 2 potatoes in Aurora, where the same were to be delivered, at the time of refusal by defendant. In this connection plaintiff testified that he did not know the market price at Aurora was $3 or more per barrel at that time. If the jury answer the first issue 'Yes,' and further find that the market price of No. 1 and

No. 2 potatoes at Aurora at the time of refusal by defendant was $3 or more per barrel, the jury are instructed to answer the second issue 'One penny,' or some other nominal amount." Refused, and defendant excepted.

In lieu of this instruction, the court charged the jury: "I instruct you that it is the duty of a party to a contract, upon breach of the contract by the other party, to exercise the care of a prudent man to mitigate the loss. If you answer the first issue 'Yes,' you will consider whether the plaintiff observed this rule and acted as an ordinarily prudent man would have acted under said circumstances, whether he observed the rule as to mitigation of damages, if you find that he was damaged. If you so find, then you will allow such sum, not to exceed $944.18, as you find the damage to be, and if you find that a less number of barrels were refused, and that he still observed the rule, then you will allow such sum as you find the damage to be. You may allow him interest on the amount you find due him from the time you find the tender to have been made."

To this instruction the defendant excepted.

The jury returned the following verdict:

"1. Did the defendant wrongfully refuse to accept and pay the plaintiff for any part of the potatoes embraced within the contract of 6 June, 1916, sued upon in the action, as alleged in the complaint? Answer: 'Yes.'

"2. If so, in what amount, if any, was the plaintiff damaged thereby? Answer: '$944.18, with interest.'"

There was a judgment in favor of the plaintiff, and the defendant appealed.

John G. Tooly and Harry McMullan for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. The statements of accounts sent by the New York merchants to the plaintiff were inconsistent, because they were mere unsworn declarations, and as to the defendant *res inter alias acta.*

If, instead of sending accounts, they had written a letter acknowledging the receipt of the potatoes, and saying they were No. 1's and No. 2's, and had been sold for a certain amount of money, it would not be contended that the letter would be admitted in evidence, and the accounts of sales contain in effect the same declaration, and are subject to the same objection.

The case of *Dyeing Co. v. Hosiery Co.,* 126 N. C., 293, is in point. In that case the plaintiff brought an action to recover a balance alleged to be due for dyeing hosiery goods belonging to the defendant, and the defendant refused to pay upon the ground that the work was defective and the goods damaged.

The defendant, after receiving the goods from the plaintiff, shipped them to another company to be sold, and statements of sales were returned to the defendant.

On the trial the defendant offered these accounts of sales for the purpose of proving the loss on the goods, but they were excluded, because, as the Court says, "They were simply the declarations of the defendant's agent. Their admission would violate the rule *res inter alias acta,* which excludes such evidence."

This authority was affirmed in *Peele v. Powell,* 156 N. C., 560, which, while reversed on a rehearing, has not been disturbed on this point.

Bitting v. Thaxton, 72 N. C., 542, is even a stronger authority against the plaintiff. In that case the plaintiff brought an action against the defendant as his agent, among other things, for the conversion of property belonging to the plaintiff, and in order to prove that the defendant had converted thirty-seven boxes of the plaintiff's tobacco to his own use by selling them to one Reid, offered a copy of Reid's book in evidence in which Reid had credited the defendant with the tobacco as his own and not as agent for the plaintiff.

The evidence was rejected upon the ground that "Reid's book was only Reid's declaration, and that was not competent evidence. And certainly the copy was not better than the original."

This is stronger authority against the plaintiff, because in the *Bitting case* the defendant had been dealing with the party whose book was offered in evidence, while in this case this defendant has had no connection or business relation with the merchants whose statements were offered in evidence.

If another rule should be adopted, and evidence of this character should be admitted, the doors would be opened wide for collusion and fraud, and parties could be confronted at the trial with damaging evidence of which they would have no notice, without the safeguard of an oath or the opportunity for cross-examination.

It follows, therefore, that there was error in receiving the evidence, and in refusing to give the first instruction prayed for.

The defendant was also entitled to have the jury instructed on the issue of damages as requested. "Some measure of damages should have been given to the jury for their guidance," and it was not sufficient to instruct the jury "to allow such sum as you find the damage to be," subject to the duty imposed on the plaintiff to mitigate the loss. *Coles v. Lumber Co.,* 150 N. C., 190.

"The measure of damages in an action by the seller for nonacceptance is the loss directly and naturally resulting in the ordinary course of events from the buyers' breach of contract. Where there is an available market for the goods in question, the measure of damages is prima facie,

or in the absence of special circumstances showing greater damage, to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept." 5 Elliott Contracts, 5095.

The same rule applies to breaches by the seller. "It is undoubtedly the general rule that on a failure by the bargainer to deliver goods having market value, the measure of damages is the difference between the contract price and the market value at the time and place where it should have been delivered." *Hosiery Co. v. Cotton Mills,* 140 N. C., 452.

The defendant had the right to refuse to receive the potatoes, and the plaintiff could recover nothing, unless the potatoes graded No. 1 and No. 2 as required by the contract, and if they were of that quality and the refusal of the defendant to receive them was wrongful, the plaintiff's damages would be nominal if the plaintiff could have sold the potatoes at Aurora, the place of delivery, for as much as the contract price, or for a greater sum, and the defendant was entitled to have the jury so instructed, and it was error to refuse to do so as requested.

New trial.

IN RE WILL OF GEORGE M. BENNETT.

(Filed 15 September, 1920.)

1. Wills—Holograph Wills—Letters—Statutes.

For a letter wholly written and signed by a deceased person to be construed as his holograph will, the provisions of our statutes, Rev., 3113 (2) and 3127 (2), must be scrupulously observed and followed in all essential respects and with substantial precision.

2. Same—Intent to Make a Will.

A letter wholly written and signed by a deceased person, to operate as his holograph will, must show his present intention to will his estate, or his purpose to dispose of it after his death, and this intention must exist at the time of the writing; and an expression in the letter that the writer wanted the addressee thereof to have everything he had in the world, "and I will have it fixed if I can have the chance," etc., only indicates the purpose of the writer to make a will in the future, in favor of the addressee, to the effect stated, and the writing is upon its face invalid as a holograph will.

3. Wills—Holograph Wills—Deposit for Safe Keeping.

A letter written wholly by the testator, and signed by him, stating that he wanted the addressee to have all of his property, and that he "would have it fixed if he had the chance," bears no evidence upon its face that

the writer intended that it should be deposited with any one for safe keeping, as required by our statutes, Rev., 3127 (2), and without further evidence of a request that it be kept, or preserved, or that it was other than any ordinary or casual letter, it is insufficient in this respect as a holograph will were it otherwise sufficient.

CIVIL ACTION, tried before *Cranmer, J.*, and a jury, upon an issue of *devisavit vel non*, at May Term, 1920, of BEAUFORT.

This is a caveat to the alleged will of George M. Bennett, deceased, the paper-writing propounded as his will being in the following language:

Nov. 11, 1917.

DEAR FRIEND:—I will try and write you a few lines to let you here from me, I am still shut up for measles but haven't broke out but I am some sick. My feever is a 104 and I am a hurting through my breast and I cough so at night I can't sleep and I don't want nothing to eat. I will be sent to the Hospital as soon as I brake out I hope I will get along all right and I truly hope you all are well but beleve me I am some blue today this is wrote on Sunday evening but you cant hardly tell the difference only they drill on Sunday there is a lot works right on and play match games all day and gamble and do eny thing except something good. J S I feel so bad. I cant write but a few lines tell all that I send my love to them and I hope God will be with me until we meat again.

I will have to close for this time and you write and let me here from you I dont know wher I will be able to answer or not but George H. Hodges sed he would git my mail to me. Answer soon, from a loving friend, G. H. Bennett.

Iff aney thing happens to me I want you to have ever thing I got in the world and I will have it fixed iff I can have the chance for you have done moore for me than aney one on earth,

from one who love you,

G. M. BENNETT.

There was testimony tending to show that the alleged testator was an enlisted soldier of the United States, and stationed at Camp Jackson, near Columbia, S. C., and that, at the time he wrote the letter to J. S. Lewis, the general beneficiary of his property named in the paper above set out, he was very sick in camp, where he died 13 or 14 November, 1917, and that the letter and address on the envelope in which it was enclosed were all in his handwriting. J. S. Lewis testified that Bennett had worked with him five or six years before going to the great war; that he was not related to him, and that Bennett had a father and a sister now living. That he owned real estate, but he did not know how much. He went to see him at the camp as soon as he heard of his condi-

tion, but arrived there only thirty minutes before he died. There was also testimony that he was of sound mind when he left for the camp. None of the witnesses saw him after he became sick. There was no testimony that the relations between Bennett and his father and sister were otherwise than those usually and generally subsisting between persons bearing such relations to each other, nor was there any suggestion that their relations were not cordial or affectionate. In regard to his personal relations with them, a witness, J. S. Stilley, testified: "I knew George M. Bennett; have known him all my life. He had been living with Mr. Lewis for five or six years before he went to Camp Jackson. I know his hand-writing. I have examined this paper, including every part, the signature and all. It is in the handwriting of George M. Bennett. He was twenty-five or thirty years old. The last time I saw him was when he went off to Camp Jackson. At that time he was in his right mind so far as I know. When he was drafted he was living one-half or three-quarters of a mile from his father. I have seen him at his father's house two or three times when his father was sick; he had been sick, but was well before George went off. I have never had a conversation with Mr. Joseph Lewis in which he made a statement to me about the young man's sanity. I just cannot remember when his mother died. His sister lived one-half to three-quarters of a mile from him. He associated with her once in a while. I know this handwriting, it is George Bennett's. He refers to his sister's daughter as 'Dear Kate.' This is his handwriting, dated 18 October, 1917; and this, too, dated 5 November, 1917. Mr. Lewis was a farmer. George M. Bennett worked with him on the farm. I just know about where I have been told that tract of land lies. I do not know who was in possession. I do not know whether it was land owned by his father." While we state this testimony literally, as it appears in the record, and the substance of the rest of it, it may not be very material, except as bearing in a general way upon the intention of Bennett to make his letter of 11 November, 1917, his last will and testament.

The caveators requested that the following instructions be given to the jury:

"1. If you believe the evidence, and find the facts to be as it tends to prove, you will answer the issue 'No.' Refused, and caveators excepted.

"2. That one of the controlling factors in determining whether a paper-writing propounded for probate as the last will and testament of the writer is, that the writer of the instrument had, at the time of writing it, the intention to dispose of his property by the same, and even if the jury should find from the evidence that the testator wrote the paper in question and intended to dispose of his property in the manner therein set out, he did not intend for said instrument to be his will, but

intended to execute another instrument setting forth the disposition of his property, then, in that event, the paper-writing propounded would not be the last will and testament of said Geo. M. Bennett, and you should answer the issue 'No.' Refused, and caveators excepted."

The jury found the issue in favor of the propounder. Judgment upon the verdict, and defendant appealed.

Small, MacLean, Bragaw & Rodman for propounders.
Ward & Grimes for caveators.

WALKER, J., after stating the case: The learned judge who presided at the trial of this case should have directed the jury to answer the issue in favor of the caveators, or, in other words, "No," as there was no evidence, in a legal sense, that the paper-writing, which was propounded by the beneficiary named in it, and, thereafter, admitted to probate in common form, or any part thereof, was the will of George M. Bennett, the supposed testator, or the miscalled testator.

By our statute the Legislature has made careful and safe-guarding provision for the execution and probate of wills, they being the last expression of the intention of their makers regarding the disposition of their property after death, and we have held repeatedly, as we should have held, undoubtedly, that these provisions must be scrupulously observed and followed in all essential respects, and with substantial precision, or at least accuracy. Rev., 3113, 3127 (1 and 2). The object of the law is that there may be no doubt as to the intention of the supposed testator to make his last will and testament, and as to the fact of his having done so by the particular writing offered for probate, thereby identifying it as the true and only document defining his intentions to will his estate and his purpose as to how it should be disposed of *after* his death. The two intentions to make a will and to dispose of his estate in the manner described in the paper-writing in question must concur and coexist. While a will must be contained in a writing, no formal testamentary instrument is required. If it adequately sets forth a testamentary intent it is enough. In many instances wills have taken the form of other instruments, while in others they have been wholly informal. A will may take the form of an assignment, or of a deed, or of a power of attorney, or of a letter, or of a promissory note, or of an order, etc., say the authorities. It may assume the form of any instrument, or be absolutely informal. This principle is well settled and numerous examples of such wills are to be found in the law books and decisions of the Courts here and abroad. Gardner on Wills (1st ed.), pp 36 to 43, and the Courts have gone very far to support such documents as valid wills, but at the same time they have required sufficient

certainty and assurance as to the intention to presently, or at the time the particular document comes into existence, make a will, and as to that paper being the very will he intended to make. Gardner, at p. 40, says: "So a letter written by a testator to a friend, authorizing him to take charge and dispose of the testator's property, and to sell and convey the same as his executor, properly attested, sufficiently evidences the testator's intention to dispose of his property, and may be probated as a will. But a letter, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of the statute, and must express a *genuine present* and *not merely an anticipated testamentary intent.*"

Mr. Jarman, in his work on Wills (6 ed.), p. 21, says, in substance at least: "The law has not made requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses its testamentary character and the intention of the maker respecting the posthumous destination of his property; and if this appears to be the nature of its contents, any contrary title or designation he may have given to it will be disregarded."

In the case of *In re estate of C. B. Richardson* (appeal of Nina R. Hardee), 94 Calif., 63, the Court held that a letter, which merely expressed a desire that his sister and her children get everything he owned, but containing words indicating that they should take it by a formal will, or by one he would make, was not testamentary in character, but only the expression of a desire, it clearly not being the intention that the letter should be so construed as to become his last will. It is argued that many cases held that such a letter constituted a will, but with this statement we cannot agree. Those referred to manifestly contained evidence of an intention to *then* devise and bequeath the writer's estate, or, in other words, that the letter should have a present and full operation as a will, leaving nothing to be done in the future in respect to the matter. But here there is on the face of the letter an expression which clearly indicates the intention that it should not itself be Bennett's will, but that some other document, more formal in character, should be, and this he would have fixed if he had a chance. The general tenor of the will shows an expectation, if not a confident hope, of his restoration to health. He expresses the hope that "God will be with them until they meet again."

He was not *in extremis,* even if quite ill with measles, as his temperature was 104, or 5 2/5 degrees above the normal, and he felt badly. He anticipated, though, that he would eventually carry out his wish, when better able to do so. The language of the paper is but the manifestation

of his purpose to do something in the future, but is, by no means, a present testamentary disposition of his property. It is more an expression of his gratitude for past favors, and a desire to reward the propounder in the future by willing him property. We cannot hold, under our law, that it rises to the dignity and solemnity of a last will and testament.

The statute requires, in the case of a holographic will, that the paper be deposited with some person for safe keeping, unless it is properly attested, or is found among the valuable papers and effects of the maker. This letter bears no evidence on its face, nor is there any proof otherwise that Bennett intended that it should be deposited with the propounder, or any one else, for safe keeping. There is no request that he keep or preserve the letter, or that he do anything more with it than he would with any ordinary or casual letter received from him, or any other person.

The case of *Haberfield v. Browning,* 4 Vesey, Jr., 200, referred to in *Mathews v. Warner,* 4 Vesey, Jr., at p. 200 (31 Full Reprint Series of Eng. Reports, p. 102), is sometimes relied on to sustain papers of this kind as wills. That was a case of instruction to an attorney to draw up a will, which, for special reasons, was held as a valid will. But in *Mathews v. Warner,* 4 Vesey, Jr., 186, it was insisted that it did not apply to a case of this kind, "where upon the face of the paper it is not intended as a testamentary disposition." There is no present disposition, nor did the deceased ever intend by signing it, "that it should immediately operate," adding that "there are many sensible passages applicable to the subject in Shep. Touchstone, 404 to 408." The Court, by so famous a judge as *Lord Loughbonough,* accepted this contention as sound and correct.

We cannot refrain from adding to this opinion the great weight of that able jurist's view as expressed by him in *Mathews v. Warner, supra:* "Under all these circumstances, with this evidence, and above all, the evidence of the paper itself, I should have no difficulty, sitting as I have sat in a Court of Law, to put it so to the jury, that I should expect a verdict that he had not devised; that it was no will, but only a project of a will, not a complete, definite rule and law for settling his fortune. It is not, it cannot, be denied, the argument presses so strong, that upon the perusal of this paper the natural conclusion is that it was his intention to make a more formal paper than this. That inference cannot possibly be avoided. Then *ex hypothesi* this paper at the time he subscribed it was not the law, the testament. When then, at what period, did the *voluntas testandi* exist in his mind *quoad* this instrument? If it is admitted, as it must be, that when he subscribed his name he was looking to some future act, the decision that this is his will would de-

stroy the most general maxim I know of, *'voluntas testatoris ambulatoria est usque ad mortem.'* No man can answer the question, at what time that intention existed in his mind. I know there was a period when a contrary intention existed. He has given that evidence under his own hand by the paper of 1789. Under all these circumstances, I should have felt myself obliged, as an act of duty, strongly to press upon the consideration of the jury the utter impossibility upon the fair view of the evidence of making the supposition, that this was the will, and I must have added another circumstance, that it was his last will. The manner in which it was kept, with so little attention, the place where it was found, these circumstances are always of great consideration. But though that is the bias of my mind, I am very far from saying it may not be a necessary conclusion in the Court, which is to decide by other maxims than we are acquainted with here, that this will may be established; but I wish the point, after it has been well canvassed and considered, to be felt as a point of great weight and importance; and if such things are to be established as wills, it loudly requires the interference of the Legislature to prevent such a latitude in that respect as makes the disposing of all a man's fortune the most slight and trivial act, attended with much less of form, solemnity, and precision than any act he could do with regard to any part of his property during his life."

Suffice it to say, that the best considered and weightiest authorities upon this important question hold with us that a paper, such as this, is not, in law, a last will, and this case, we think, by reason of its special facts and the peculiar language of the paper, especially that of the last clause, is much stronger for the caveators than any one in the large group which support their view.

It is impossible to read the paper now before us for consideration, and come to the conclusion that it is a testamentary one. It states merely an intention to execute something in the future as his will, which he may or may not do after fuller consideration, for, as said by *Lord Loughborough, supra,* and translating his Latin, "the will of a testator is ambulatory even to his death," which means, in other words, that it is not fixed legally, but may be changed even to the time of his death.

There is also nothing in the language used which shows an intention to deposit the paper "with some person as his will," but is a casual letter, written and mailed only as is a letter in any correspondence, and not attended by the solemnity which is, and should be, required in executing so important an instrument as a will.

The cases of *Spencer v. Spencer,* 163 N. C., 83, and *In re Will of Ledford,* 176 N. C., 610, belong to that class of cases we have mentioned above, where the letters showed that they were written *animo testandi,* and that they should operate as wills, and not some other paper to be

written in the future. In the *Spencer case* the Court said: "The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written *animo testandi.* It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it. In the case at bar the testator had made his will in New York City on the eve of his departure for a European trip. This so-called codicil is a letter written to his brother immediately after he had executed his will, and makes no reference to it. It is scarcely probable that the testator regarded, or intended, such a letter to be in any sense a part of his will. 1 Redfield on Wills, star p. 174, and notes; *St. Johns Lodge v. Callendar,* 26 N. C., 335; *Simms v. Simms,* 27 N. C., 684." This language, or the essential part of it, was quoted and approved in the *Ledford case. Alston v. Davis,* 118 N. C., 203, was overruled. The case of *Milam v. Stanley,* 17 L. R. A. (N. S.), 1126, was decided upon the same principle. The Court there said: "The letter shows on its face that it is inartificially written, but his meaning is sufficiently apparent. He did not have in mind that he was thereafter to make his daughters a deed to the house and lot. (Quoting language of letter.) These words show that he had in mind, not something that he was going to do, but something that he was then doing. In other words, they show that he intended them to have the house and lot by virtue of the letter he was then writing, and not by virtue of some instrument he was thereafter to write."

It is not necessary to discuss the question whether the words of the statute, "or was lodged in the hands of some person for safe keeping" (Rev., 3127 (2)), meant some third person, or one not a beneficiary.

The court erred in its instruction to the jury, and in not giving the caveators' prayers.

New trial.

HENRICO LUMBER COMPANY v. DARE LUMBER COMPANY.

(Filed 15 September, 1920.)

1. Actions—Venue—Parties—Interest in Lands—Cities—Corporations—Nonresidents.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of our statute, Rev., 419, requiring that the venue of such action shall be in the county wherein the land is situated, and where both plaintiff and defendant are corporations, nonresident of the State, an action brought in a different county from the situs of the

property, wherein neither has property, nor conduct its business, the case falls within the intent and meaning of Rev., 423 and 424; and upon a proper motion aptly made, is removable to the Superior Court of the County wherein the land is situated, and the cause of action arose.

2. Removal of Causes—Transfer of Causes—Courts—Jurisdiction—Motions—New Parties.

Where a cause is removable, for improper venue, from the county in which it has been brought, and new parties defendant are made at their own request, such new parties are not prejudiced by the delay of the original defendant to take timely steps to remove the cause to the proper county, when they act promptly and within the time allowed by law.

CIVIL ACTION, heard before *Calvert, J.*, on a motion to remove the same to the county of DARE for trial, which was granted, and the removal ordered. Plaintiff excepted, and appealed to this Court.

The facts are these: The plaintiff sued to recover damages for the breach of a contract by the defendant to sell and deliver to it a certain quantity of pulpwood, for the price of $120,102.10, and also to set aside bonds and a deed of trust on lands for fraud. The Dare Lumber Company, a corporation, issued its bonds to the amount of $6,000,000, and secured the payment of the same by executing a deed of trust to the Commercial Trust Company on its lands in Dare and Pasquotank counties. The contract for the sale and delivery of the pulpwood was authorized and approved by the Metropolitan Trust Company, which corporation was the owner of all the stocks and bonds of the Dare Lumber Company, the approval of that company being based upon a valid consideration, that is, the benefit and advantage which would accrue to it from the pulpwood contract. The Metropolitan Trust Company is now the owner and holder of the bonds of the Dare Lumber Company, secured by the deed of trust, which are alleged to be fraudulent as to the creditors of the said company. The latter company was the original defendant in the action, which was brought in Beaufort County. The other defendants were afterwards made parties, as defendants, upon their own request, and moved that the venue of the action be changed to Dare County, because the cause of action arose there, and the lands described in the deed of trust are situated there, all of the parties being nonresidents of this State. A sale of the lands by the trustee, under the power contained in the deed of trust, was enjoined and other orders made, which, though, it is not material to consider at this stage of the proceedings.

The Metropolitan Life Insurance Company having become the owner of the stocks and bonds of the Dare Lumber Company, the Metropolitan Trust Company had been substituted as trustee in the deed of trust for the Commercial Trust Company. The time for answering expired on 13 July, 1920, and the motion to remove was filed 12 July, 1920.

Small, MacLean, Bragaw & Rodman for plaintiff.
Frank Ewing, P. W. McMullan, and W. A. Worth for defendant.

WALKER, J., after stating the foregoing material facts: The right to have the place of trial changed from Beaufort County to Dare County would seem to be clear upon the facts. Why the venue of the action was laid in Beaufort County does not appear. It manifestly was not the proper county, as none of the parties resided therein; the cause of action did not arise in that county; nor was any of the land to be affected by the judgment, and described in the deed of trust, situated therein; nor was the business of the companies, or any of them, usually done in that county. But Dare County answered all these requirements. Rev., 419, 423, 424. The plaintiff, as we have remarked, is a Virginia corporation, and the defendants are New York corporations, and those sections fix the venue, which does not include Beaufort County. The law provides that actions for the following causes must be tried in the county where the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the following cases:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the foreclosure of a mortgage on real property, etc. Rev., 419.

An action against a corporation created by or under the laws of any other State, government, or country may be brought in the Superior Court of any county in which the cause of action arose, or in which it usually did business, or in which it has property, or in which the plaintiffs, or either of them, shall reside. Rev., 423. This action was brought for the purpose of setting aside the deed of trust, and obtaining a lien thereon superior and prior thereto. It, therefore, comes within the operation of Rev., 419 (not to mention the other sections which are applicable), because the plaintiff seeks the determination, in some form, of an estate or interest in real property. We held in *Wofford v. Hampton,* 173 N. C., 686, that a creditors' bill for setting aside an alleged fraudulent deed of a debtor to his wife was triable only in the county where the land, or some part thereof, is situated. The object of this action is to establish a claim and to annul, for fraud, a deed of trust on lands in Dare County, where the cause of action arose.

There is a suggestion that the motion to remove the case for trial to Dare County was not made within the time prescribed by the statute, but this appears to us to be an erroneous view of the case. It is certain that the insurance company and the trust company made their application for removal in time, and, even if the other defendant was tardy, it could not, by its inaction, prejudice, much less sacrifice, their right of

removal. These two defendants acted promptly after they were allowed to become parties. They would have been mere interlopers had they taken action to remove before their entrance into the case. A similar question was before the Court many years ago in *Knowis v. Baker*, 4 N. C. (Anno. Ed.), p. 196, where *Judge Cameron* said: "No neglect or delay in making the application can be fairly imputed to the defendant; for although the suit has been pending for several terms, yet till he became interested in it, he had no authority to interfere in it; and the application for a removal is made at the same term at which he is made a party to the suit." Besides, the defendants could not judicially have known what was the cause of action, and that it was removable to the proper venue, until the complaint was filed. As we have said, if the Dare Lumber Company was too late, or had waived its right, it did not deprive the other defendants of theirs.

After providing for the venue of actions concerning real property (Rev., 419), the statute declares that "in all other cases, the action shall be tried where the plaintiffs or defendants, or any of them, reside." Rev., 424. None of the parties reside in Beaufort County, as they are all nonresidents.

There was no error in the order.

Affirmed.

J. H. LEROY v. JOHN SALIBA.

(Filed 15 September, 1920.)

1. Appeal and Error—Inspection of Papers—Judgments—Orders—Finding of Facts—Presumptions—Statutes—Partnership.

In an action by a partner for the dissolution of the partnership and an accounting against the managing partner, charging him with fraud, it will be assumed, on appeal from an order of the Superior Court judge for an inspection and production of papers, etc., in the possession of the defendant, Rev., 1655, 1657, that the judge found such facts as were sufficient to support his ruling, in the absence of any written finding, and he was not requested by the appellant to find the facts.

2. Same—Evidence—Fraud.

There must be some evidence upon which the trial court bases its order for the inspection and production of papers, etc., in an action to dissolve a partnership, Rev., 1656, 1657; but allegations in an affidavit that the plaintiff had received certain checks from the managing partner of a firm, in which he was a partner, for his share of the partnership profits, which had been paid, and the contents were then unknown to him, and that they related to the merits of the action, are sufficient when there are allegations that the managing partner had committed fraud in the conduct of the

partnership affairs and intended to depart from the State and remove his property and effects therefrom for the purpose of defrauding and defeating his creditors.

CIVIL ACTION, tried before *Stacy, J.*, at January Term, 1920, of PASQUOTANK. Defendant appealed.

Ehringhaus & Small, Meekins & McMullan, and Thompson & Wilson for plaintiff.

Aydlett & Simpson for defendant.

WALKER, J. This is a motion in the cause for an inspection and production of papers and documents, in possession of the defendant, which relate to the merits of the action, or the defense therein, under Rev., 1656 and 1657. The action was brought for a dissolution of a copartnership, and an accounting by defendant, who managed its business, and has had possession of its books and papers. The verified pleadings were, by consent, used as affidavits. The defendant is charged in the complaint with fraud committed in the conduct of the partnership affairs, and further with the intention of departing from the State and removing his property and effects therefrom for the purpose of defrauding and defeating his creditors, and particularly the plaintiff, which allegation is based upon statements made by the defendant.

It is further charged that he has secreted his property with the same fraudulent intent.

The judge granted plaintiff's motion. He did not find any facts, nor was he requested by defendant so to do. In the absence of such a special finding we must assume that the judge found such facts as were sufficient to support his ruling. This is well settled. *Albertson v. Terry,* 108 N. C., 75; *Hardware Co. v. Buhman,* 159 N. C., 511; *Jones v. Fowler,* 161 N. C., 354; *McLeod v. Gooch,* 162 N. C., 122. It must, of course, appear that there is some evidence to justify the decision upon the motion. It does appear in the complaint, treated as an affidavit, that the contents of the checks, which were included in the order for an inspection by name, were not known to the plaintiff, and that they "related to the merits of the action," using the language of the statute (Rev., 1656), and this cannot be questioned. The checks were given to the plaintiff in part payment of his share of the partnership profits, and, therefore, he had seen them at the time, but they were sent to the bank on which they were drawn and by it returned to the defendant. This does not necessarily prove that he remembers their contents, as the transaction took place some time ago, and, besides, the complaint shows that they are pertinent to the issue joined between the parties. It was said in *Sheek v. Sain,* 127 N. C., 266: "Although it appears to us from defendant's affidavit

that such exhibition (of the check) could have done him no good, still we would have sustained the ruling of the court upon the ground that the statute gives the judge discretion to make an order requiring the plaintiff to exhibit the check to the defendant, and to give him, or to allow him to take, a copy of the same." Other cases sustaining the ruling of the Court are *Whitten v. Tel. Co.*, 141 N. C., 361; *Evans v. R. R.*, 167 N. C., 415; *Bank v. Newton*, 165 N. C., 363. *Justice Hoke* said in the last case: "A perusal of the statute will disclose that the question rests in the sound legal discretion of the court, and as we find no such abuse of discretion on the part of his Honor as to raise a legal question for our decision, the judgment is affirmed." And *Justice Brown*, commenting upon that language, said, in *Evans v. R. R., supra:* "Under the authority of that case (*Bank v. Newton*), we deem it proper to say that when this case is tried it will still be competent for the judge, in his sound discretion, to compel the production of this Form 408 when its competency and pertinency as evidence bearing upon the issue may the better be determined."

There is no error in the ruling of the court.

Affirmed.

MRS. HELM P. POWELL, ADMINISTRATRIX, v. HOOKERTON TERMINAL COMPANY.

(Filed 15 September, 1920.)

Bills and Notes—Lost Collateral—Trusts and Trustees—Right of Action—Judgments—Rights of Pledgor.

Defendant gave its renewal notes to plaintiff for the purchase of shares of stock in a banking corporation, endorsed by its agent and with the consent of all parties concerned except the plaintiff. The shares were placed in the hands of a trustee to be delivered to the endorser, the defendant's agent, upon the payment of the note they secured. The shares of stock were misplaced or lost by the trustee, and it was *Held*, not to be required that the plaintiff produce the shares of stock before her right of action accrued on the past due note, she not being chargeable with, or in default for, the loss of the shares; and a judgment requiring the plaintiff to give sufficient indemnifying bond, both to the defendant and the bank, upon the payment by the defendant of the note and retaining the cause for the plaintiff to take such other steps as she may be advised upon the nonpayment of the note, is a proper one.

APPEAL by defendant from *Lyon, J.*, at March Term, 1920, of EDGECOMBE.

This is an action on a note for $300, given by the defendant to the plaintiff. It is one of three notes, the other two having been paid. All

were endorsed by Mr. H. C. Bridgers, and were given for the purchase of stock in the First National Bank of Tarboro. Stock of said bank was, by agreement between all the parties except the plaintiff, deposited with Ed. Pennington to hold as trustee to secure the payment of the notes, with a stipulation that as and when the serial notes are paid, the certificate of stock in the hands of Mr. Pennington, as trustee, which secured the note so paid, should be surrendered by the trustee to Mr. H. C. Bridgers, the endorser, and who represented, and was acting for, the defendant, as agent. The note in suit was originally one of a set of twelve notes secured by the same collateral, the other eleven having been paid, and the certificates held by the trustee as collateral having been surrendered according to the agreement. The certificate for the five shares securing the note sued on has been lost or mislaid by the trustee, but by no fault of the plaintiff, who was not a party to the agreement as to depositing the certificates with Mr. Pennington. Defendant now insists that the plaintiff had no right of action until she had tendered the certificate for the five shares of the stock held by Mr. Pennington, as trustee, as collateral to her note, and that she is not entitled to recover any costs because of her failure to surrender the collateral, or to offer so to do, to the defendant. The court required plaintiff to give an indemnifying bond in the sum of $900 to defendant, and also one in the sum of $2,000 to the bank, which was done.

The court held that plaintiff is not required to produce the certificate for five shares of bank stock, or, if it is lost, to cause another one to be issued before she can recover.

Judgment was thereupon rendered for the plaintiff upon the note, and for costs, with this provision inserted therein: "This cause is retained to the end that if said judgment is not paid, then the plaintiff can take such other and further action herein as she may be advised towards selling said stock for the payment of the said judgment."

Defendant and Mr. H. C. Bridgers excepted to the judgment, and to the ruling against them, and appealed.

W. O. Howard for plaintiff.
John L. Bridgers for defendant.

WALKER, J., after stating the case: There is no rule of law which requires the plaintiff, before bringing this action, and upon the special facts of the case, to produce and deposit the stock. If any such action on her part as to the deposit of the certificate in court, so that it could be surrendered when the judgment is paid, was necessary as a condition precedent to her having judgment upon her note, the admitted fact that the certificate had been lost, and that indemnity bonds had been given,

as ordered by the court, supplied the place of such production and tender of the original certificate, or a new certificate as a substitute for it. She did not have the possession of the stock, under the agreement, but Mr. Pennington, as trustee, had it, and received it at the special instance and request of Mr. Bridgers, the endorser, and the defendant, with the concurrence of the bank. She was not trusted with it, and is not responsible for its keeping and production. It would be a hard measure to impose such a duty or obligation upon her when the necessary means and opportunity of producing it was taken from her by an agreement between the other parties. She acquired a benefit by the deposit of the stock as collateral, but this was done under the law, and by no provision in the agreement. The defendants could not tie her hands and then ask that she be required to do what, by their own action, they have prevented her from doing. Under the terms of the agreement between defendants, they were required to pay the note and take it to the trustee, Pennington, and demand the collateral. If he could not produce it, because he had lost it, it becomes a matter between him and the other defendants, and Mrs. Powell was placed in no default by reason thereof. We think this clearly the law, and, moreover, is right and just.

Although no authorities were cited to us, we are of the opinion that the foregoing views are fully sustained by *Bateman v. Hopkins,* 157 N. C., 470. As said substantially in that case, How can the defendants have been hurt if they are fully assured by the indemnity bond required that no loss can come to them? There is another principle of that case that applies strongly here, which is, that if defendants' own laches have prevented the plaintiff from complying with their present demand, the law affords them no relief. It will simply proceed to do justice according to the facts, and not give to the defendants a relief which has been forfeited by their own conduct in the matter. If they preferred the method of depositing the collateral with Mr. Pennington, and the certificate has been lost by him, they must take the consequences, as it would be contrary to all our notions of justice to visit upon Mrs. Powell, an innocent party, any part of their misfortune, which they solely have brought upon themselves. We do not say that defendants were negligent, but that Mrs. Powell, the plaintiff, was not.

If the collateral had been deposited with the plaintiff, the question might be different. Why did not the defendants have new stock issued and deposited with the trustee? This is not explained.

There was no error.

Affirmed.

WASHINGTON HORSE EXCHANGE COMPANY v. G. I. BONNER.

(Filed 15 September, 1920.)

Bills and Notes—Endorser—Admissions—Notice—Waiver—Burden of Proof—Instructions—Appeal and Error.

The burden of proof is upon the plaintiff in his action against an endorser on a note to show both notice of dishonor or waiver thereof when this defense is relied upon, and an erroneous admission on the trial of the defendant's counsel, that the burden was on him to show want of notice, does not relieve the plaintiff of his burden of showing the defendant's waiver, and an instruction to the jury that placed the burden on defendant to show both the lack of notice and its waiver, is reversible error.

BROWN, J., did not sit.

APPEAL by defendant from *Cranmer, J.*, at the Spring Term, 1920, of BEAUFORT.

This is an action on a note against the defendant Bonner, an indorser.

The defendant admitted the execution of the note and the indorsement thereon, but denied that notice of dishonor of the note was given to him, and therefore insisted that he was released from liability.

The plaintiff contended that notice was given to the defendant, and, if not, that it has been waived.

The plaintiff also alleged that at the time of the indorsement of the note the defendant agreed to collect the same, which was denied by the defendant.

Both parties introduced evidence in support of their respective contentions.

Before evidence was introduced by either party, "counsel for defendant stated the making and the indorsement of the note was admitted, and the burden on the defendant to show want of notice, and he was entitled to open and conclude as a matter of law, and requested the court to so hold, and allow him to open and conclude."

His Honor so held, and in his charge told the jury: "The burden is upon the defendant to satisfy you by the evidence, and by its greater weight, that he did not receive notice, and did not waive notice. If he has so satisfied you, you will answer the issue in his favor, but if he has not so satisfied you, you will answer the issue in favor of the plaintiff."

The defendant excepted. There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
Daniel & Carter for defendant.

ALLEN, J. It is conceded that the charge excepted to does not state the law correctly, and that the burden was on the plaintiff to prove notice of dishonor, or that the notice had been waived (*Perry v. Taylor,* 148 N. C., 362), but the plaintiff insists that the error was caused by the conduct of the defendant, in that he had substantially requested the court to so charge, and that, therefore, the defendant cannot take advantage of the error.

It is true that a party cannot except to an instruction given at his request (*Kelly v. Traction Co.,* 132 N. C., 374), but an examination of the instruction given shows that it goes beyond the position taken by the defendant.

The defendant assumed the burden of showing that he did not receive notice, but not that there was no waiver of notice, and the charge places on him the burden of showing both, and in this we are of opinion there is substantial error against the defendant.

The letter which was introduced in evidence by the plaintiff, and to which the defendant excepted, was, we think, competent as tending to corroborate the evidence of the plaintiff that the defendant agreed to collect the note, which would be material on the issue of waiver of notice, as the principle is well established that there may be a waiver of notice before or after maturity of the instrument.

For the error pointed out there must be a

New trial.

BROWN, J., not sitting.

MARTHA W. HARRISON v. C. M. DAW AND WIFE.

(Filed 15 September, 1920.)

Sales—Mortgages—Void Foreclosure—Resale—Title.

Where, under the power of sale contained in a mortgage or deed in trust, the purchaser is judicially ascertained to have acted for and as the agent of the mortgagee, he and the mortgagee may again sell the land under the continuing power contained in the mortgage, without the order of court to sell, and convey the title to the purchaser at the second sale.

APPEAL by defendant from *Cranmer, J.,* at the April Term, 1920, of BEAUFORT.

This is an action to recover possession of a certain tract of land.

The defendants denied the right of the plaintiff to recover.

Prior to 1914, the defendant Daw was the owner of said land, and on 23 May of that year he and his wife executed a mortgage with power of sale to S. B. Windley to secure $187.50. After said debt became due,

the land was sold under said mortgage and bought by E. A. Daniel, Jr., to whom the land was conveyed by deed on 17 December, 1917.

The said Daniel brought an action against the defendants to recover possession of said land, and the defendants alleged that the plaintiff Daniel bought the land at the mortgage sale for, and as the agent of, the mortgagee.

A decree was entered in said action in which it was adjudged that the said Daniel held the title to said land under the said mortgage in trust to secure the debt therein set forth, and upon the condition set out in said mortgage.

The said Daniel and the said Windley, mortgagee, thereafter advertised said land for sale under the power contained in said mortgage, the same was again sold, and the plaintiff became the purchaser, and deed was executed to him for the same.

The defendants on the trial in the Superior Court stated in open court that they rested this case on the legal question as to whether the foregoing deeds and mortgage conferred title on the plaintiff.

The court held that the plaintiff was the owner of the land in controversy, and rendered judgment accordingly, and the defendants excepted and appealed.

Small, MacLean, Bragaw & Rodman for plaintiff.
John G. Tooly and Harry McMullan for defendants.

ALLEN, J. The determination of the question involved in this appeal depends on the right of a mortgagee to sell a second time after he has once sold the land under the power contained in the mortgage and executed a deed pursuant to the sale, when the first sale has been set aside.

The minority rule seems to be that the mortgagee cannot resell the property, although the first sale is invalid and is upon the ground that upon the execution of a trust deed or mortgage the legal title passes to the trustee or mortgagee, and that any conveyance conveys his legal title, and that he retains no title which he can convey on a resale of the premises.

"The majority rule is that where the trustee named in a trust deed or mortgage, with a power of sale, has made an invalid sale of the property conveyed to him in the trust deed or mortgage, he may resell the property in accordance with the provisions thereof. Thus, in a case wherein it appeared that a sale of property by a trustee in a trust deed had been set aside by a court of equity on account of the insufficiency of the description of the property in the notice of sale, and that the trustee had resold the property, the Court held that the resale was valid, and that it was not necessary to obtain an order of the court therefor." 19 R. C. L., 620.

Our Court has adopted the majority rule. *Brett v. Davenport,* 151 N. C., 56.

The case of *Reeside v. Peter,* 35 Md., 221, is directly in point. In this case the Court says: "On a former appeal between the same parties, 33 Md., 120, a previous sale made by the trustee was set aside on the ground that the property was not sufficiently described or designated in the public notice of sale given by the trustee; and the cause was remanded in order that the property might be resold, and the necessary steps taken in the court below for that purpose, in conformity with the opinion of this Court. The trustee thereupon proceeded to advertise the property again for sale, under the power contained in the deed, and the sale was made on 24 August, 1870, and a report thereof made to the Circuit Court.

. . . . . .

"The *first* objection has been mainly relied upon in this Court. It rests upon the ground that it was necessary, after the case had been remanded, for the Circuit Court to pass an order directing a resale of the property, and that the trustee had no power to sell without such order.

"In our opinion, such order was not necessary; the power to sell was conferred upon the trustee by the terms of the deed, and no previous order of the court is necessary to enable the trustee to exercise it.

"In the former appeal, this Court considered the instrument as a deed of trust and not as a mortgage. Even if it be treated, however, as a mortgage coming within the provisions of the Code, article 64, and it be conceded that, after the sale had been set aside, the case came within the operation of the 9th section of that article, still we do not understand the terms of that section as mandatory, requiring that a resale shall be ordered by the court. It would certainly be a safer and better practice to obtain such order; but the resale would not be invalid without it, nor is the want of it a good ground for setting the sale aside, if it be fairly made and free from objection on other accounts. The power to sell in this case is not derived from the court, but from the deed; and as it may be exercised in the first instance, and the property sold without the court's order, so it may be resold without such order, where the first sale has been set aside."

We therefore conclude that his Honor held correctly that the plaintiff is the owner of the land in controversy.

No error.

CORNELIUS MIDGETT v. THE BRANNING MANUFACTURING COMPANY.

(Filed 15 September, 1920.)

1. Employer and Employee—Master and Servant—Fellow-servant Act—Negligence of Vice Principal—Statutes.

The plaintiff was employed by defendant logging railway company at a steam power-driven "rigged skidder," used for drawing logs attached to a rope from the woods to be loaded on cars, the duty of plaintiff being to give signal for the "skidder" to start. While acting under the supervision of the defendant's superintendent regarding a log that had been caught between stumps, the skidder started, causing a personal injury to the plaintiff. The evidence was conflicting as to the plaintiff's contributory negligence, and whether the "skidder" accidentally started or signal was given negligently by other employees of defendant: *Held*, though the fellow-servant act would not apply, still, if the plaintiff was injured by the negligence of the defendant's vice principal, the defendant would be liable unless the plaintiff was guilty of contributory negligence, and under the conflicting evidence this question was properly submitted to the jury. Rev., 2646.

2. Employer and Employee—Master and Servant—Negligence—Fellow-servant Act—Actions—Damages.

When the negligence of the employer and a fellow-servant concurs in producing an injury, the injured employee can recover from either, if he himself is free from negligence.

APPEAL by defendant from *Lyon, J.*, at November Term, 1919, of TYRRELL.

This is an action for personal injuries. The defendant logging railroad was operating a steam skidder for pulling the logs from the woods to be loaded on its cars, it being what lumbermen call a "rigged skidder." The plaintiff's duty was to carry the bull rope attached to the said machine out in the woods and fasten it to the logs to be pulled, and also to place the ropes around the logs when they were lifted and loaded on the cars. The plaintiff was the only one who had authority to signal the skidder to start pulling a log. When the rope had been attached by him, he would back off a few feet and give the signal, whereupon the engineer would give two short blasts of the whistle as a signal for the men to get out of the way, when he would begin to pull. When the engineer gave the signal, the plaintiff would run further back into the woods.

On this occasion the log had fallen in such a manner that it lay parallel to the railroad track, and was wedged between stumps. The plaintiff reported this to the foreman in charge, who went where the log was lying, in company with the plaintiff and other employees, and ordered them to saw the log in two, and said that he would then break it

with the skidder. In sawing the log in two, it settled down and pinched the saw, and under the direction of the foreman the plaintiff placed the bull rope on the top of the log, while other employees drove wedges into the log to release the saw. While the plaintiff was standing by to give the signal, when ready, the skidder suddenly started up, without warning, snatching the log with such a force that it swung around several feet to where the plaintiff was standing, knocking him down, breaking his leg, and otherwise injuring him.

The jury found that the plaintiff was injured by the negligence of the defendant, and that the plaintiff was not guilty of contributory negligence, and assessed the damages at $500. The defendant appealed from the judgment.

Majette & Whitley for plaintiff.
T. H. Woodley and Meekins & McMullan for defendant.

CLARK, C. J. The evidence for plaintiff was that the skidder started up without any warning. The evidence for the defendant was that the skidder started up without orders from the foreman, and upon the signal from another employee, who got notice from still another employee, who received notice from the plaintiff. On this conflict of evidence the motion for nonsuit was properly refused.

The defendant further insists that this injury was an accident, and if not, that it was caused by the negligence of a fellow-servant, for which the defendant is not responsible. The plaintiff was obeying the orders of his superior, the foreman, and the vice principal of the company, who was present at the time and directing the work.

It is true that the fellow-servant act, Rev., 2646, applies to the operation of logging roads. *Liles v. Lumber Co.*, 142 N. C., 49; *Bissell v. Lumber Co.*, 152 N. C., 123; *Bloxham v. Timber Corp.*, 172 N. C., 37. This does not extend to the operation of the skidder by other than the train crew, and if used only for the purpose for drawing logs out of woods to be loaded upon the cars. *Twiddy v. Lumber Co.*, 154 N. C., 237. In *Jackson v. Lumber Co.*, 158 N. C., 317, it was intimated that the operation of the skidder to draw the logs out of the woods was not a part of the operation of the railroad company, but that the use of the loading machine to lift them on the cars was.

In this case the plaintiff was injured by the negligence of the skidder, as the jury found, but if the fellow-servant act does not apply, the defendant was liable for negligence of its vice principal, who was directing the work, and under whose orders the plaintiff was acting. "In such a case, the negligence is imputed to the principal, and a prayer for instruction was properly refused, to the effect that if the plaintiff was

injured, under such circumstances, by the misconduct of a co-employee he could not recover." For if the negligence of the employer and a fellow-servant concurs in producing the injury, the injured employee can recover from either if he himself is free from blame. *Wade v. Contracting Co.*, 149 N. C., 180, citing 12 A. and E. (2 ed.), 905; *Beck v. Tanning Co.*, 179 N. C., 126.

No error.

E. D. CARSTARPHEN v. TOWN OF PLYMOUTH ET AL.

(Filed 15 September, 1920.)

Municipal Corporations—Sale of Public Building—Jail—Notice—Approval of Voters—Injunction.

In the absence of a special statute, the mayor and councilmen of a town are unauthorized to sell the only building of the town in which the jail and municipal offices, etc., are located, without having given the thirty days notice required by Rev., 2978, or the approval of the qualified voters of the town, Rev., 2916 (6), and in such instances a permanent injunction is proper.

APPEAL by defendants from *Cranmer, J.*, at July Term, 1920, of WASHINGTON.

Majette & Whitley for plaintiff.

Ward & Grimes, Vance Norman, and Van B. Martin for defendant.

CLARK, C. J. This is an action by the plaintiff, a citizen and taxpayer of Plymouth, against the mayor and councilmen to restrain the sale by them of a brick building owned by the town, in which is located the office of the mayor, the office of the chief of police, the town lock-up, the city market, and the city hall. This building is located upon land conveyed by Arthur Rhodes and wife to the trustees of the town of Plymouth in 1790. Said building is the only building owned or used by the town for the above purposes.

On 21 January, 1920, the mayor and board of councilmen passed a resolution looking to the sale of the said property, and the following night, at a public meeting attended by seventy-five citizens of Plymouth and others, bids were received, the last and highest bid being $13,251, by S. A. Ward, who is also a party defendant herein. Before the sale was consummated, a restraining order in this case was issued by Lyon, J.

Said sale, or attempted sale, was not made after thirty days public notice, as required by Rev., 2978. The Court finds the above facts, and

held that the mayor and councilmen were without authority to sell the said property, and decreed that the restraining order theretofore granted should be made permanent.

This judgment is in accordance with *Southport v. Stanly,* 125 N. C., 464. There is no special act authorizing the sale. There was no approval by a majority of the qualified voters of the said town, under Rev., 2916 (6).

Affirmed.

SWIFT & COMPANY v. NEW BERN PRODUCE COMPANY.

(Filed 15 September, 1920.)

1. Principal and Agent—Vendor and Purchaser—Fertilizer—Commissions—Estimates—Sales.

A sale of fertilizer upon commission, whereunder the agent was to obtain estimated amounts from the purchasers, sales to be approved by the principal, shipped out direct to the purchasers when they sent in their orders, and the commissions *were due* only *when* the fertilizers had been paid for, does not entitle the agent to commissions on fertilizers on the estimates furnished, but only on such for which the orders were given and paid for by the purchasers.

2. Principal and Agent—Commissions—Vendor and Purchaser—Fertilizer—Wastage—Damages.

When fertilizers are consigned to the selling agent, to be sold upon commission, title retained by the vendor, and the agent to render a statement to him at designated time, and return the unsold part of the consignment, the agent cannot recover for wastage by reason of the sacks not having been properly sewed, when it established that the agent had been paid his commissions in full.

3. Principal and Agent—Vendor and Purchaser—Contracts—Wastage—Fertilizer.

A selling agent of fertilizer, upon commission, may not recover for wastage by reason of insecurely sewed sacks, when he has not complied with a stipulation in his contract providing that "all claims of whatsoever nature must be made within ten days of the receipt of the fertilizer, or they will not be recognized," and had not paid the vendees for any shortage by reason of such waste.

APPEAL by defendant from *Bond, J.,* at Spring Term, 1920, of PASQUOTANK.

This case was heard on the exceptions to the report of a referee, by *Bond, J.,* at Spring Term, 1920, of Pasquotank. The court sustained all the findings of fact to which the defendants did not except, but they excepted to his overruling certain exceptions as to the law, and appealed from the judgment.

W. A. Worth and Aydlett & Simpson for plaintiff.
Meekins & McMullan for defendant.

CLARK, C. J. On 27 November, 1916, the plaintiff and the defendant companies entered into two contracts. By exhibit "A" the plaintiff appointed the defendant company "its agent to sell fertilizer on a commission of $1 per ton for *actual deliveries.*" Under this contract the fertilizer was not delivered to the defendant company, but was shipped direct to parties whose names were sent in by the defendant company to the plaintiff. Some of these parties had sent in estimates of the amount of fertilizer they would require, and made written agreements with the defendant for that amount, but four of these parties subsequently failed to order out in the aggregate 618½ tons of the total amount they had agreed to order out.

The referee allowed the defendant company commissions on all the fertilizer that was actually ordered out and shipped, but declined to allow commissions on the 618½ tons which the parties failed to order. These parties testified that they would have ordered out more but for the delay in the shipping. The referee finds "that the failure on the part of Swift & Company to make prompt deliveries, while not a willful failure, was not due to causes beyond its control, and was so prolonged as to induce a reasonable apprehension in the minds of the buyers that further orders, if made, would not be filled in time for use."

Said contract "A" appointed the defendant company "agent" of Swift & Company for the sale of its fertilizer, and agreed "to pay said agent in full for all services rendered and expenses incurred hereunder the following commissions, based upon actual number of tons of fertilizer actually delivered: one dollar ($1) per ton due and payable only when all notes and accounts accruing hereunder have been paid in full to principal." It was further stipulated, "All contracts for sale shall be subject to approval by Swift & Company, at its office in Baltimore." In view of the above provisions, the above company was not entitled to commissions on the 618½ tons which the parties before named failed to order out. The plaintiff did not refuse to deliver the goods. They could only deliver upon order from these parties. If the plaintiff had shipped the fertilizer without orders, these parties would have been under no obligation to receive it. Besides, if ordered, the plaintiff had the option to refuse the order or to approve it.

The court properly sustained the ruling of the referee that the defendant company was not entitled to a counterclaim of $1 a ton for the fertilizer which parties had agreed to order, but subsequently had failed to do so.

The second contract, exhibit "B," made at the same time, constituted the defendant company "its agent for the sale of such of its different brands of its fertilizers mentioned below *as it shall consign to said agent to be delivered at Elizabeth City.*"

Item one of the contract says: "Swift & Company, Inc., agrees to pay agents as commissions for services mentioned," etc.

Item two says: "Agent accepts this appointment and agrees to push the sale of Swift's Fertilizer," etc.

Item three says: "Agent agrees to make full settlement to Swift & Company, at Baltimore Md., on 1 April, 1917, for all sales, with cash for all cash sales, and with purchaser's notes for all time sales. Purchaser's notes to be endorsed by agent, and to bear interest at 6 per cent per annum from maturity; . . . purchasers' notes to be made on blanks to be furnished by Swift & Company, Inc." "Agent further agrees to send to Swift & Company, Inc., Baltimore, Md., on 1 April, 1917, *a list of fertilizer remaining on hand and not sold on that date.*"

Item four says: "Agent shall keep a separate record of sales, payments, note transactions, and stock on hand for Swift & Company, Inc., which they may examine on demand. *All unsold fertilizer shall continue to be owned by Swift & Company, Inc., subject to its order. On demand of Swift & Company, Inc., it shall be delivered by agent at station named, subject to Swift & Company's orders, free from liens, charges, or expenses, and in good order. Agent shall store all goods separate and apart from other goods, and in a suitable building.*"

Item five says: *"Agent shall have no liens,"* etc.

From the above it is clear that the New Bern Produce Company was merely agent of the plaintiff. As the defendant company was merely the agent of the plaintiff, to whom the fertilizer belonged, the defendant cannot recover any loss of fertilizer caused by bad sewing. The title of the fertilizer was in the plaintiff, and the defendant could return to the plaintiff any part of the fertilizer which it did not sell. The judge approved the referee's finding of fact that the bags were not properly sewed, and that as much as ten per cent of the fertilizer was thus shipped and wasted, before delivery. But it was also found that the defendant received full price without any abatement to the purchaser by reason of any wastage, though the referee allowed certain other demands for recoupment to the defendant.

Item ten of the contract provides: "All claims of whatever nature must be made within ten days of the receipt of the fertilizer or they will not be recognized." The defendant was notified to make claim for any losses, which would be adjusted, but made none until after this suit was brought, and have paid out nothing. They are not entitled to recover on the counterclaim, not only because they filed no claim for losses, as

required by contract, but because they have not suffered any loss. *Hubbard v. Godwin,* 175 N. C., 174. The court properly sustained the refusal of the referee to allow the counterclaim for wastage.

Affirmed.

IN RE BAILEY.

(Filed 15 September, 1920.)

1. Appeal and Error—Exceptions—Brief—Rule of Court.

The court will dismiss the appellant's case when she fails to assign error as required by Rules 19, 20, and 21, or fails to file brief by the time required by Rule 34.

2. Wills—Devisavit Vel Non—Evidence—Declarations—Rebuttal.

Declarations of testator, who signed by cross mark to his alleged will, that the paper-writing was a forgery, and that he had not signed it, are competent in rebuttal of the evidence introduced in support of its genuineness.

3. Appeal and Error—Objections and Exceptions—Letters—Contents—Records.

Where the contents of letters introduced on the trial do not appear on appeal, an exception thereto cannot be sustained on appeal.

4. Appeal and Error—Devisavit Vel Non—Instructions—Harmless Error.

Where two paper-writings, each purporting to be a will, are, by consent, passed upon together on the trial of *devisavit vel non,* and neither one sustained, an exception to the charge that if both were properly executed, etc., the later would prevail, becomes immaterial.

5. Wills—Devisavit Vel Non—Verdict Set Aside—Consent.

The court will not set aside a verdict in an action *devisavit vel non* at the request of all the parties, for this would present a moot question, which the courts will not consider.

APPEAL by propounders from *Daniels, J.,* at October Term, 1917, of NASH.

Devisavit vel non. William Bailey offered a paper-writing purporting to be the last will and testament of Ellen Bailey, dated 26 March, 1914. This was caveated by Cora Wilson, who offered a paper-writing also purporting to be the last will and testament of Ellen Bailey, dated 10 May, 1915. This was caveated by William Bailey. The other heirs at law were made parties. By consent, the following issues were jointly submitted:

"1. Is the paper-writing bearing the date 26 March, 1914, offered by the propounder, William Bailey, the last will and testament of Ellen Bailey?

"2. Is the paper-writing bearing the date of 10 May, 1915, propounded by Cora Wilson, the last will and testament of Ellen Bailey?"

The jury responded to each of these issues, "No." Judgment accordingly.

No counsel for Cora Wilson.
Thorne & Thorne and F. S. Spruill for William Bailey.
Finch & Vaughan and J. S. Manning for the heirs at law.

CLARK, C. J. There were no assignments of error filed by Cora Wilson, as required by rules 19 (2) and 21, 174 N. C., 832, 833; *Lee v. Baird,* 146 N. C., 361, and numerous cases since. Also, there was no brief filed for her, in the time required by rule 34, and the motion by appellee to affirm the judgment as to her is allowed.

In the appeal of William Bailey, the first assignment of error is the admission of the declarations to the witness Woodruff by Ellen Bailey that the paper-writing of 26 March, 1914, was a forgery, and she had never signed the same. It purported to be executed by making her mark, and this declaration was competent to rebut the evidence offered by William Bailey in its support. *In re Wellborn,* 165 N. C., 641; *In re Shelton,* 143 N. C., 220; *Reel v. Reel,* 8 N. C., 248.

The second assignment of error that the court allowed Cora Wilson to introduce as evidence sundry letters of Ellen Bailey cannot be sustained, for the record does not disclose the contents of the letters.

The third assignment of error is to the charge that if the jury find that both paper-writings were legally and properly executed by Ellen Bailey; that the paper-writing propounded by Cora Wilson was the last will and testament of Ellen Bailey, because it was of later date than that propounded by William Bailey, has no foundation, because the jury found that both were forgeries.

The fourth assignment of error, that the court refused to set aside the verdict when requested to do so by all parties at that time, cannot be sustained. In *Kenny v. R. R.,* 165 N. C., 104, the Court held that the parties have a right before trial to settle their differences by agreement and compromise, but, after the return of the verdict, the court, in its discretion, may refuse to try the case over again although the parties consent for a new trial, for courts of justice cannot be turned into moot courts.

No error.

BARGAIN HOUSE v. C. E. JEFFERSON.

(Filed 15 September, 1920.)

Appeal and Error—Justices' Courts—Supreme Courts—Docketing Case—Laches—Attorney and Client—Statutes.

Defendant appealed from a judgment of a justice of the peace rendered upon condition that plaintiff produce certain receipts, which he did in a few days, the appeal being conditioned upon the rendition of the judgment. The judgment was docketed in the Superior Court; nineteen days after the signing of the judgment, and eleven days after it was docketed in the Superior Court, a term of court was held for the county, and another several months thereafter; but the appeal had not then been docketed, and thereafter the plaintiff had execution issued, and defendant moved and obtained a writ of *recordari*, without notice: *Held*, the writ was improvidently granted, and plaintiff's motion to dismiss should have been granted. Rev., 1492. *Held further*, the defendant's laches, in failing to perfect his appeal, was personal to him, and he could not be relieved by imputing it to his attorney.

ALLEN, J., dissenting; WALKER, J., concurs in dissenting opinion.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1920, of BEAUFORT.

Judgment was rendered in this case by a justice of the peace 3 September, 1919, for $44.79, the defendant being present in person and by counsel, the justice requiring the plaintiff to produce a receipt for the goods alleged to be lost before he would sign judgment, which the counsel for the plaintiff agreed to do. The counsel for the defendant entered notice of appeal upon condition that the judgment was so entered. On 10 September the plaintiff produced said receipt, and the justice entered the judgment, which was docketed in the Superior Court 18 September, 1919.

On 29 September, 1919, nineteen days after the judgment was signed by the justice, and eleven days after it was docketed in the Superior Court, a term of court was held for the county. But neither at that term nor at the next term, beginning 17 November, was the appeal entered in the Superior Court.

On 2 December, 1919, no appeal having been docketed, the plaintiff caused execution to issue. On 9 December, 1919, the defendant obtained a writ of *recordari* without notice to plaintiff. At April Term, 1920, the plaintiff moved to dismiss the *recordari*, which was refused, and the plaintiff appealed.

A. W. MacNair for plaintiff.
Daniel & Carter for defendant.

CLARK, C. J. The writ of *recordari* was improvidently granted, and the motion to dismiss should have been granted. Rev., 1492.

When an appeal from a justice of the peace is lost, without fault on the part of the appellant, he is entitled to the writ of *recordari* as a substitute for the lost appeal. But here the appellant was guilty of inexcusable neglect, and was not entitled to the writ. The judgment was rendered 3 September, conditional upon the plaintiff's producing a receipt, which he did a few days later, and the plaintiff entered its appeal. The justice signed judgment 10 September, which was docketed in the Superior Court 18 September.

At the term of the court 29 September the appellant, with proper care, should have made inquiry as to the disposition of the case which had been made by the justice, and certainly it was inexcusable negligence to wait nearly three months before applying for a *recordari*. *Pants Co. v. Smith,* 125 N. C., 590; *Davenport v. Grissom,* 113 N. C., 38, and cases there cited.

It is no excuse for the defendant if he depended on his counsel to look after the matter, for he could have attended to it himself. "It is not enough that parties to a suit should engage counsel and leave it entirely in his charge. They should, in addition to this, give to it that amount of attention which a man of ordinary prudence usually gives to his important business." *Roberts v. Allman,* 106 N. C., 394, and citations thereto in Anno. Ed.

It was incumbent upon the defendant to docket his appeal in the time required by law or show sufficient ground for the *recordari* in lieu of the appeal. *Walker, J.,* in *Tedder v. Deaton,* 167 N. C., 479.

An appeal lies from the dismissal of an action, or of an appeal, for that is final, but it does not lie from the refusal to dismiss, for an exception should be noted and an appeal lies from the final judgment. *Clements v. R. R.,* 179 N. C., 225. If the party loses, then the whole case will come up for review. But when an appeal is in fact taken, the Court, though dismissing the appeal, in its discretion may express an opinion upon the merits. *Hoke, J.,* in *Taylor v. Johnson,* 171 N. C., 85.

Each party will pay half the costs of appeal. *Fleming v. Fleming,* 159 N. C., 440; *Wilson v. R. R.,* 142 N. C., 341; *Patapsco v. Magee,* 86 N. C., 357.

Appeal dismissed.

ALLEN, J., dissenting: I would agree to the judgment of the Court if all the facts appearing in the record were stated in the opinion, but some are omitted, which, I think, are determinative of the appeal in favor of the defendant.

The defendant states in his petition for a *recordari,* which is verified and was used as an affidavit, that after the introduction of evidence by

plaintiff and defendant, and the argument of counsel before the justice, the court (justice) stated "that there was no evidence before it at that time that the plaintiff ever made delivery of the said goods to the railroad company, and that it would continue the matter for the plaintiff to secure more evidence, and upon obtaining this additional evidence would give notice to the defendant at the time it would render judgment in said cause," and it is denied specifically that notice of the rendition of the judgment was given to him, or that he had any knowledge of it.

The attorney of the defendant also files an affidavit in which he says that the statement by the defendant in his petition as to the agreement by the justice to give notice of the rendition of the judgment "is absolutely true to affiant's own knowledge, he being present in person," and that he "did not know that judgment had been rendered until execution was issued thereon."

As stated by *Walker, J.*, in *LeRoy v. Saliba,* at this term, "The judge granted plaintiff's motion. He did not find any facts, nor was he requested by defendant so to do. In the absence of such special finding we must assume that the judge found such facts as were sufficient to support his ruling. This is well settled."

Applying this rule, the judge refused to dismiss the petition for a *recordari,* because he found that the justice agreed to give the defendant notice of the rendition of the judgment, that he failed to do so, that the defendant relied on his promise, that the defendant did not know there was a judgment against him until execution issued, that he applied for a *recordari* at the next term of court after receiving notice of judgment, and in this I see no laches or negligence.

WALKER, J., concurs in dissenting opinion of ALLEN, J.

W. C. DUDLEY AND H. A. WATSON v. ATLANTIC COAST LINE RAILROAD COMPANY, AND WALKER D. HINES, DIRECTOR GENERAL.

(Filed 15 September, 1920.)

1. Railroads— Evidence— Negligence— Crossings— Gates—Watchman— Municipal Assent.

It is incumbent upon a railroad company to take such reasonable precautions as are necessary to the safety of travelers at a public crossing, and, upon the issue of negligence, it is competent to show that there were no automatic alarms or gates at the crossing in plaintiff's action to recover damages, caused by a collision of plaintiff's automobile with defendant's train, it being for the jury to determine the question of whether the plain-

tiff's or the defendant's negligence was the proximate cause; and the assent of the municipal authorities that a watchman should be stationed at the crossing, who should give warning, is not conclusive upon the question.

2. **Railroads— Crossings— Collisions— Automobiles—Negligence—Proximate Cause—Superior Rights—Pedestrians.**

The liability of the defendant, whose train had a collision with the plaintiff's automobile at a public crossing depends upon whether the plaintiff's or defendant's negligence was the proximate cause of the injury; and a prayer for instruction, tendered by the defendant, which eliminates this principle, and makes it the plaintiff's duty to recognize the prior right of the defendant to the crossing, is properly refused. The principle applying to a trespasser who was negligent after the defendant's engineer should have discovered his condition, *distinguished.*

3. **Railroads—Judgments—Director General—Lessor and Lessee—Federal Statutes.**

When the Government, represented by the Director General, is a party defendant with a railroad company, under the Federal Control Act, a judgment against the Director General alone is not objectionable, the Government being the lessee operating the railroad, and the railroad company the lessor, permitting adjustments of balances due under the Federal statute, and a judgment could be taken against either or both.

APPEAL by the defendant from *Cranmer, J.*, at May Term, 1920, of BEAUFORT.

This is an action to recover damages sustained by an automobile in crossing the defendant's track on Second Street, Washington, N. C. The automobile was going west on said street, which the railroad track crosses about 200 feet from Gladden Street. The space between the two streets is occupied by a warehouse. The engine came out from behind the warehouse. There was evidence tending to show that it was then too late to avoid the collision. There was also evidence for the defendant that the engine bell was being rung, and that a watchman was in the street, displaying a large sign with the word "stop" on it, and that it could have been seen by plaintiffs.

Upon the conflicting evidence, the jury found that the injury was caused by the negligence of the defendant, and that the plaintiffs did not contribute thereto, and assessed the damages at $600.

From the judgment the defendant appealed.

Ward & Grimes for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. We do not think the exceptions to the evidence require any discussion. It was in evidence that the watchman was placed by the defendant at this crossing with the approval of the governing body

of the city. It was not error for the court to permit the plaintiffs to offer evidence that there was no automatic alarm, or gates, at the crossing, and the court properly left it to the jury to say, upon all the attendant circumstances, whether the railroad company was negligent in not erecting gates. It was incumbent upon the defendant to take such reasonable precautions as were necessary to the safety of travelers at public crossings. 22 R. C. L., 988. This was a question of fact for the jury. That the city authorities assented that a watchman should be stationed at the crossing was not conclusive upon the plaintiffs if, in the opinion of the jury upon the evidence, this was not sufficient protection to the public.

We think that the judge, in the charges given and the prayers refused, followed the ruling in *Goff v. R. R.*, 179 N. C., 216; *Forsyth v. Oil Mill*, 167 N. C., 179; *Osborne v. R. R.*, 160 N. C., 309; *Hinkle v. R. R.*, 109 N. C., 472.

It is not error for the court to refuse to charge that "It is the duty of those going upon a railroad crossing to recognize the prior right of the railroad company to use the crossing in the operation of its business." The Court has so held as between the railroad company and the trespasser on the track, who, if injured, has no cause of action unless the railroad company was guilty of negligence after the engineer should have discovered that the trespasser was unable to avoid the injury, and the railroad could have done so after this was discovered. But when there is a collision at a crossing the liability depends upon whose negligence was the proximate cause of the injury, and the court properly so amended the prayer of the defendant. 22 R. C. L., 987, sec. 215, which is a very clear statement of the law.

The court rendered judgment against the Director General alone. We do not see that the railroad company can object to this. It can make settlement with its codefendant in adjusting the balances due under the Federal statute. The Government, as lessee, was represented by the Director General, and the appellant, as lessor, was also a party, and the judgment could have been taken against either or both. *Clements v. R. R.*, 179 N. C., 230; *Gilliam v. R. R., ib.*, 510.

No error.

A. C. HASSELL v. E. R. DANIELS ET AL.

(Filed 15 September, 1920.)

1. **New Trials—Appeal and Error—Nonsuit—Opinion of Supreme Court—Verdict Directing—Evidence—Trials.**

Where, on a former appeal from a judgment of nonsuit on the question of whether an employer had negligently failed to furnish his employee a safe place to work, the Supreme Court following its uniform ruling in considering only the evidence in plaintiff's favor, interpreted in the light most favorable to him, said the place in question could not, as a matter of law, be held a safe place, this expression does not justify a directed verdict on the appropriated issue on the new trial granted, where the further evidence is conflicting as to whether the place was in fact a safe one under the principles of law applicable.

2. **Employer and Employee—Master and Servant—Evidence—Safe Place to Work—Opinion.**

Where the negligence of the defendant depends upon whether he failed in his duty to furnish his employer, the plaintiff in the action, a safe place to oil his machinery, it is competent for a witness to testify in the defendant's behalf that a person of the plaintiff's height could have safely stood on a box provided for the purpose and have thus oiled the machinery, the witness being an experienced and trained machinist, familiar with this type of machine, both as to its operation and upkeep, and had made personal observation of the condition at this plant, and the very machine in question, whether the evidence be considered as a statement of a fact, or of the opinion of the witness thus qualified to speak.

CIVIL ACTION, tried before *Lyon, J.*, and a jury, at October Term, 1919, of DARE.

The action is by an employee to recover damages of defendants, his employers, for alleged negligence on their part in not providing him with a safe place to do his work. There was denial of liability, pleas of contributory negligence, and assumption of risk. On issues submitted, the jury rendered verdict for defendant to the effect that plaintiff was not injured by defendant's negligence, as alleged in the complaint, and making no response to the other issues.

Judgment on the verdict for defendants, and plaintiff excepted and appealed.

Ehringhaus & Small for plaintiff.
Aydlett & Simpson and Meekins & McMullan for defendants.

HOKE, J. This cause was before us on a former appeal by plaintiff from a judgment sustaining defendant's motion for nonsuit, and it was held that such judgment was erroneous, and "that the same be set aside in order that the matters in controversy be submitted to the jury." See

Hassell v. Daniels, 176 N. C., 99. Accordingly, on the present hearing the issues arising on the pleadings were submitted, the jury have rendered a verdict against the plaintiff on the principal issue as to defendant's negligence, and we find nothing in the record that justifies the Court in disturbing the results of the trial.

It is urged for error, chiefly, that on the evidence, if believed, the jury should have been directed to find this first issue against the defendant, and that the court, in effect, so held on the former appeal. It is true that in delivering that opinion the Court said: "The plaintiff was injured while performing a duty for the defendants under orders from his superior, and he was required to stand above the floor, on a ledge about 3 inches wide, made slippery by the dripping oil, and to lean forward, with an oil can in one hand and a funnel in the other, both necessary implements in the performance of his duty, and pour oil in cups between a piston-arm and drive-wheel, each making 70 revolutions a minute, and when he necessarily came within 3 or 4 inches of the moving machinery, and this cannot be held to be a safe place to work, as a matter of law."

In that utterance, however, the Court was only following our uniform rulings that "on a judgment sustaining defendant's motion for nonsuit, it is proper and permissible to consider only the evidence which makes in favor of plaintiff's recovery, interpreted in the light most favorable to him."

While there is evidence of plaintiff, in the present trial, tending to establish the facts suggested in this excerpt from the Court's opinion, there is also testimony coming from defendant, and tending to show that "it was not necessary for plaintiff to have taken a position on this ledge, 3 to 4 inches wide, but that he could have well performed the instant duty of pouring the oil in the cups when standing on the floor of the room, and so escaped the dangers that threatened, and of which he complains, and, furthermore, that there was a box there and available, 8 inches high, affording a method of oiling machine in comparative safety."

These opposing aspects of the testimony relevant to the issue, and pertinent to the only source of negligence charged against defendant, were submitted to the jury under proper instructions, and, as stated, they have by their verdict exonerated the defendant from liability.

It was further insisted that his Honor made an erroneous ruling in permitting the witness, William Harnley, to testify, over plaintiff's objection, that a man five feet eight inches high could very handily stand on a box eight inches high and oil the cups of the machine. (Five feet eight being the assumed height of plaintiff, and eight inches being

the height of the box there, and available for the purpose.) He further said that he had oiled the machine standing on the floor, and he was six feet tall.

This witness was shown to be an experienced and trained machinist, familiar with this type and kind of machine, both as to its operation and upkeep, and had made personal observation of the conditions at this plant and the very machine in question.

While to some extent in the form of an opinion, this testimony is really the statement of a fact, but whether the one or the other, the witness having personal observation of conditions, and being qualified by opportunity, training, and experience to give an opinion that would aid the jury to a correct conclusion on the subject, the testimony was in our opinion properly received. *Caton v. Toler,* 160 N. C., 104; *Murdock v. R. R.,* 159 N. C., 131; *Tire Setter Co. v. Whitehurst,* 148 N. C., 446; *Britt v. R. R.,* 148 N. C., 37; 1 Elliott on Ev., sec. 675; McKelvey on Ev., pp. 230-231.

On careful examination, we find no error which gives the plaintiff just ground for exception, and the judgment for defendant is affirmed.

No error.

E. P. COHOON v. J. L. HARRELL.

(Filed 15 September, 1920.)

1. Contracts— Customs—Evidence—Presumptions—Timber—Sawmills—Lumber—Slabs.

A lawful and existing business custom or usage, clearly established, concerning the subject-matter of a contract, may be received in evidence to explain ambiguities therein, or to add stipulations about which the contract is silent, and where such a custom is known to the parties, or its existence is so universal and prevailing that knowledge will be imparted, the parties will be presumed to have contracted in reference to it, unless excluded by the express terms of the agreement between them.

2. Same.

A parol contract of purchase for timber specified that the purchaser was to cut the timber from the vendor's land, and to pay the latter, the plaintiff in this action, a certain price per thousand feet when sawed into lumber; that the purchaser had the timber sawed at the defendant's mill, who used or sold the slabs, and the plaintiff sues to recover them or their value. There was nothing said either in the plaintiff's contract with the purchaser or the latter's contract with the defendant about the disposition to be made of the slabs, and there was an established custom in this locality that they should belong to the mill sawing the logs: *Held,* it appeared from the contract between the plaintiff and

the purchaser that the timber was to be sawed at some mill, and the defendant was entitled to the slabs under the prevailing custom.

3. Evidence—Contracts—Parol Agreements—Subsequent Writings—Timber—Lumber—Sawmills—Slabs.

The plaintiff, by a parol contract, sold the timber on his land, to be cut, removed, and sawed by the purchaser, and paid for at a certain price per thousand feet, who had the same sawed at defendant's mill; and a controversy having arisen between the plaintiff and defendant as to the ownership of the slabs, the plaintiff thereafter procured from the purchaser a written statement that he only bought the lumber to be sawed from the trees, etc.: *Held*, the parol agreement of purchaser as established controlled the question as to whether, under an established custom, the slabs belonged to the defendant, the owner of the mill where the trees were sawed.

CIVIL ACTION, tried before *Cranmer, J.*, and a jury, at April Term, 1920, of TYRRELL.

The action is to recover a lot of slabs and billets of wood, or the value thereof, claimed by plaintiff, and used or consumed by defendant, and on the trial the evidence tended to show that plaintiff, the owner of a lot of timber on his own land, sold the same to one H. W. Brantley at $9 per thousand, board measure; that said Brantley cut and hauled the timber to defendant's mill, who sawed the same at $5 per thousand; that there was cut for Brantley 93,000 feet of this lumber; that there was no contract with plaintiff about the sawing, nor, in the contract with Brantley, about the slabs, and defendant had consumed these slabs or sold them in accord with a universal custom in that vicinity that the slabs belonged to the mill man who sawed the lumber. Numerous witnesses on the part of the defendant testified that it had long been the recognized and general rule and usage in the mill business that the slabs belong to the mill man who cuts the timber; that the recognized custom is general, and prevailed in Tyrrell and adjoining counties, and throughout eastern North Carolina. It was shown, too, that plaintiff, in having lumber sawed for himself, acted on the custom, and made no claim for the slabs. In this connection, the court charged the jury: "That if they should find from the greater weight of the evidence that it was the general, well established rule, custom, and usage in this community, and in Tyrrell County, when logs were sawed at mill, that the sawmill man got the slabs unless there was an agreement to the contrary, and this custom was known to plaintiff and defendant, and the jury should find further that these logs were sawed at the mill of defendant for Brantley and no contract was made as to the ownership of the slabs either by Brantley or plaintiff, then the slabs would not belong to plaintiff."

There was verdict for defendant. Judgment, and plaintiff excepted and appealed, assigning errors.

Majette & Whitley for plaintiff.
T. H. Woodley and Aydlett & Simpson for defendant.

HOKE, J. It is the accepted principle here and elsewhere that a lawful and existent business custom or usage, clearly established, concerning the subject-matter of a contract, may be received in evidence to explain ambiguities therein, or to add stipulations about which the contract is silent, and, further, where such a custom is known to the parties, or its existence is so universal and all prevailing that knowledge will be imputed, the parties will be presumed to have contracted in reference to it, unless excluded by the express terms of the agreement between them. *Oil Co. v. Burney,* 174 N. C., 382; *Riddick v. Dunn,* 145 N. C., 31; *Brown v. Atkinson,* 91 N. C., 389; 17 Corpus Juris, 492, *et seq.;* Lawson on Presumptive Evidence, pp. 16-17; Anson on Contracts, p. 328.

The portion of his Honor's charge excepted to is in accord with these authorities, and we find nothing in the record that withdraws, or tends to withdraw, the claim of plaintiff from the effect and operation of the principle.

The evidence of both plaintiff and H. W. Brantley, the purchaser of the timber, was to the effect that in the contract of sale, which was in parol, plaintiff sold to Brantley "all merchantable timber to be cut from the Simmons place at $9 per thousand feet, board measure. Merely that and nothing more." The contract between Brantley and defendant, the mill man, also in parol, was that the latter was to saw the lumber as the stocks were delivered at the mill by Brantley, at $5 per thousand, and in neither contract was anything said about the slabs. It was shown to be the universal custom, in Tyrrell and adjoining counties, that the mill man was to have the slabs. It appears, also, while plaintiff was not informed of the exact terms of the contract between Brantley and defendant, it was well understood, and was the clear purport of the contract of sale that the lumber was to be sawed at some mill, and, as a matter of fact, that plaintiff went with Brantley to this mill at the time the arrangement for sawing was made, and further, that a considerable portion of the lumber had been sawed before plaintiff made any claim for the slabs. True that after the controversy arose about them, plaintiff induced Brantley, the purchaser, to sign a written instrument, purporting to state a contract between plaintiff and Brantley, for sale of the timber on the Simmons place, and containing also a further stipulation as follows:

"It is understood that the said Cohoon is only selling Brantley the sawed lumber to be obtained from said pine trees, and that said Brantley

bears all the expenses of felling said trees, sawing them into logs, hauling the logs to the mill, and the costs of sawing the logs into lumber."

No one claims or testifies that the parol contract, which controls in the matter, was expressed in the terms of the written stipulation. Brantley, testifying on the subject, says "that the contract between them, as stated, was that plaintiff sold to witness all the merchantable timber on plaintiff's Simmons place at $9 per thousand, board measure, and he only signed this paper at plaintiff's instance, to show that he, the witness, had nothing to do with the slabs." This written memorandum, therefore, neither is nor purports to be the contract as expressed in the agreement of the parties, and, at most, is only the plaintiff's estimate of what the parol contract signified. Whatever may have been the effect of this written addenda on the rights of the parties, plaintiff and defendant, the parol contract, the binding agreement between them, leaving the matter at large, the right to the slabs would go to the mill man, under the custom prevailing and known to the parties, and verdict and judgment to that effect must be affirmed.

No error.

L. T. THOMPSON v. THE AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 15 September, 1920.)

Carriers of Goods—Express Companies—Special Damages—Notice—Tobacco Flues—Damages.

An express company receiving tobacco flues so crated that the piping is exposed to view, and may be seen and understood as being only for the purpose of curing tobacco, and in a section of country where tobacco is largely grown and cured, and in the tobacco curing season, is evidence of the special circumstances that the consignee's tobacco will be injured in its curing by the negligent delay in the transportation by the carrier, which the jury may consider in passing upon the amount of damages recoverable in the consignee's action.

CIVIL ACTION, tried before *Cranmer, J.*, and a jury, at May Term, 1920, of BEAUFORT.

The action is to recover damages for breach of contract of shipment, in failing to deliver promptly some flues for curing tobacco, and there was evidence on the part of plaintiff tending to show that he was a farmer and engaged in raising and curing tobacco near Aurora, N. C.; that having two barns filled and ready for curing, and going over the flues just before firing, he ascertained that some of them were defective, and immediately, on 15 July, 1918, telephoned to a dealer in Washing-

ton, N. C., the only place they could be readily procured, ordering the necessary flues for shipment, and they were delivered for shipment to defendant, an express company, uncovered, so that the nature and purpose of the goods were in clear evidence, and a receipt taken, dated Tuesday, 16 July. That Aurora was 28 miles distant by railroad from Washington; that defendant was a common carrier by express, and the regular daily trains available left Washington at 4:15 p. m., arriving at Aurora at 6 p. m.; that not receiving the flues on Tuesday, as he had a right to expect, on Wednesday he telephoned to defendant at Washington, stating the contents of receipt, and making inquiry for the goods. They again failed to arrive, and, on Thursday, plaintiff went to Washington by automobile and made inquiry in person, showing the receipt. The agent looked at the receipt, saying they were billed for shipment on Tuesday. They, however, made further search and produced flues, saying they had been found near Hackney's tobacco factory, in a ditch. (This is a point on the route.) They then reshipped the flues, and plaintiff received them at Aurora Thursday night, etc. By reason of the delay, one of the barns of tobacco was badly damaged, to the extent of four or five hundred dollars; that it was the tobacco curing season; "that this was plaintiff's third curing of that year, and that it was a tobacco raising section and curing was generally going on at the time," etc.; that flues of this kind were only used for the purpose of curing tobacco, and, as stated, were shipped uncovered in any way, so that then the kind of goods were readily observable.

The cause was submitted to the jury, who rendered a verdict for plaintiff, assessing his damages at $200, the amount demanded.

Judgment on the verdict for plaintiff. Defendant excepted and appealed, assigning for error chiefly that the court, in its ruling and charge, permitted an award of compensatory damages in reference to the special circumstances attendant on the order and the delay in shipment.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J. In this case the negligence of the defendant and consequent injury are admitted, or clearly established, and the single question presented is whether, on the record, there was sufficient evidence of knowledge or notice of "special circumstances" to permit that the jury should consider such circumstances in determining the amount of damages.

Speaking to the general principle applicable, in *Furniture Co. v. Express Co.*, 148 N. C., at page 90, the Court said: "Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the

difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered. We have so held in the case of *Davidson Development Co. v. R. R.*, 147 N. C., 503, and *Lee v. R. R.*, 136 N. C., 533, is to the same effect. When, however, the goods are ordered for a special purpose, or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated. And it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. Moore on Carriers, p. 425; Hutchinson on Carriers, sec. 1367."

Applying the principle in a former case of *Neal v. Hardware Co.*, 122 N. C., 104, a recovery of special damages was sustained for negligent delay in the failure to supply and ship promptly flues for curing tobacco, ordered of a manufacturing company through a local agent, the Court holding, among other pertinent rulings, that the "Manufacturer who makes, and the agent who sells, flues for curing tobacco, in localities where tobacco is cultivated, must be presumed to know the proper season for cutting and curing tobacco, and if it is not cured in apt time, serious loss will result."

These cases are in full support of his Honor's charge, submitting the evidence of special circumstances and the notice thereof to the consideration of the jury, it appearing that these flues, used only for curing tobacco, were delivered to defendant company for shipment in a locality where tobacco was generally grown, and in the midst of the curing season, and, as said by *Chief Justice Faircloth* in the *Neal case:* "In localities where tobacco is cultivated, it must be common knowledge that, if it is not cut and cured in apt time, serious loss is the necessary consequence." And *Rawls v. R. R.*, 173 N. C., 6; *Peanut Co. v. R. R.*, 155 N. C., 148; *Lumber Co. v. R. R.*, 151 N. C., 23; *Tillinghast v. R. R.*, 143 N. C., 268, are all decisions in approval of the general principle.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

A. A. PAUL v. W. T. BURTON ET AL.

(Filed 15 September, 1920.)

1. **Appeal and Error—Instructions—Objections and Exceptions—Record—Statutes.**

   Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in apt time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Consolidated Statutes, secs. 643, 641, 640, 590; Rev., 591, 590, 554.

2. **Same—Appearance After Verdict—Pleadings—Judgments—Pro Confesso.**

   Where one of the defendants in an action appears for the first time after a verdict adverse to himself alone, not having filed an answer, and specifically excepts to the charge of the court, he is entitled to have the trial judge pass upon his exceptions, and, upon their being overruled, to have them incorporated in his case on appeal to the Supreme Court, when he has perfected it according to law, and it is reversible error for the trial court to decree that the allegations of the complaint be taken *pro confesso* against him, and refuse to consider his exceptions to the charge, and confine him to his exceptions to the overruling his demurrer to the complaint and the overruling of his motion for judgment *non obstante veredicto*.

3. **Same—Certiorari—Procedure.**

   Where the trial court erroneously refuses to consider appellant's exceptions to the charge; and in refusing to permit them to be incorporated in the case on appeal, a writ of *certiorari* will issue from the Supreme Court, directing the trial judge to restate the case on appeal so as to set forth these exceptions, and so much of the charge as may be required to show their true significance, and enable the Supreme Court to properly pass on their merits.

CIVIL ACTION, tried before *Cranmer, J.*, and a jury, at May Term, 1920, of BEAUFORT.

From a perusal of the record it appears that plaintiff instituted his action in said court against the National Auction Company, S. A. Eure, and W. T. Burton, trading as Burton Brothers, and filed his complaint therein duly verified, construed on the hearing as setting forth two causes of action against defendants, one for breach of contract, and the second for libel in publishing in the papers a repudiation of said contract, said publication alleged to have contained false and defamatory matter concerning plaintiff and his claims, made thereunder; that defendants Eure and the National Auction Company filed verified answer in substantial

denial of plaintiff's allegations, and no answer was made by defendant Burton, nor did he appear at the hearing till after verdict rendered.

This cause came on for trial at May Term, 1920, and the jury rendered the following verdict:

"1. Did defendants, Auction Company and Burton, make and enter into a contract with plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was plaintiff ready, able, and willing to perform the same on his part? Answer: 'Yes.'

"3. Did said defendants wrongfully breach said contract, as alleged? Answer: 'Yes.'

"4. If so, what damage has plaintiff sustained by reason of the breach thereof? Answer: 'None.'

"5. Was the publication of the notice in the *Daily News* of 31 May, 1917, wrongful and unlawful on the part of the defendant Burton, and did plaintiff request said defendant before its publication not to publish the same? Answer: 'Yes.'

"6. If so, what damage has plaintiff sustained by reason of the said publication by said W. T. Burton, trading as Burton Brothers? Answer: '$2,500.' "

There was judgment on the verdict in terms as follows:

"This cause coming on to be heard at the above term of court before his Honor, E. H. Cranmer, judge presiding, and it appearing to the court that the defendant W. T. Burton, trading as Burton Brothers Company, has entered no appearance and filed no answer, and the matter having been submitted to the jury, and the jury having answered the issues as set out in the record:

"It is now, on motion of Small, MacLean, Bragaw & Rodman, J. D. Paul, and Ward & Grimes ordered, adjudged, and decreed that the allegations of the complaint be taken pro confesso as against said Burton, and that the plaintiff, A. A. Paul, recover of the defendant, W. T. Burton, the sum of twenty-five hundred dollars ($2,500), and the costs of the action, to be taxed by the clerk."

It further appears in the case on appeal that while the defendant Burton was not present at the trial before the jury, he did appear after verdict rendered, and, through his counsel, moved to set the same aside "for mistake, surprise, and excusable neglect," Cons. St., sec. 600, Rev., sec. 513, and for other reasons, excepted to the order denying his motion, and to the judgment, appealed therefrom in open court, and in his case on appeal, tendered in apt time, set forth and urged for error certain exceptions to the charge of the court. These proposed exceptions the court declined to consider, and in the case on appeal restricted appellant to two positions:

1. A demurrer *ore tenus* to the complaint on the grounds that it did not state a cause of action.

2. A motion for judgment *non obstante veredicto.*

These positions having been overruled, and judgment entered as stated, defendant Burton appealed, assigning errors.

Ward & Grimes, John D. Paul and Small, MacLean, Bragaw & Rodman for plaintiff.

Skinner & Whedbee, W. A. Lucas, and Wiley C. Rodman for defendant.

HOKE, J. Without adverting to the various objections presented in the record, except to say that the publication complained of seems to be of a libelous tenor, the statutes more directly appertaining to the principal exception, and authoritative decisions construing the same, are to the effect that errors in the charge, or in granting or refusing to grant prayers for instructions, shall be deemed excepted to "without the filing of any formal objections," and, if specifically raised and properly presented in the case on appeal, prepared and tendered in apt time, they shall be considered and passed upon by the trial court, and made to appear in the record. This was held in the case of *Lowe v. Elliott,* 107 N. C., 718, where the positions applicable are stated as follows:

"(1) Exceptions as to all matters other than the charge must be taken at the time.

"(2) Exceptions to the charge, and for refusing to give special instructions, are in time if taken at or before the stating of the case on appeal, though the better practice is to assign all exceptions in making motion for new trial.

"(3) The appellant is entitled to have his assignments of error to the charge, and for refusing or granting special instructions, if set out by him in his statement of case on appeal, incorporated by the judge in the case settled. If they are omitted, *certiorari* will lie."

This well considered decision has been again and again approved as the correct interpretation of the statutes applicable and controlling on the subject. *Cameron v. Power Co.,* 137 N. C., 99; *National Bank v. Sumner,* 119 N. C., 591; *Bernhardt v. Brown,* 118 N. C., 701, etc.; Consolidated Statutes, secs. 643, 641, 640, 590; Revisal 1905, secs. 591, 590, 554.

In *Cameron's case,* speaking to the question, the Court said: "The assignment of errors must appear in the case, and appear, too, as the appellant frames it, otherwise he may be deprived of a most important and valuable right given by the statute. The judge may say what the evidence was, and also what was the charge when it was not in writing,

but he may not say how the alleged errors in it shall be excepted to or assigned by the appellant, nor can he omit the assignment of errors from the case because he does not believe it was properly made or does not conform to the rulings upon the prayers for instructions or to the charge, provided it was set out in the case on appeal as tendered by the appellant. As to all matters concerning which the judge's statement is conclusive upon us we will not grant a *certiorari* for the purpose of having the case amended, unless it appears that an error or mistake has inadvertently been committed by the judge, and it appears further that there are reasonable grounds to believe that the judge will correct the case if he is afforded an opportunity to do so. *Porter v. R. R.*, 97 N. C., 63; Clark's Code (3 ed.), pp. 935, 936. But in respect to an assignment of errors made in the appellant's case, he is entitled to have it stated in the case on appeal settled by a judge as matter of right."

There was error, therefore, to appellant's prejudice in declining to consider his exceptions to the charge, and the writ of *certiorari* will issue, directing the trial judge to restate the case on appeal so as to set forth, in addition, these exceptions, and so much of the charge and evidence pertinent as may be required to show their true significance, and enable the court to properly pass on their merits.

Error.

W. T. HUDNELL v. EAST CAROLINA LUMBER COMPANY.

(Filed 22 September, 1920.)

1. Deeds and Conveyances—Timber Deeds—Contracts—Cutting and Removing Timber.

A contract for the sale or purchase of timber standing upon lands specifying a certain size, when cut, then standing, or which may be standing or growing during the term of two years from its date, or such time as may be necessary for the removal of the timber not exceeding five years, vests the title and the right to cut and remove the timber in the purchase for the five year period, when he had begun to cut it within the time specified in the contract, and the delay was not caused by any default of his own, but by conditions he could not control.

2. Same—Extension Period for Cutting—Conditions Precedent.

Where five years is given a purchaser of timber growing upon lands, if without delay attributable to him, it cannot be cut and removed in two years, the principle requiring the performance of a condition precedent or notice, within the first period, as upon the exercise of an option, has no application.

APPEAL by plaintiff from *Connor, J.*, by consent, at Wilson, on 20 May, 1920, from PAMLICO.

This is an appeal by the plaintiff from a judgment dissolving an order restraining the defendant from cutting certain timber.

On 28 January, 1918, the plaintiff (now sole owner of the timber in controversy), together with R. L. M. Bonner (then owning one-half interest therein), conveyed, by timber deed or lease, certain timber of the size of 12 inches in diameter, 18 inches from the ground *"when cut, now standing, or growing, or which may be standing or growing, during the term of two years from the date hereof, or such time as may be necessary for the removal of said timber, not exceeding five years,"* on the land described in the deed. The consideration was $3 per thousand feet stumpage, and the defendant agreed to commence cutting within ninety days from 28 January, 1918, or as soon thereafter as possible.

Upon the expiration of the two-year term specified in the contract, the defendant, not having cut and removed all the timber from the land, without request for additional time, *and with no notice to plaintiff that additional time was necessary or desired, continued to cut and remove timber from said land,* and now insists that its term is, substantially, five years.

The plaintiff contended that the deed passed the right to cut within two years with an option to extend to five years, and the defendant took the position that by the terms of the deed it had a full *five-year* term, instead of a two-year term.

Plaintiff obtained a temporary order, and an order to show cause, on 20 May, 1920, and upon the hearing the order was made dissolving the restraining order, and the plaintiff appealed.

The affidavits on file fully support the findings of his Honor, as follows: "That defendant commenced the cutting and logging of said timber within ninety days from 28 January, 1918, or as soon thereafter as was possible, and has continued cutting and logging the said timber since such commencement; that owing to delays caused by temporary suspensions of operations for necessary repairs, to its mill and equipment, by its inability to secure sufficient and adequate labor for carrying on said operations, and by other unavoidable conditions incident to the cutting and logging the said timber, the defendant was unable to cut and remove all of said timber during the term of two years from 28 January, 1918, and additional time is necessary for the removal of the same.

"That defendant did not request of plaintiff additional time for the removal of said timber, nor did it notify plaintiff that additional time was necessary prior to 28 January, 1920."

Small, MacLean, Bragaw & Rodman for plaintiff.
Aydlett & Simpson for defendant.

ALLEN, J. The authorities in this State sustain the doctrine for which the plaintiff contends, that deeds conveying timber, with a time specified for cutting, pass "an estate of absolute ownership, defeasible as to all timber not cut and removed within the specified period," and that a clause inserted in such deeds extending the time for cutting, upon the performance of certain conditions by the vendee, "is in the nature of an option, and it is held by the great weight of authority that contracts of this character do not of themselves create any interest when the conditions are not performed and work a forfeiture when not strictly complied with."

We do not think, however, these principles have any application to the deed now before us. No condition is imposed on the vendee, nor is it required to pay money or do any other act before exercising the right to cut within five years from the date of the deed, and the right to do so is granted as a present interest by the deed.

The two terms of two and five years are mentioned in the deed because the plaintiff was anxious to have the timber cut as soon as practicable, and the defendant thought it might require five years, and the consideration for the longer term was not something to be done thereafter by the purchaser, but the price agreed to be paid for the timber.

Undoubtedly it was the duty of the defendant to exercise ordinary care to cut the timber within two years, because the longer period is given only in the event that it may be necessary, but his Honor finds, and we approve the finding, that the defendant commenced cutting as soon as possible, and prosecuted the work diligently, and that "the defendant was unable to cut and remove all said timber during the term of two years from 28 January, 1918, and additional time is necessary for the removal of the same."

These findings, while not binding on the parties if issues should be submitted to a jury, and are not conclusive on us, were properly made by the judge on a motion to dissolve a restraining order.

Taylor v. Manger, 169 N. C., 728, and *Ricks v. McPherson,* 178 N. C., 154, furnish illustrations of cases where the right to cut during the longer period mentioned in a deed passed by the deed, and was self-executing without action on the part of the purchaser. In the deed before us, the purchaser is not required to pay anything or to give notice or do any other act before exercising the right to cut during the full period.

We are of opinion, therefore, the defendant had the right to continue cutting after the first period of two years expired, and that the restraining order was properly dissolved.

Affirmed.

W. G. NEWBY AND F. M. WEEKS v. ATLANTIC COAST REALTY COMPANY AND J. W. FERRELL.

(Filed 22 September, 1920.)

1. Contracts—Breach—Options—Measure of Damages—Crops.

Plaintiff sued to recover damages for breach of contract, alleging failure of defendant to furnish the money to take up an option on lands expiring at a certain date, with a further agreement to sell the land and pay the plaintiff one-half the profits less one-half the expense of sale, and to furnish the money for the cultivation of crops for a year under plaintiff's management with a division of the profits on the crops: *Held*, upon establishing the contract, and defendant's breach, the measure of plaintiff's damage is one-half the profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment, and one-half of the loss sustained for the failure to make the crops which might naturally be supposed to have followed its violation, certain both in its nature and in respect to the cause.

2. Same—Instructions—Appeal and Error.

Where the measure of damages for a breach of contract of the defendant to take up an option at a certain date, is such as would arise from profits prevented in the resale of the land, at a future date, and also from crops to be raised on the land during a certain year, etc., it is reversible error for the judge to charge the jury that it would be the difference between the purchase price in the option and the market value of the land at the expiration period thereof, as such was not within the contemplation of the parties, or within the purview of the contract.

3. Contracts—Breach—Options—Prospective Profits—Crops—Measure of Damages.

Where the recovery of damages in an action depends upon the breach of defendant's agreement to take up plaintiff's option on lands before its expiration, and the profit that could have been made thereon by reselling the land, the market value of the land and the contemplated sales is material but not controlling, and the circumstances, such as the size of the land, the opportunity to secure purchasers, etc., and the condition of the money market, etc., may be considered.

4. Evidence—Declarations—Hearsay—Corroboration.

Where evidence of the value of lands is competent, upon the question of the measure of damages for defendant's failure to take up the plaintiff's option thereon, testimony that one who had previously held an option on the same land that he would not take a certain price therefor, are incompetent as unsworn declarations, and cannot be considered in rebuttal, when the declarant had been on the stand himself and had not testified on the subject.

5. Evidence—Contracts—Admissions.

Where the breach by defendant of his contract is the subject of the action, the plaintiff may not testify to the breach of a prior contract, when relevant, to show the inducement, the relation of the parties, and the measures for entering into the contract sued on, after he has testified that the prior contract had been abrogated.

APPEAL by defendant from *Cranmer, J.*, at the April Term, 1920, of PERQUIMANS.

This is an action to recover damages for breach of contract.

In 1918 the plaintiffs procured an option on the Fleetwood farms in Perquimans County, giving them the right to buy the farms and the stock and the farming implements thereon by 1 January, 1919, for $96,875, and subsequently entered into a contract with the defendants giving them an interest in the option.

Pursuant to agreement between the parties, the land was offered for sale on 6 December, 1918, when, the crowd at the sale not being as expected, the land was bought in for the benefit of the plaintiffs and defendants, and the plaintiffs allege that the first contract was then abrogated and a new contract made, which is the contract sued on, and by the terms of which the defendants agreed that the property bought at said sale on 6 December was to be held for a higher profit and sold as opportunity offered; that the defendant realty company would furnish the money to comply with the option, and would also furnish the money necessary to cultivate said lands during the year 1919, and that the plaintiffs should have one-half of the profits arising from the sale of the lands less the expenses of the sale, and one-half the profits from the cultivation of the lands.

The plaintiffs introduced evidence tending to establish the contract, which was not in writing, as alleged by them, and its breach, and also evidence as to the damages they were entitled to recover.

The defendants denied the execution of the contract, and also denied that the plaintiffs had suffered any damage.

His Honor, among other things, charged the jury as follows:

"As to the land, what damages are plaintiffs entitled to recover on account of defendant's refusal to finance the proposition? And when you come to consider this issue, if you do consider it, I charge you that the measure of damage is the difference between the price of the land in the option, to wit, $96,875, and the fair market value of the land on 1 January, 1919, whatever you find the fair market value to be. And if you find there was a contract, plaintiffs will be entitled to one-half of the difference between the price named in the option and the fair market value of the land and chattels on 1 January, 1919. There is no contention about the price named in the option, which is $96,875, so that will give you no trouble. You are to find the fair market value of the property on 1 January, 1919, and then one-half of the difference between it and the option price will be the sum you should write as your answer," and the defendants excepted.

The jury returned the following verdict:

"1. Did plaintiffs and defendant enter into the contract, as alleged in the complaint? Answer: 'Yes.'

"2. Were plaintiffs ready, able, and willing to comply with said contract? Answer: 'Yes.'

"3. Did defendants wrongfully breach said contract, as alleged in the complaint? Answer: 'Yes.'

"4. What damages are plaintiffs entitled to recover?

"(a) On account of defendant's refusal to finance the proposition? Answer: '$15,000.'

"(b) On account of profits in farming operations? Answer: '$7,500.' "

There was a judgment in favor of the plaintiffs, and the defendants appealed.

Ehringhaus & Small and Meekins & McMullan for plaintiffs.

Chas. Whedbee, Thompson & Wilson and Aydlett & Simpson for defendants.

ALLEN, J. There is no exception in the record requiring the consideration of the application of the statute of frauds to the contract on which the defendants declare, and the case has been tried on two questions—the existence of a contract and its terms, and the amount of damages in the event of a breach.

The first of these questions is one of fact, and is not complicated by any legal questions except as to the admissibility of evidence, but the second involves the rule for the measurement of damages, which cannot be correctly laid down without a clear apprehension of the nature of the contract.

In the first place, the plaintiffs are not asking to recover damages for breach of contract to convey land. If they had done so, and the contract had been in writing, the rule laid down by his Honor would have been the true measure of damages, being one-half of the difference between the option price and the market value of the land at the time of the breach, but being by parol if one to convey the land, the statute of frauds would be a complete defense.

The plaintiffs are asking to recover damages for breach of a contract by the terms of which, as they allege, the defendants agreed to furnish the money to take up the option, which expired on 1 January, 1919, and to sell the land and pay the plaintiffs one-half the profits less one-half the expenses of sale, and to furnish the money for the cultivation of the lands for the year 1919, under the management of one of the plaintiffs, and to pay the plaintiffs one-half the profits from the crops.

What, then, is the measure of damages for the breach of the contract sued on?

Damages are awarded as a compensation for the breach.

"Generally speaking, the amount that would have been received if the contract had been kept, and which will completely indemnify the injured party is the true measure of damages for its breach. *Benjamin v. Hilliard,* 23 How., 149; *Mace v. Ramsey,* 74 N. C., 14. When one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed." *Machine Co. v. Tobacco Co.,* 141 N. C., 289.

"The amount which would have been received if the contract had been kept is the measure of damages if the contract is broken, and this means the value of the contract, including the profits and advantages which are its direct results and fruits." 8 R. C. L., 452.

"As a general rule, a party not in default is, in case of a breach of contract due to the fault or omission of the other party, entitled to recover profits which would have resulted to him from performance." 17 C. J., 788.

In other words, the plaintiffs are entitled to be put in the same position they would have been in if the contract had been performed, and to recover only what has been lost by nonperformance, and tested by this principle instead of being entitled to the difference between the option price and the market value of the land on 1 January, 1919, they ought to recover, if they sustain their contentions, one-half the profits which would have been made upon a resale of the property in the exercise of reasonable care and judgment.

His Honor has fixed the date for the ascertainment of the damage as of 1 January, 1919, the time when the option expired, when it was not within the contemplation of the parties that the land should be sold at that date or that any profit should then be realized, and when, according to the plaintiffs, it had been agreed that the land should be sold at a later date, and the profits then divided.

The market value of the lands, when the lands could be reasonably sold under the contract, will be material, but not controlling, and other circumstances, such as the size of the land, the opportunity to secure purchasers for so large a body of land, the condition of the money market, may properly be considered.

We are therefore of opinion that there has been substantial error committed against the defendants.

His Honor also permitted the witness, T. B. Waters, to testify that he heard Mr. Charles Whidbee, who held an option on the land prior

to the option secured by the plaintiffs, say that he would take $150,000 for the land, and that if the witness would take it for that price he could easily get that for it.

Mr. Whidbee had been examined as a witness in behalf of the defendants, but he did not testify as to the value of the land, and this declaration, therefore, had no tendency to contradict him, and was incompetent as an unsworn declaration.

The plaintiffs were also permitted to introduce evidence tending to show a breach of the first contract by the defendants when the plaintiffs testified that this contract had been abrogated, which was erroneous.

Evidence as to the first contract was only permissible as matter of inducement to show the relation of the parties at the time of making the second contract, and the reasons for entering into it.

There must, therefore, be a

New trial.

J. A. H. EDWARDS ET AL. v. ALBERT WHITE ET AL.

(Filed 22 September, 1920.)

1. Wills — Probate — Common Form— Courts— Judgments— Collateral Attack.

Where a will has been admitted to probate in common form before the clerk of the Superior Court, and no inherent or fatal defects appear upon the face of the proceedings, the judgment may not be collaterally attacked, but only in the court where the judgment was rendered, and in accordance with the statutory provisions enacted for such purpose; and the record and probate of the will is conclusive evidence of its validity until it is vacated on appeal or declared void by a competent tribunal. Rev., 3128, 3129.

2. Same—Presumptions.

Jurisdiction of the court in admitting a will to probate is presumed, and acts or omissions affecting the validity of the proceedings and judgment must be affirmatively shown, and unless the want of jurisdiction, either as to the subject-matter or the parties, appears in some proper form, the jurisdiction and regularity of the proceedings leading up to the judgment will be supported by every intendment.

APPEAL from *Devin, J.*, at the March Term, 1920, of HALIFAX.

Action to set aside a will alleged to be a forgery or fraudulently offered for probate as the will of Bettie V. Johnson. The alleged will, dated 1 June, 1906, was duly probated in common form on 17 May, 1907. The plaintiffs seek to set aside the will and probate, on the ground that the paper-writing is not the will of Mrs. Johnson, and to have an ac-

counting and settlement with J. Albert Johnson, the person named in the paper as her executor, concerning the money and other property which came into his possession as such executor.

The court held that this action is not maintainable, the probate of the will appearing by the record of it to be regular and formal in every particular, and thereupon dismissed the suit, taxing the plaintiffs with the costs, and they appealed.

Thorne & Thorne, R. B. Blackburn, George Green, and John L. Bridgers for plaintiffs.

Stuart Smith, A. P. Kitchin, E. L. Travis, and W. E. Daniel for defendants.

WALKER, J., after stating the case: The correctness of Judge Devin's ruling is so amply sustained by several recent decisions of this Court, where the question in the case was so exhaustively discussed, that it would be nothing more than supererogation to go over the same ground again. It was held there that where a probate has no inherent or fatal defect appearing upon its face, the judgment of the court having full jurisdiction of the matter, cannot be indirectly or collaterally attacked, but the assault upon it must be made in the court where the judgment admitting the will to probate was rendered, and in accordance with the statutory provisions enacted for such purpose.

The recent decision in *Starnes v. Thompson,* 173 N. C., 467 (approved in the case of *In re Thompson,* 178 N. C., 540), discusses the subject so fully as to require but few additional observations at this time.

As jurisdiction is presumed, at least *prima facie,* any acts or omissions affecting the validity of the proceedings and judgment must be affirmatively shown, and unless the want of jurisdiction, either as to the subject-matter or the parties, appears in some proper form, the jurisdiction and regularity of the proceedings leading up to the judgment will be supported by every intendment. 11 Cyc., 692, 693.

The rules as to the presumption in favor of the courts of general jurisdiction apply to courts of probate and those with like powers, where they are courts of general jurisdiction or possess the attributes thereof. even though they have not exclusive jurisdiction, or have a limited but not a special jurisdiction or their powers are limited to certain specified subjects. 11 Cyc., 694.

It is further to be remarked that although a court may be an inferior or limited tribunal, yet if it has general jurisdiction of any one subject, its proceedings and judgments in respect to that subject will be sustained by the same liberal presumptions as to the jurisdiction which obtain in the case of the Superior Courts. Black on Judgments (2 ed.), vol. 2, sec. 283.

Our statute makes the record and probate of a will, even in common form, conclusive as evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal. Rev., 3128, 3129.

It is well settled that a judgment or decree admitting a will to probate, when made by a court having jurisdiction thereof, may be attacked only in such direct proceedings as are authorized by statute, and that it is not open to attack or impeachment in a collateral proceeding. More specifically, it is not permissible to collaterally attack such a judgment or decree on the ground that certain errors and irregularities exist, which, if shown really to exist, would, at the most, make the judgment only voidable, such as an alleged fact that the persons interested were not all duly cited or given notice or made parties; that the probate was granted on insufficient proof, as where it was granted on production of a copy instead of an original will; that the execution of the will was defective and insufficient; that the order admitting the will to probate does not use the exact language of the statute; that there was no formal entry of the judgment; that the decree contained a translation of the will into English, or that the jury were erroneously instructed, and returned a verdict contrary to the evidence; but when irregularities of this nature are alleged in a collateral proceeding, the court will indulge in liberal and conclusive presumptions in favor of the sufficiency of the record and proceedings, such as a presumption that proper and sufficient notice was given; that the petition for probate was properly filed; that orders continuing the hearing were regularly made; that the execution, attestation, and proof of the will were sufficient; that the testator possessed testamentary capacity, and that the instrument probated is sufficient to pass such property as it purports to pass. It is even held that fraud is not a ground of collateral attack, as the identity, validity, and sufficiency of the instrument propounded as the last testamentary act of the deceased is the very question determined; and while a judgment or decree relating to the probate of a will is open to collateral impeachment, when it has been rendered by a court which was wholly without jurisdiction, the determination, by the officer or court probating the will, that the requisite jurisdictional facts, such as the residence of the testator at the time of his death, or the situation of his property within the county, exist, is conclusive and not open to collateral attack. 40 Cyc., 1377 and 1378.

An order or decree of a surrogate, or probate, or orphan's court, jurisdiction having attached, is not examinable in any collateral proceeding. In fact, the orders and judgments of probate courts concerning matters over which they have jurisdiction are no more open to collateral attack than are the orders and judgment of other courts of general jurisdiction; they must have accorded to them the same intendments

and favorable presumption which attend the judgments of courts of general common-law jurisdiction. This rule applies to an order admitting a will to probate. 1 Black on Judgments (2 ed.), sec. 250.

This Court held, in *Fann v. R. R.*, 155 N. C., 136, that, in this day and time, and under our present system, it seems to be generally conceded that the decrees of probate courts, when acting within the scope of their powers, should be considered and dealt with as orders and decrees of courts of general jurisdiction, and where jurisdiction over the subject-matter of inquiry has been properly acquired, that these orders and decrees are not as a rule subject to collateral attack. And to the same general effect was *McClure v. Spivey*, 123 N. C., 678, where the Court said that probate of a will by the clerk of the Superior Court is a judicial act, and his certificate is conclusive evidence of the validity of the will until vacated on appeal or declared void by a competent tribunal in a proceeding instituted for that purpose. It cannot be vacated in a collateral manner, citing *Mayo v. Jones*, 78 N. C., 402. Stronger language, if possible, was used in the more recent case of *Powell v. Watkins*, 172 N. C., 244, where it was said that, "The proceeding for the probate of a will is not regarded as an adversary suit *inter partes*, but is a proceeding *in rem*, in which the jurisdiction of the court, in the exercise of probate powers, is exclusive, and an adjudication of probate may not be assailed or questioned in any collateral or independent proceedings." This has been approved in numerous cases. *Collins v. Collins*, 125 N. C., 98; *McClure v. Spivey*, 123 N. C., 678; *Varner v. Johnson*, 112 N. C., 570; *McCormick v. Jernigan*, 110 N. C., 406; *Hutson v. Sawyer*, 104 N. C., 1. The Court ruled, in *Batchelor v. Overton*, 158 N. C., 397, the opinion being delivered by *Justice Hoke*, that notwithstanding the requirements of the statute, it is very generally held that when a clerk of our Superior Court in the exercise of the probate powers conferred by statute, has general jurisdiction of the subject-matter of inquiry, as indicated in chapter 1, sec. 16, Revisal, and on application made has entered a decree appointing an executor or administrator, and letters are accordingly issued, such decree is controlling and may not be successfully attacked or in any way questioned but by direct proceedings instituted for the purpose. *Chief Justice Smith*, in *London v. R. R.*, 88 N. C., 584, a case on this question which is generally cited and approved, states the rule to be well settled that the judgment of the probate court, in which is vested exclusive jurisdiction to pass on wills of personalty (and in this State by statute of realty also) and to grant letters testamentary or of administration, is conclusive of the right determined, and is not exposed to impeachment collaterally in another court where the effect of the action is to be considered. A probate in common form, unrevoked, is conclusive in courts of law and equity as to the appointment

of an executor and the validity and contents of a will; and it is not allowable in an action to show that another was appointed executor. This is the principle announced in the elementary books. Williams on Exrs., 339; Toller, 76. The English law is the same, for *Justice Buller,* a judge of great renown, so announced for the judges, who were of the opinion, that the probate of a will is conclusive until it be repealed, and no court of common law can admit evidence to impeach it. See *London v. R. R.,* 88 N. C., 584.

The above principles are sustained by what was decided in *Sumner v. Staton,* 151 N. C., 198, and are fully in harmony therewith.

Our statute makes the record and probate of a will, even in common form, conclusive as evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal.

The Court, in dismissing the case for lack of jurisdiction and also because no cause of action cognizable by it was stated in the complaint, decided correctly and its ruling is sustained.

This renders the question of the statute of limitations of no special importance, and we forbear a discussion of it.

Affirmed.

T. P. NASH AND W. S. WHITE v. ELIZABETH CITY HOSPITAL COMPANY AND DR. JOHN SALIBA.

(Filed 22 September, 1920.)

1. Sales—Auction—Suppressing Bids—Deeds and Conveyances—Fraud.

The purpose and policy of a sale at public auction is to obtain the worth of the property by free and fair competition among the bidders, and where one, in violation of his principle and by agreement or words and conduct reasonably designed and calculated to effect the result, has succeeded in stifling competition and procuring the property at a lower price, he will not be allowed to hold his bargain, and the sale and deed predicated upon it will be set aside.

2. Same—Corporations—Pleadings—Demurrer.

The minority stockholders of a corporation, after demand on and refusal by the corporation to do so, brought action in behalf of themselves and other shareholders, etc., to set aside a deed made to a purchaser of the lands sold at public auction under allegation that the purchaser had joined with others in a movement to purchase the property for the use of a hospital for the benefit of the public, and had secured a person of high standing and integrity in the community to bid for them up to a certain price; that after reaching that price the defendant privately instructed the designated bidder to bid to a higher price, and thinking he was doing so for the defendant and his associates, he did so, and the property was

accordingly sold to him; that the defendant's associates, and those attending the sale, understood that the bidder was acting under the agreement until after the sale; that the property brought a grossly inadequate price, to the loss of the shareholders of the corporation: *Held*, sufficient to set aside the purchaser's deed, and a demurrer to the complaint was had.

3. Fraud—Pleadings—Results—Ratification.

When fraud is the subject-matter of a cause of action, it should be pleaded with sufficient fullness and detail to apprize the defendant of the matters he is called upon to answer; and where, in an action to set aside a deed made by a corporation to a purchaser at a sale at public auction of practically all of its property, the facts upon which the allegations of the principal fraud rests are sufficiently pleaded, and the suit has been properly instituted by the minority stockholders of the corporation, added allegations of the complaint showing the results of the principal fraud, and to repel a possible claim of ratification by the corporation, etc., are not required to be set forth in the same detail of averment.

CIVIL ACTION, heard on demurrer to the complaint, before *Bond, J.*, at August Term, 1920, of PASQUOTANK.

There was judgment overruling the demurrer, and defendant excepted and appealed.

Thompson & Wilson for plaintiffs.
Meekins & McMullan for defendants.

HOKE, J. The action is instituted by plaintiffs, two of the minority stockholders of defendant corporation in behalf of themselves and such other stockholders as may desire to make themselves parties, and after definite averment of demand and refusal on the part of the corporation to bring suit, the complaint in effect alleges: That the defendant corporation having offered its principal property for sale at public auction in Elizabeth City, the same was bid off by the codefendant, Dr. John Saliba, at $5,700, a grossly inadequate price, and a deed made to him by the company, which he now holds. The circumstances of the sale, the conduct of the defendants concerning it, and the effect upon the pecuniary rights of the parties are then set forth in the complaint as follows:

"That in the latter part of the year 1917 the defendant, Elizabeth City Hospital Company, having discontinued the operation of its hospital, desiring to sell the property described in the said deed, with the exception of a lot of coal, amounting to about forty tons, and two barrels of grain alcohol, the said sale to be subject to a certain deed of trust executed by said corporation to J. B. Leigh, trustee, on 1 October, 1914, and registered in the office of the register of deeds of Pasquotank County, in Book 39, on page 526, securing payment of a series of bonds

aggregating fifteen thousand dollars, and subject to the assumption of the payment of said bonds by the purchaser, and also certain indebtedness of the corporation then in litigation. The said corporation having advertised said property for sale on 20 December, 1917, there was a movement inaugurated by certain public-spirited citizens of Elizabeth City and vicinity with whom the said Dr. John Saliba pretended to cooperate to establish a community hospital as a public charitable and eleemosynary institution for the benefit of the general public of the city and surrounding section. That as a part of said movement the said citizens employed the defendant, Dr. John Saliba, as a committee of one to secure the services of the Reverend Dr. B. C. Henning, a man highly respected and closely identified with all public and charitable movements, to attend said sale and bid on the said property for and on behalf of said community hospital for the public benefit, and as a charitable institution.

"5. That these plaintiffs are informed and believe that the said Dr. John Saliba did see Dr. B. C. Henning, and requested him to attend the sale and bid on the property for the community hospital, and gave him instructions as to the amount up to which he should bid. That the said Dr. Henning, having confidence in said Dr. John Saliba, and believing that he was acting for the benefit of a public enterprise, and not in the furtherance of his, Dr. Saliba's, own private interest, attended the sale and placed bids on the property for the benefit of the said community hospital, it being well known and generally understood by bidders, stockholders, and others attending said sale, and by the public at large, that the said Dr. Henning was bidding for the said purpose. That during the bidding, and when it had reached the limit, which the said Dr. John Saliba had set in his instructions to Dr. Henning, the said defendant, Dr. John Saliba, spoke to Dr. Henning private and secretly, and without the knowledge of the other bidders or bystanders or these plaintiffs, requested the said Dr. Henning to continue the bidding for the benefit of the said defendant Saliba individually. That no notice was given by said defendant or any one else that the said Dr. Saliba had procured Dr. Henning to bid for him, and not for the community hospital, or that the said Dr. Henning was no longer bidding for the said community hospital, but was bidding for the said Dr. John Saliba, and the persons present were left under the impression that he was still acting for and on behalf of said community hospital. That the said Dr. Henning innocently, and misunderstanding the effect of Dr. Saliba's request, continued to bid, and became the last and highest bidder for the said property at the sum of $5,100. That it was not until after the bidding had stopped and the sale completed that it became known to the other bidders, bystanders, and others that the final bid of $5,100 had been

placed on said property for the benefit and advantage of the said Dr. John Saliba, and not of the said public and charitable community hospital; that by reason of this fact and the unlawful act on the part of the said Dr. John Saliba, in procuring Dr. Henning innocently to bid for him instead of for said charitable service for community hospital, and by reason of the fact that all bidders and others believed that Dr. Henning, who enjoyed the highest confidence and respect of the public, was still bidding for the said charitable purpose, the bidding was suppressed and chilled, and other persons deterred and wrongfully induced from bidding for said property a fair and just amount, the said bystanders believed that by bidding further they would impede, hamper, embarrass, and prevent the establishment of said charitable community hospital for the public benefit.

"6. That by reason of said wrongful act on the part of said Dr. John Saliba, in procuring said Dr. Henning to become the innocent instrument in obtaining the said property for him, because of the belief and understanding of those present that he was bidding for the charitable purpose aforesaid, the said defendant, Dr. John Saliba, obtained the property at a grossly inadequate sum, the real value of said equity of redemption being five or six times as much as he paid for it.

"7. That thereafter, and still pursuing his wrongful and inequitable designs, the said Dr. John Saliba wrongfully and inequitably procured the Elizabeth City Hospital Company to make and execute to him the deed for said property hereinbefore mentioned for said grossly inadequate and inequitable price of $5,100, and did further unlawfully and inequitably procure and induce the said corporation to include in said deed all the ground, buildings, and equipment of said hospital, without excepting the property hereinbefore mentioned, as excepted and without stipulating in said deed that the payment of the bonds secured by said deed of trust to J. B. Leigh, trustee, was assumed by the purchaser, thereby wrongfully and by inequitable conduct obtaining a conveyance of more property than had been offered for sale at the auction aforesaid.

"8. That these plaintiffs are informed and believe that the said Dr. John Saliba has never paid in full the purchase-money mentioned in said deed, nor the interest on the amount unpaid.

"9. That by reason of the wrongful, inequitable, and unlawful acts and doings of the defendants as aforesaid, the plaintiffs have been greatly damaged, and, if the said deed is allowed to stand, the value of their stock has been greatly diminished, and they are now offered by said corporation a mere 20 per cent of its par value in the liquidation of the affairs of said corporation, whereas the stock is and rightfully should be worth more than par." And the complaint asks judgment that the

deed be set aside returning to said Dr. Saliba this amount which he has paid on his bid, and for other relief, etc.

Upon these facts, admitted by the demurrer to be true, we concur with his Honor in the position that the demurrer should be overruled.

A sale at public auction is based upon the purpose and policy of obtaining the worth of property by free and fair competition among the bidders. As said by *Henderson, J.*, in *Smith v. Greenlee,* 13 N. C., 126-128: "A sale at auction is a sale to the best bidder, its object a fair price, and its means competition," and, accordingly, it has been uniformly held here and elsewhere that when one, in violation of the principle, and by agreement or words or conduct, reasonably designed and calculated to affect the result, has succeeded in stifling competition and procuring the property at a lower price, he will not be allowed to hold his bargain, and the sale and the deed predicated upon it will be set aside. *Henderson and Snyder v. Polk,* 149 N. C., 104; *Davis v. Keen,* 142 N. C., 496; *Neely v. Torian,* 21 N. C., 410; *Smith v. Greenlee,* 13 N. C., 126; *Byers v. Fowler,* 12 Ark., 218; *Rees v. Branch,* 138 Ga., 150; *Martin v. Rawlet,* 5 Richardson Law, 541; *Hamilton v. Hamilton,* 2 Rich. Eq., 355; *Herndon v. Gibson,* 38 Syc., 357; 6 Corpus Juris, 830; *Rodgers v. Rodgers,* 13 Grant (N. Y.), 143; 2 R. C. L., 1131.

In the citation to Corpus Juris, the general principle applicable is stated as follows: "Generally it may be said that any act of the auctioneer or of the party selling, or of third parties as purchasers which prevents a fair, free, and open sale, or which diminishes competition or chills the sale, is contrary to public policy and vitiates the sale." And in *Rodgers v. Rodgers, supra,* a case very similar to the present, the sale was avoided where it was made to appear that on the sale of a father's property, a stranger, with a view and purpose of avoiding or lessening competition, had secretly employed the son to bid, and had thereby succeeded in obtaining the property at an under price. On the record, we are of opinion that the sale, in this instance, comes clearly within the condemnation of these authorities, and the wholesome principle they illustrate, and, if the facts are established, as alleged, that said sale should be set aside.

It is further insisted for the defendant Saliba that the allegations of section 7 of the complaint, that said defendant Saliba had, wrongfully and inequitably, procured the company to execute a deed to him of this property for a grossly inadequate price, and had "unlawfully and inequitably procured and induced the company to include in said deed a lot of detached property not offered for sale and without stipulating for a payment by purchaser of the bonded indebtedness, etc., are too indefinite and general to comply with the requirements of good pleading in such cases. It is undoubtedly true that when fraud is the subject-

matter of a cause of action, the general rule requires that the facts should be set forth with sufficient fullness and detail apprized that the charge of fraud stands revealed, and the defendant of what he will be called on to answer. *Mottu v. Davis,* 151 N. C., 237. But, on this record, the plaintiffs' cause is based upon the allegations of the complaint showing that the defendant has procured a deed for practically all of the company's property at a grossly inadequate price in violation of the principles established to insure fairness in the conduct of auction sales, accompanied by full and specific averment that the company itself had refused to institute suits for the proper protection of the owners. On these averments plaintiff's cause of action would seem to be sufficiently stated without the impeaching allegations of section 7, which are only made with a view of showing the results of the principal fraud, and to repel a possible claim of ratification which otherwise might arise on the record.

These allegations, therefore, are only an addenda to the principal cause of action, and more by way of forestalling a defense, and, in our opinion, are sufficiently full for this apparent purpose.

There is no error in overruling the demurrer, and the judgment to that effect is affirmed.

No error.

OSCAR WILLIAMS v. FARMERS MANUFACTURING COMPANY.

(Filed 22 September, 1920.)

1. Employer and Employee—Master and Servant—Negligence—Duty of Servant.

Where the employer and employee have equal opportunity to see and understand the danger of an occurrence, which results in injury to the latter, which he could have avoided by the exercise of reasonable care, he cannot recover the resulting damages.

2. Same—Instructions—Evidence—Contributory Negligence—Verdict Directing.

In an action by an employee to recover damages against an employer for a personal injury, alleging the latter's negligence, there was evidence tending to show that the plaintiff was engaged to saw logs after they had been placed by defendant's other employees, in his own way, and while sawing a log it rolled on him causing the injury complained of by reason of its not having been checked, which he could have done, or by his failing to call on other employees, whose duty it was to fix it; and that he could have placed himself in such position with reference to the log that the injury would not have occurred: *Held,* a question for the jury under an instruction to find for the defendant, upon the issue of contributory negligence, if they found the facts to be as testified.

CIVIL ACTION, tried before *Cranmer, J.*, at March Term, 1920, of GATES, upon these issues:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged? Answer: 'Yes.'

"2. Did plaintiff assume the risk of his injury, as alleged in the answer? Answer: 'No.'

"3. Did the plaintiff contribute to his own injury, as alleged? Answer: 'No.'

"4. What damages is the plaintiff entitled to recover? Answer: '$2,500.'"

B. L. Banks and Ehringhaus & Small for plaintiff.
Meekins & McMullan for defendant.

BROWN, J. The evidence tends to prove that the plaintiff was injured while working for the defendant upon its logging yard in Gates County. The plaintiff and Mills Eure were sawyers, their duties being to saw into shorter lengths the logs pulled in by the skidder and placed upon the yard. On the afternoon of the plaintiff's injury a log was pulled in by the skidder and placed diagonally across another log, whereupon John Hinton, a skidder man, as was customary, called out "log placed." The plaintiff, together with Mills Eure, soon after went to the log for the purpose of sawing it, and after the log had been sawed in two, the long end of the log, being the end on plaintiff's side of the supporting log, rolled down upon plaintiff and broke his leg. Plaintiff, at the time of this occurrence, was upon the side of the saw next to the rolling log. There was nothing to prevent the plaintiff from seeing that the log was not "chocked" or held by grab irons at the time he began to saw it, and nothing, upon the testimony, which required him to stand until the log was completely severed on the side of the saw next to the rolling log, instead of on the far side of the saw, where his position would have been safe. Plaintiff, at the time of the injury, was not acting under the directions of a superior, but was doing the work in his own way. There was nothing to prevent his "chocking" the log if same was necessary, or to request that it be done by the loading crew whose duty he testified it was, or to request that the position of the log be steadied or changed by grab irons.

Defendant in apt time requested the court to charge the jury as follows:

"If you find from the evidence in this case, and by its greater weight, that, at the time of his injury, the plaintiff knew, or by the exercise of his ordinary powers of observation, could have known that the log which he was engaged in sawing was not "chocked"; or if you find by the

greater weight of the evidence that the plaintiff, by the exercise of ordinary care in stepping to the other side of the log, or otherwise, could have avoided the injury, then, in either of these events, you will answer the third issue 'Yes.'" Denied, and defendant excepted.

We think the prayer should have been given. The testimony tended to prove that plaintiff could have easily seen that the log was safely placed for sawing, and that, had he requested it, the loading crew and skidder man would, by use of grab irons, have placed it in proper position. No such request was made. This was customary, and it was further customary in pulling in the logs to deposit them upon the yard, leaving the question of whether they could be sawed safely to be determined by the sawyer himself when he came to perform the work. This view of the case should have been presented to the jury under the issue as to contributory negligence. If these facts are found to be true, plaintiff contributed to his own injury, and his negligence was the proximate cause of the injury.

It was plaintiff's plain duty to take notice of the log, and to see it was properly chocked. He owed this duty to himself. It was not a primary duty of the master.

As is said in *Pigford's case,* 160 N. C., 93: "It may be assumed that the law does not impose on the master any duty to take better care of the servant than the latter should take of himself, their respective obligations in this respect being equal and the same: that is, to be careful, and to adjust their conduct to the standard of the ordinary prudent man."

If plaintiff has exercised ordinary care he could have seen, if the evidence is believed, that the log was not "chocked." If he had chocked it himself, or had waited until the loading crew chocked it, he would not have been injured.

The rule of law is well settled that when the danger is of such nature that it can be seen and understood as well by the servant as by the master, and that the servant, by reasonable care, can avoid the injury, it is his duty to do so. If he fails to exercise such care and diligence, he is guilty of contributory negligence, and cannot recover. *Covington v. Furniture Co.,* 138 N. C., 374; *Mincey v. R. R.,* 161 N. C., 469.

New trial.

A. BERRY v. W. H. BOOMER AND ALEX. HARRIS.

(Filed 22 September, 1920.)

1. Mortgages—Deeds and Conveyances—Warranty—Powers of Sale—Equity—Exoneration—Courts.

The owner of lands conveyed it, taking at the time a mortgage to secure the purchase money, which has never been paid, and the grantee, H., sold the land to plaintiff by deed with full covenant and warranty of title, and the plaintiff reconveyed a portion of the land to H. by deed with warranty. The administrator of the original owner advertised the land for sale under the power of sale contained in the mortgage, and at the time thereof the administrator acceded to plaintiff's request to first sell the land not covered by his deed to H., which was done, and it brought a sufficient sum to pay off the mortgage debt. The defendants are the heirs at law of H. in the action of trespass involving the title to the lands: *Held*, the equity of exoneration applies to a sale under the power contained in the mortgage, without the necessity of the intervention of court, and the plaintiff's warranty in his deed reconveying a portion of the lands did not deprive him of his equitable right.

2. Deeds and Conveyances—Warranties—Encumbrances.

A warranty in a deed against claims of the grantors and their heirs forever is not a warranty against encumbrances.

3. Mortgages—Sales—Powers—Presumptions—Deeds and Conveyances.

The presumption of law is in favor of the regularity of a sale made under the power contained in a mortgage, and, there being no evidence to the contrary, the sale will not be declared void.

4. Mortgages—Sales—Powers—Subdivisions of Lands—Trustee.

It is not necessary that a mortgage of lands provides that the sale shall be as a whole or in parcels for the same to be done, as such is within the sound discretion of the one authorized to sell upon default, and it is his duty to reasonably see that the sum to be realized shall be sufficient to pay the mortgage debt, and that other interested parties are injured as little as possible.

5. Mortgages—Deeds and Conveyances—Sales—Void—Voidable—Equity.

Where interested persons are injured by a sale made under a power contained in a mortgage by a division of the lands into lots or parcels by the one exercising the power in an arbitrary or unfriendly manner, the sale is voidable, and not void, entitling the one so injured to the equity of setting aside the sale.

CIVIL ACTION, tried before *Cranmer, J.*, at May Term, 1920, of HYDE. From judgment of nonsuit plaintiff appealed.

Spencer & Spencer and Daniel & Carter for plaintiff.
Thomas S. Long and Ehringhaus & Small for defendants.

BROWN, J. This action involves title to a tract of land containing about 25 acres. The action is brought to restrain defendants from trespassing thereon.

The land belonged to Virginia Fisher, who conveyed it to Mary J. Harris, who with her husband executed a mortgage thereon to Virginia Fisher for the purchase-money, which has never been paid.

On 29 December, 1903, Mary J. Harris and husband sold and conveyed the land with full covenant of warranty to plaintiff. On 16 January, 1906, plaintiff reconveyed to Mary J. Harris 25 acres of this tract of land, with a covenant of warranty.

Mary J. Harris and husband are both dead, and defendants are their heirs at law.

After the death of Mary J. Harris and husband, and also of Virginia Fisher, the purchase-money debt being unpaid, Statz Credle, administrator of Virginia Fisher, advertised the land for sale. At sale plaintiff demanded that the administrator sell the 25 acres belonging to Mary J. Harris first, and if that did not bring sufficient to pay the purchase-money debt, that the administrator then sell the remainder of the 150-acre tract. The administrator did this, and plaintiff became the purchaser.

The administrator executed a deed to him for the 25 acres, which brought sufficient to pay the mortgage debt in full.

1. The fact that plaintiff had reconveyed the 25 acres to Mary J. Harris with covenant of warranty, even if it had been a full covenant, did not take from plaintiff his equitable right to have the 25 acres sold in exoneration of the remaining land which had been conveyed to him by Mary J. Harris, with specific warranty against incumbrances as well as a general warranty as to title.

Plaintiff was not compelled to resort to law to enforce the well established equitable right if the administrator was willing to perform his duty in that respect. The purchase-money was the personal debt of Mary J. Harris, and it was her duty to pay it.

There is no evidence or even allegation that plaintiff agreed to pay it as part of the purchase-money when he bought the land from Mrs. Harris. Besides, plaintiff did not warrant against incumbrances when he executed the deed for the 25 acres. He did not warrant the title, except as "against claims of themselves and heirs forever."

2. The defendants contend that inasmuch as the deed from Virginia Fisher's administrator to the plaintiff did not set out in full that the terms and conditions contained in the mortgage were complied with, that the sale and the deed thereunder are void. The deed in question uses this language: "The said Statz Credle, administrator, did according to said conditions expose to public sale the property therein mentioned."

The position is untenable, and is not ground for a nonsuit. The presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden was on the defendants to show it. *Jenkins v. Griffin,* 175 N. C., 184; *Cawfield v. Owens,* 129 N. C., 288; *Troxler v. Gant,* 173 N. C., 425.

The presumption being in favor of the regularity of the sale, and there being no evidence to the contrary, the sale was not void.

3. It is contended that the administrator of Mrs. Harris had no right to sell the 25 acres separately, but that he should have sold the whole 150 acres.

This position cannot be maintained. The plaintiff had right under the facts in evidence to have the 25 acres belonging to Mrs. Harris sold in exoneration of the land conveyed by her to him.

It is true that the mortgage did not give to the administrator of the mortgagee right to sell the land in lots or parcels, but the law vests in him a certain discretion in the matter, his primary duty being to see that the property brought the amount of the indebtedness, and his secondary duty being to see that the sale should cause as little injury as possible to others.

The rule is stated in 27 Cyc., p. 1480: "In other cases, and unless otherwise directed by the mortgage or deed of trust, the question of selling the property en masse or in parcels rests in the sound discretion of the trustee or other person making the sale."

If the trustee or administrator in making the sale acts arbitrarily or unfriendly, and so divides the land as to injuriously affect its value at the sale, the persons injured may seek the aid of a court of equity in setting aside the sale. It may be voidable, but is not void.

There is nothing of that nature presented by this record.

Reversed.

SPRUILL V. BRANNING MANUFACTURING COMPANY AND BATEMAN & BASNIGHT v. BRANNING MANUFACTURING COMPANY.

(Filed 22 September, 1920.)

Navigation—Navigable Waters—Fishing—Nets—Negligence—Instructions—Appeal and Error.

While vessels operating in pursuance of their trade have paramount right over fish nets set in the lane of navigation, where the rights conflict, yet where both can be freely and fairly enjoyed, the right of navigation does not permit a trespass upon and injury to the fishing, and where the evidence is conflicting, the question of negligence depends upon whether, by the exercise of ordinary care, the vessel ought to have seen the nets

of the plaintiff in time to have avoided striking them and causing the damages complained of in the action; and a refusal of a prayer for instruction to this effect is reversible error.

CIVIL ACTION, tried before *Lyon, J.*, at November Term, 1919, of TYRRELL, upon these issues:

"Q. Were the nets of the plaintiff, J. W. Spruill, injured by the negligence of the defendant, as alleged in the complaint? Answer: 'No.'

"Q. If so, what damage is the plaintiff entitled to recover?

"Q. Were the nets of the plaintiffs, Herbert W. Bateman and L. L. Basnight, injured by the negligence of the defendant, as alleged in complaint? Answer: 'No.'

"Q. If so, what damage is the plaintiffs entitled to recover?"

From the judgment rendered, the plaintiffs appealed.

Majette & Whitley for plaintiffs.

T. W. Woodley and Meekins & McMullan for defendant.

BROWN, J. These actions were consolidated and tried as one. They are brought to recover damages for destruction of plaintiffs' nets in the waters of Albemarle Sound. The evidence tended to prove that the nets were set between what is known as Laurel Point and Bull Point, in what is called Bulls Bay, and were at least four or five hundred yards, as shown by the evidence, inside of Laurel Point lighthouse, and inside of the lane of navigation from the sea buoy at the mouth of the Scuppernong River to said lighthouse. The nets of Bateman and Basnight were set some distance in front of those of Spruill and the tug of defendant company necessarily had to run over these nets before she reached those of Spruill. During the times aforesaid, the defendant company was engaged in operating a tug boat named "Arm & Hammer," for the purpose of towing rafts of logs from Scuppernong River to Edenton. In running this course the said tug, by marine usages and the Inland Rules of Navigation, was supposed to clear the sea buoy at the mouth of Scuppernong River, and then navigate by her compass northwest by one-quarter north, clearing the Laurel Point lighthouse by a safe margin. When she cleared the said lighthouse, the next course up the sound by the compass is north by one-quarter south to Sandy Point, or to the draw in the Norfolk Southern bridge across the sound. This was the proper and usual lane of navigation, and the nets in question were well inside of this lane, according to the evidence. In making her runs to Edenton with the said rafts, on numerous occasions the said tug ran over the nets of the plaintiffs, set as aforesaid, destroying some and greatly injuring others. The sound at that point is fifteen miles wide, with an average depth in the sound of four fathoms. According to the evidence, the

weather on each occasion when the nets were run over was fair, the water smooth, and there was no necessity for running over the nets.

The plaintiffs asked the following instruction:

"That if the jury shall find from the greater weight of the evidence that the employees of defendant in charge of its tug saw, or by the exercise of ordinary care, ought to have seen the nets of the plaintiffs in time to have avoided striking them, and did not use due care to avoid injury to the nets, you will answer the first issue 'Yes.' "

We are of opinion that this instruction should have been given. The instruction simply makes ordinary negligence the test of the defendant's liability, which is the true rule. 36 Cyc., 166.

Although the right of navigation in navigable waters is ordinarily paramount to the right of fishing therein, where the rights conflict, yet where both can be freely and fairly enjoyed, the right of navigation has no right to trespass upon and injure the right of fishing, and in such cases the owners of a vessel will be liable for damages caused to fishermen by the negligent navigation of their vessel, although they do not act maliciously or wantonly.

New trial.

LUCRETIA MIDGETT v. EASTERN CAROLINA TRANSPORTATION COMPANY.

(Filed 22 September, 1920.)

1. Carriers of Goods—Baggage—Gratuitous Bailee—Negligence.

Where baggage through no dereliction of the carrier fails to accompany the passenger and is forwarded by it at a later date without charge, the contract is one of bailment for the exclusive benefit of the bailor, and the obligation of the carrier is that of a gratuitous bailee, depending only upon its exercise of the care of a person of ordinary prudence under the circumstances.

2. Same—Instructions—Appeal and Error.

Where the carrier is only held to the liability of a gratuitous bailee in transporting a trunk for its passenger, proof of delivery to the carrier of the trunk on the day following that of his passage, and the failure of the carrier to deliver, is evidence of its negligence sufficient to take the case to the jury, requiring an instruction as to the law relating to a gratuitous bailment and making a direction of an affirmative verdict on the issue of negligence reversible error.

3. Instructions—Verdict Directing—Evidence—Appeal and Error.

Where a verdict may be directed by the court on the issue of a carrier's negligence, it is reversible error to do so on the issue of damages upon the testimony of the plaintiff as to the value of a lost trunk, the subject of the inquiry.

MIDGETT *v.* TRANSPORTATION CO.

CIVIL ACTION, tried before *Cranmer, J.*, at Spring Term, 1920, of DARE, upon these issues:

"1. Was the property of the plaintiff lost and damaged through the negligence of the defendant? Answer: 'Yes.'

"2. What damage, if any, is plaintiff entitled to recover? Answer: 'Yes, $331.75.'"

The court peremptorily charged the jury as follows:

"If you believe the evidence, and find the facts to be as testified, then the court charges you to answer the first issue 'Yes.'"

From the judgment rendered, the defendant appealed.

B. G. Crisp and W. A. Worth for plaintiff.
Meekins & McMullan for defendant.

BROWN, J. The defendant company is a carrier, operating steamer *Trenton.* This steamer makes daily trips between Manteo and Elizabeth City. On 30 July, 1919, the plaintiff took passage on the *Trenton,* purchasing a ticket from Manteo to Elizabeth City. After reaching Elizabeth City, the plaintiff took passage on the gas boat *Ray,* operated under another and separate ownership, for South Mills, N. C., and paid for this latter passage a separate and distinct fare. On this latter trip the plaintiff requested Capt. Johnson of the gas boat *Ray* to meet her trunk the next day at Elizabeth City, upon the arrival of the steamer *Trenton.* At the time of leaving home on the early morning of the 30th, plaintiff had packed her trunk and left it to be sent after her the next day. During the afternoon of the 30th the trunk was delivered to defendant's agent at Manteo, who placed same in defendant's warehouse over night, and had it put aboard the *Trenton* next morning to be carried to Elizabeth City. No bill-lading, check or receipt was issued or requested, and no transportation charges paid or demanded. At that time it was the rule of defendant company that baggage following a passenger on a different date through dereliction of the company should be shipped only upon bill-lading, and upon payment of proper charges for transportation. On 9 August, 1919, plaintiff received the trunk on the wharf of the gas boat *Ray* at South Mills, at which time its contents, valued at $331.75, had been stolen or removed.

We are of opinion that his Honor erred in charging the jury peremptorily to answer the issues as above. *Perry v. R. R.*, 171 N. C., 38; *Kindley v. R. R.*, 151 N. C., 207. The trunk did not accompany the plaintiff as a passenger through no fault of the defendant. It was delivered the next day to the agent of the steamer at Manteo, and placed in the warehouse to be shipped to the plaintiff.

Where baggage, through no dereliction of the carrier, fails to accompany the passenger, and is forwarded at a later date without charge, the contract is one of bailment for the exclusive benefit of the bailor. The obligation of the carrier in such case is that of a gratuitous bailee. *Perry v. R. R., supra.*

Proof of delivery to carrier and of its failure to deliver is evidence of negligence sufficient to carry the case to the jury, but the jury should be instructed that the carrier is not liable, if, upon the whole evidence they do not find that it did not exercise the care of a person of ordinary prudence under the circumstances.

Again, there is no admission that the contents of the trunk were worth $331.75. It is true the plaintiff testified to this, but that was simply the opinion of the witness, and her opinion was not binding upon the jury. It was for the jury to fix the value.

New trial.

N. G. PENNIMAN, TRADING AS BALTIMORE PULVERIZING COMPANY, v. L. L. WINDER.

(Filed 22 September, 1920.)

Vendor and Purchaser—"Order Notify"—Title—Goods Destroyed—Contract—Breach—Recovery.

Title to goods shipped "order notify," bill of lading attached to draft, remains in the shipper until the draft is paid, and when the shipment is lost in transit the seller cannot recover of the purchaser the purchase price thereof.

CIVIL ACTION, tried before *Guion, J.*, at February Term, 1920, of PASQUOTANK.

From a judgment of nonsuit, the plaintiff appealed.

Aydlett & Simpson for plaintiff.
Thompson & Wilson and Meekins & McMullan for defendant.

BROWN, J. It appears in evidence that the plaintiff and defendant entered into a contract whereby plaintiff agreed to sell defendant, and defendant agreed to buy 95 tons of oyster-shell lime f. o. b. vessel at Baltimore, and defendant arranged with Wathen & Company, ship brokers, of Baltimore, Md., for the schooner "Mary Gaillard" to receive the said lime at Baltimore for him.

The plaintiff did not deliver the lime to the defendant at Baltimore, and did not ship same to him open, but shipped same to be delivered at

Hall's Creek, Little River, N. C., to "order notify," defendant, and attached the bill of lading to a sight draft and sent them through the First National Bank of Elizabeth City for collection.

On the voyage from Baltimore to Hall's Creek the "Mary Gaillard" sank, and the cargo of oyster-shell lime was never delivered at Hall's Creek.

This action is brought to recover the purchase price for lime, being the amount of the draft attached to the bill of lading.

The general rule in mercantile law is that the risk follows the title. If the title had passed to the defendant, then the loss would have fallen upon him, and he would be liable to pay for the lime although he had never received it. If, on the contrary, the title had not passed to the defendant, but was retained by the plaintiff, then the risk in transit was on the plaintiff, and he cannot recover the price of the lime. *Joyce v. Adams,* 8 N. Y., 291. We think the undisputed evidence shows that the title to the lime was retained by the plaintiff for his own protection, and that it was only to be delivered to the defendant upon payment of the draft attached to the bill of lading.

When the seller ships goods "to order notify," and draws for the purchase money, the title and right of possession to the property is reserved by the seller until the draft is paid. No title passes to the buyer, and any loss in transit must be borne by the seller. 24 R. C. L., title "Sales," secs. 306-310; 35 Cyc., 332-333; *Sims v. R. R.,* 130 N. C., 556.

Affirmed.

DAVIS, ADMINISTRATOR OF L. G. DAVIS, v. NORTH CAROLINA SHIPBUILDING COMPANY.

(Filed 29 September, 1920.)

1. Employer and Employee—Master and Servant—Negligence—Vice Principal—Direct Orders—Defective Appliances.

Evidence that defendant's employee, acting under the immediate order of his superior, and defendant's vice principal, went beneath a heavy piece of timber to unfasten it so as to be drawn by defendant's derrick crane to position, with evidence that by reason of its defective condition the crane should not have been used on the occasion in question, is sufficient to take the case to the jury upon the question of the defendant's actionable negligence.

2. Employer and Employee—Master and Servant—Question of Employment—Policy of Indemnity—Contracts—Evidence.

Where the defendant has denied that the plaintiff's intestate was employed by him, and the action is to recover damages under the alleged negligence of the defendant as the employer of the intestate, it is compe-

tent to show that the defendant had taken out a policy indemnifying it against loss for personal injuries received by its employees, including the intestate. *Clark v. Bonsal* cited and distinguished.

3. Contracts, Written—Evidence—Parol—Collateral Matters.

The rule excluding parol evidence as to the contents of a written contract does not apply when the contract is merely collateral to the issue, and its contents is not directly involved therein, and is not the subject-matter in dispute.

CIVIL ACTION, tried before *Connor, J.*, and a jury, at March Term, 1920, of CARTERET.

The action is to recover damages for death of plaintiff's intestate, caused by alleged negligence of defendant while he was claimed to be in defendant's employment. There was denial of employment of intestate, defendant claiming that the plant and enterprise, at the time, were under control of United States Government. There was also denial of any negligence on part of defendant, and also pleas of contributory negligence and assumption of risk.

On issues submitted the jury rendered the following verdict:

"1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged? Answer: 'Yes.'

"2. Was Leslie G. Davis, deceased, at the time of his death employed by the North Carolina Shipbuilding Company, defendant? Answer: 'Yes.'

"3. Did the plaintiff's intestate, by his own negligence, contribute to his own injury? Answer: 'No.'

"4. Was the death of plaintiff's intestate caused by injury due to risk of his employment voluntarily assumed by said intestate? Answer: 'No.'

"5. What damage is plaintiff entitled to recover of defendant? Answer: '$5,000.' "

Judgment on verdict, and defendant excepted and appealed, assigning errors.

Ward & Ward and M. Leslie Davis for plaintiff.
J. F. Duncan for defendant.

HOKE, J. There were facts in evidence tending to show that on 1 March, 1918, the intestate of plaintiff, with other employees of the shipbuilding company, were engaged in removing some heavy timber from a car and piling them on the ground near, by means of a derrick or crane; that these workmen, at the time, were under the immediate supervision and direction of a foreman or boss, who stood towards them in the relation of vice principal, and that the derrick crane was defective,

and had been for several days; that in attempting to remove a very heavy piece of timber from the car, one end of it lodged or became fastened in some way, and the boss ordered the intestate to go in under the timber and push it free; that intestate, a young man, 24 years of age, who had been on the work about a week, proceeded to obey the order, pushed the timber free; the derrick failed to work, and the timber slid down on the intestate and crushed him to death. There was ample evidence of negligence, the proximate cause of the killing, imputable to defendant, both in the condition of the derrick and in the negligent order of the vice principal, and his Honor was clearly right in refusing defendant's prayer for instructions to the effect that if the jury believed the evidence they would find the issue as to the principal negligence for defendant. *Thompson v. Oil Co.,* 177 N. C., 279; *Howard v. Oil Co.,* 174 N. C., 651; *Ridge v. R. R.,* 167 N. C., 510.

As apposite to the facts presented, it was said in *Thompson's case, supra:* "And in this connection there are numerous decisions to the effect that the general directions or present and special orders of a boss or higher employee, one who represents the employer and stands towards the workmen in the position of vice principal, may be considered as a relevant fact when it is one from which, in itself or in connection with the attendant circumstances, the fact of negligence may be reasonably inferred. *Atkins v. Madry,* 174 N. C., 187; *Howard v. Oil Co.,* 174 N. C., 651; *Howard v. Wright,* 173 N. C., 339; *Wade v. Contracting Co.,* 149 N. C., 177; *Holton v. Lumber Co.,* 152 N. C., 68; *Noble v. Lumber Co.,* 151 N. C., 76; *Allison v. R. R.,* 129 N. C., 336; *Patton v. R. R.,* 96 N. C., 455.

"Not only is an employer supposed, as a rule, to control the conditions under which the work is done, and to have a more extended and accurate knowledge of such work and the tools and appliances fitted for same, but the order itself given by the employer or his vice principal directing the work and the natural impulse of present obedience on the part of the employee are additional and relevant facts to be considered in passing upon the latter's conduct in reference to the issue."

It was chiefly urged for error that the court admitted, over defendant's objection, evidence tending to show that the shipbuilding company had taken out and held indemnity insurance in reference to employees engaged in this work, citing *Clark v. Bonsal,* 157 N. C., 270, in support of the objection.

It is true that in *Clark v. Bonsal* the Court decided that an injured employee could not maintain an action for negligent injury against the insurance company on an indemnity policy as ordinarily drawn, taken out, and held by the employer for his own protection. Applying the principle, it has been held in several such cases that the existence and

contents of such a policy is not, ordinarily relevant on the question of damages, or on the issue as to negligence, but, in the present case, the defendant was endeavoring to maintain the position that it was not then operating the plant, and the intestate, at the time of the occurrence, was not in their employment. And the fact that the company had taken out and then held indemnity insurance for injuries to their employees was clearly relevant in that issue. The court was careful to restrict the evidence to the purpose indicated, and the exception must be overruled. In this connection it was earnestly insisted that there was error in permitting witnesses to speak of the policies in question when it appeared that they were in writing and not produced. The question chiefly pertinent here was not so much the contents of the policies as the independent fact that such policies were held, but, in any event, the policies not being the subject-matter in dispute between the parties nor their contents directly involved in the issue, they do not come within the rule which excludes parol evidence as to the contents of a written paper or document. *Miles v. Walker,* 179 N. C., 479-484; *Morrison v. Hartley,* 178 N. C., 618.

Speaking to the position in *Miles' case, supra,* the Court said: "Again it is objected that the court, over defendant's objection, allowed plaintiff to say that he had sublet the property at $50 per month, the objection being put on the ground that this sublease was in writing, but as held in numerous cases on the subject, the rule excluding parol evidence of the contents of a written paper or document applies only in actions between the parties to the writing, and when the enforcement of obligations created by it is substantially the cause of action, it does not prevail as to collateral matters though they may be relevant to the inquiry."

On careful consideration, we find no error to defendant's prejudice, and the judgment for plaintiffs is affirmed.

No error.

E. R. COATS ET AL., ADMINISTRATRIX, v. A. E. NORRIS ET AL., ADMINISTRATRIX.

(Filed 29 September, 1920.)

1. Courts—Discretion—New Trials—Appeal and Error.

A motion to set aside a verdict and grant a new trial is made to the discretion of the trial judge, and not reviewable on appeal.

2. Evidence—Questions for Jury—Trials.

Held, in this case, the evidence was sufficient to be submitted to the jury on the issues raised by the pleadings.

WALKER, J., dissenting.

COATS *v.* NORRIS.

CIVIL ACTION, tried before *Bond, J.*, at February Term, 1920, of HARNETT.

The following issues were submitted:

"1. In what sum, if anything, is defendant, administratrix, indebted to the plaintiff, Mrs. A. V. Coats, as to which she was indemnified by the terms of the bond sued upon to which defendant's intestate, John E. Wilson, is alleged to have been surety? Answer: '$2,348, with interest from each date of judgment first paid in making up said amount.'

"2. In what sum, if anything, is defendant, administratrix, indebted to the plaintiff, Mrs. A. V. Coats, administratrix of E. R. Coats, as to which she was indemnified by the terms of bond sued upon, to which defendant's intestate, John E. Wilson, is alleged to have been surety? Answer: 'Nothing.'"

From the judgment rendered the defendant, E. J. Wilson, administratrix of John E. Wilson, appealed.

Young & Best for plaintiff.
J. F. Wilson and Clifford & Townsend for defendant.

BROWN, J. This action is brought to recover from the surety on a penal bond for money paid out by the plaintiff and alleged to be covered by the terms of the bond. The evidence tends to prove that E. R. Coats A. V. Coats and A. E. Norris were partners, trading as the Norris Dry Goods Company, prior to 23 May, 1910. On that date A. E. Norris purchased the interest of the other two partners in the assets of the company, and assumed the liabilities of said company, and executed a bond in the sum of $5,000, with John E. Wilson as surety, to indemnify and hold the two Coats harmless against having to pay any of the indebtedness then outstanding against the Norris Dry Goods Company. The complaint alleges that the plaintiff, A. V. Coats, was compelled to pay $2,348 of indebtedness which the said Norris Dry Goods Company were owing prior to 23 May, 1910, and seeks to recover said money from A. E. Norris and his bondsman, John E. Wilson.

There are only three assignments of error. The first relates to the alleged error of the court in permitting the plaintiffs to introduce as evidence certain judgments upon the ground that there was no evidence to show that these judgments were founded upon an indebtedness of the Norris Dry Goods Company incurred prior to the execution of the penal bond. We are of opinion that this contention cannot be maintained.

It is useless to set out the evidence or comment upon it. The issue was presented to the jury in a very clear and comprehensive charge, and has been found for the plaintiff with abundant evidence to support the finding.

The second assignment of error is to the refusal to grant the motion to nonsuit. This motion was properly denied for the reason given. The third assignment of error is to the refusal of the court to set aside the verdict and grant a new trial. This is a matter within the sound discretion of the judge, and is not reviewable by us, as has been held in innumerable cases.

No error.

WALKER, J., dissents, because there was no sufficient evidence that the judgments were based upon debts, which were within the terms of the indemnity bond.

C. A. HAMILTON v. J. B. BENTON AND J. J. EDWARDS.

(Filed 29 September, 1920.)

1. Pleadings—Counterclaims—Torts—Contracts—Statutes.

In an action by the principal against his agent for conversion or embezzlement the defendant may not set up as a counterclaim a breach by the plaintiff of his contract to assume an indebtedness of the defendant, the action arising in tort and the counterclaim on contract. Rev., 481.

2. Novation— Principal and Surety— Mortgages— Notes—Extension of Time—Contracts—Discharge.

The owner gave a chattel mortgage upon his property to E., and afterwards sold the property to plaintiff, who agreed to assume the mortgage without the consent of the mortgagee, and afterwards the plaintiff sold the property to one M., with whom the mortgagee E. entered into a written contract extending the time of payment of the mortgage debt, and to foreclose the mortgage then past due, upon certain conditions of payment, resulting in foreclosure: *Held*, the mortgagor and the plaintiff were discharged from their obligations under the mortgage by the agreement of the mortgagee with M., whether regarded as a novation or substitution of M. as a new paymaster, or whether they be considered as sureties.

3. Contracts—Novation—Substitution of Paymaster—Agreements—Evidence—Implied Contracts.

A contract may be discharged by agreeing to the substitution of a new party in the place of one of the original ones, although the terms of the agreement otherwise remain the same; and such assent may be implied or evidenced by circumstances and by the conduct of the parties.

APPEAL by defendants from *Connor, J.*, at Fall Term, 1919, of LEE.

The defendant, J. B. Benton, executed and delivered to defendant, J. J. Edwards, a chattel mortgage on a printing press outfit, described in the record, to secure a certain note; afterwards Benton sold the mortgaged property to plaintiff, who agreed with Benton to assume and pay

the Edwards mortgage. Edwards did not consent to this agreement. Later plaintiff sold the mortgaged property to Mr. McNeeley, with whom Edwards entered into a written agreement to extend the time fixed for payment of the debt, and to postpone foreclosure of his mortgage, which was then past due, upon the condition that McNeeley make payments on the mortgage, as provided in the agreement. McNeeley made no payment, and ran away. The property was sold under the mortgage.

This action was originally brought by plaintiff against J. B. Benton, and was referred to W. H. Weatherspoon, Esq. The referee found that Benton was indebted to plaintiff in the sum of $221.05, and that plaintiff was indebted to Benton in the sum of $454.46, for the Edwards mortgage, assumed by plaintiff in the purchase from Benton. At August Term, 1919, Lee Superior Court, Judge Connor ordered Edwards to be made a party defendant, so as to settle the equities between the parties, which was done. At the trial of this case, at November Term, 1919, Judge Connor, upon the pleadings and evidence, submitted to the jury the issue appearing of record, as to the indebtedness of Benton to Edwards on the note secured by said mortgage, and reserved the question of law arising upon the agreement between Edwards and McNeeley. The jury answered the issue according to Edwards' contention, finding that Benton was indebted to Edwards in the sum of $446.55. The judge set aside the verdict of the jury, and held, as matter of law, that the agreement between Edwards and McNeeley (although Benton or Hamilton was not a party to it), was a novation, and released Benton and Hamilton from the original mortgage; and thereupon refused to sign the judgment tendered by the defendants, and signed the judgment tendered by plaintiff, which is as follows:

"This cause coming on to be heard, and being heard, upon the exceptions filed by the plaintiff to the report of W. H. Weatherspoon, referee, heretofore filed in this cause, after hearing and considering the evidence and argument of the counsel, the court doth adjudge:

"First. That the plaintiff's first exception be sustained, and that the second exception, the finding of facts, be sustained, 'and that said second finding of facts be stricken from the records, and that no finding now be made in lieu thereof' (inserted by me, George W. Connor, J.), and the court being of the opinion that the liability assumed by C. A. Hamilton with respect to the Edwards mortgage mentioned in the bill of sale was as grantor to hold the defendant, J. B. Benton, harmless from and by reason thereof, and it further appearing that a final judgment with respect thereto cannot be rendered binding upon all parties that they may be concluded thereby, unless J. J. Edwards be made a party, it is ordered that J. J. Edwards be made a party defendant; that process issue to bring him in; that he have leave of court to file pleadings against

the plaintiff and defendant, either, if he be so advised, to enforce or have determined any liability claimed by him by reason of said mortgage and the note secured thereby; that plaintiffs and defendants have leave of court to file such pleadings as they may be advised for such purpose; and it appearing that the plaintiff Hamilton has offered for filing such pleadings, it is ordered that the same be filed, and that the defendant Edwards have 30 days to file answer thereto, after the service of summons, and the defendant Benton have thirty days as of this term to answer the same. It is further ordered that no costs be taxed against the defendant Benton, upon the trial of such issue as may be raised thereby.

"Second. That plaintiff's exception to the referee's second conclusion of law is sustained, and a finding with respect to the matters set out therein shall hereafter be made, based upon the findings of a jury upon the matters of fact involved therein, and necessary to a decision before any conclusion of law can be made.

"Third. The exception of the plaintiff that the referee erred in not holding as a matter of law upon the facts found that J. B. Benton received and took into his possession as agent and servant of the plaintiff the sum of two hundred and twenty-one and 5/100 dollars, and that he had failed to account for the same; that the plaintiff is entitled, as a matter of law, to have judgment against the person of the defendant is sustained, and the court holds, as a matter of law, that the plaintiff is entitled to such judgment. Except as herein noted, the findings of facts and conclusions of law of the referee are affirmed and adopted by the court.

"Upon the foregoing, the court doth further adjudge that the defendant, J. B. Benton, is indebted to the plaintiff, C. A. Hamilton, in the sum of two hundred and twenty-one dollars and five cents, with interest thereon from 1 October, 1914; and upon the return of an execution therefor, unsatisfied, in whole or in part, that execution issue against the person of the defendant according to law. It is further ordered that execution shall not issue upon the foregoing judgment until an issue that may be raised between the parties and J. J. Edwards shall have been determined, and that the question of costs as between the original parties is reserved until after such issues may have been tried. It is further ordered that the two items of $25 each, found by referee to have been paid to Edwards by Benton, shall be credited to Benton in final accounting between him and Hamilton."

The case being further heard afterwards, the judge modified the former decree, and ordered that the verdict in favor of Edwards and against Benton be set aside, and held, and finally so adjudged, that the written agreement between McNeeley and Edwards released, and dis-

charged, both plaintiff and Benton from any further liability on Benton's note to Edwards, and the mortgage securing the same, rejected the two payments of $25 each as credits on the mortgage debt, and held that they are not proper offsets to plaintiff's claim, they having been applied to the Fisher note, and that plaintiff is not indebted to Benton on the latter's counterclaim, or in any amount, and further adjudged that plaintiff recover of Benton $225.05, with interest from 1 October, 1914, being the amount wrongfully converted by Benton as agent of plaintiff, and that execution issue on said judgment, and that, upon a return thereof unsatisfied in whole or in part, execution issue against the person of Benton, as provided by law, and further adjudged the costs of the action against Benton, except a certain amount which he adjudged against both Benton and Edwards, and providing that upon payment of the cost adjudged against him, Edwards should be allowed to have the judgment for costs against him and Benton assigned to some other person as trustee for Edwards' use and benefit, as the law directs.

Defendants appealed.

Hoyle & Hoyle for plaintiffs.
Seawell & Milliken for defendant Benton.
E. L. Gavin for defendant Edwards.

WALKER, J., after stating the case: We need only decide a few questions so as to eliminate the immaterial ones from the case, and thus simplify those really presented, on the merits, and material to the decision of the case.

First. The counterclaim of Benton for breach of contract by plaintiff Hamilton is inadmissible, and cannot be set up against the plaintiff's cause of action for the conversion or embezzlement of Benton as plaintiff's agent. One is a tort, the embezzlement, and the other is a contract, that is, the assumption by plaintiff of the debt due by Benton to Edwards, which is evidenced by note, and the breach of that contract. They were two different and distinct transactions. Both did not "arise out of the transactions set forth in the complaint," nor was the one in contract "connected with the subject of the action," but they were foreign to each other, so that one cannot be a counterclaim against the other. Rev., 481; *Street v. Andrews,* 115 N. C., 417; *Bazemore v. Bridgers,* 105 N. C., 191. It is said in *Smith v. Young,* 109 N. C., 224: "A party cannot set up a counterclaim to an action for tort, matters which arise out of a contract unconnected with the transaction sued on."

It is said in 34 Cyc., pp. 662 and 663: "In actions sounding in tort a counterclaim not connected with the subject of the action nor arising out of the transaction forming the basis of the plaintiff's cause of action

will not be allowed, and thus counterclaims disconnected with the transaction sued on, or with the subject of the action have been disallowed in actions for conversion." See, also, the following cases to the same effect: *Scheunert v. Kaehler,* 23 Wis., 523; *Schaefer v. Empire Lith. Co.,* 28 N. Y. App. Div., 469; 51 N. Y. Suppl., 104; *Chambers v. Lewis,* 11 Abbott's Pr. (N. Y.), 210, Aff.; 28 N. Y., 454 (16 Abbott's Pr., 433).

Second. It can make little or no difference whether Benton and Hamilton are discharged from liability upon the note and mortgage given by Benton to Edwards, by novation, or, in other words, by the substitution of a new and sole paymaster under the agreement between Edwards and McNeeley, or whether they or either of them is discharged by an extension of time for payment given for the ease and accommodation of the debtor, and to the prejudice of his sureties—so that in the end they are discharged, or either of them is released. Viewing them as sureties, for the sake of argument, when Benton sold to Hamilton he became surety to the latter, who became principal debtor to the creditor, Edwards, if Edwards consented thereto, and when Hamilton sold to McNeeley, he became surety to the latter, and Benton and Hamilton were entitled to the usual rights of sureties. Edwards could not extend the time of payment to McNeeley without the consent of Benton and Hamilton, or, if he did so, they were discharged.

It could have been, if so agreed, that, by the several transfers or sales, a new paymaster, or principal debtor (McNeeley) was finally substituted with the other two as sureties. *Woodcock v. Bostic,* 118 N. C., 822; 32 Cyc., 191 to 195. But if this had been so, extension of time for payment or performance to the debtor, under a binding contract, discharged the surety, unless he consented thereto. *Smith v. Hays,* 54 N. C., 321; *Thornton v. Thornton,* 63 N. C., 211; *Fitts v. Messick Grocery Co.,* 144 N. C., 463. But there was no such consent. The reason of the rule is that, where there are sureties, as soon as a debt is due and payable, if the principal debtor does not pay it, the surety may pay it and immediately sue the principal for money paid to his use. If, therefore, the creditor agrees with the principal debtor in such manner as that he is bound by the agreement to postpone the day of payment, he puts it out of the power of the surety to pay the debt and sue the principal, and he thereby puts the surety in jeopardy; and the surety, being no party to the new contract for indulgence, is discharged from all liability. *Scott v. Harris,* 76 N. C., 205. In regard to this principle, 32 Cyc., at p. 191, says: "The rule is well settled that if a creditor or obligee, by a valid and binding agreement, without the assent of the surety, gives further time for payment or performance to the principal debtor, the surety will be discharged. And where two persons are bound for the same debt, and there is an obligation on the part of one to exonerate the

other, in the event of payment being enforced against such other, and this is known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though such debtor occupies the position of a principal debtor to the creditor, as where debtors become sureties by another assuming the indebtedness." See, also, *Tuchy v. Woods,* 122 Calif., 665; *Union Stove, etc., Works v. Caswell,* 48 Kansas, 689; *Steele v. Johnson,* 96 Mo. App., 147; *Long v. Patton,* 43 Texas Civ. App., 11; *Calvo v. Davis,* 73 N. Y., 211 (29 Am. Reports, 130), and 8 Hun., 222. The fact is that the mortgagee (Edwards) had full actual notice of the relation of the parties when he dealt with McNeeley, and, besides, he knew, and could not avoid knowing, that Benton was the original debtor, and he also knew that Hamilton, with whom he dealt in the substitution of McNeeley as debtor, had acquired Benton's rights. He acted with his eyes open—no man had better knowledge of the facts—and he deliberately and substantially so changed the original contract as to extinguish all claim on both Benton and Hamilton by the novation, or if they had remained as sureties, the extension of time by him to McNeeley would have discharged them as such. There is no way you can look at the case without concluding that Benton and Hamilton are no longer liable for this debt.

But we are of the opinion the judge was right in holding that McNeeley was finally and fully substituted for Benton and Hamilton as sole paymaster and debtor, Benton and Hamilton being retired as sureties and discharged from all obligation whatever. This is the correct view of the facts, but whichever way is given (*quacunque via data*), whether they were still sureties or McNeeley became the sole debtor, they are finally acquitted of all liability.

Third. A contract may be discharged by a change in the parties thereto; as by the substitution of a new party in the place of one of the original parties by the agreement of all, although the terms otherwise remain the same, which is fully discussed in *Redding v. Vogt,* 140 N. C., 562. This is a species of novation by assent of the parties thereto, and may exist in more complicated form than the simple form of which the above is an illustration. Such an assent may be implied, and such substitution and discharge may be evidenced by circumstances and by the conduct of the parties, showing an acquiescence in the change. It is not necessary, so long as they all finally consent in time, that they should all consent at the same moment. Elliott on Contracts, vol. 1, sec. 1867, citing numerous cases to sustain the text. See, also, *Lester v. Bowman,* 39 Iowa, 611, citing and approving *Tatlock v. Harris,* 3 T. R., 174, and *Heaton v. Angier,* 7 N. H., 387. In the first case it is said: "In neither of those cases was there an express agreement to discharge

the first debtor, but in both of them the agreement to accept another paymaster, and the agreement of the other to pay effected such a discharge." It has been repeatedly held in this jurisdiction that a firm agreement to accept another paymaster, in the place of the former one, based upon a consideration, discharges the original debtor, whether principal or surety, from personal liability. *Barnhardt v. Star Mills,* 123 N. C., 428; Clark on Contracts (2 ed.), 420. Tested by these standards, the transaction may have amounted, in our view, to one form of novation. Benton had already agreed in advance, and in writing, with Hamilton that the latter should "become solely responsible for the two claims." Hamilton procured Edwards to execute with McNeeley a written agreement by which Edwards agreed upon McNeeley as his paymaster. McNeeley expressly promised to pay the debt, and thereby made himself responsible therefor; and Edwards accepted this promise to pay. One (that is, McNeeley) promised to pay a certain amount in fixed installments; the other accepts this promise and changes thereby the due date, and postpones the maturity of the debt and mortgage. This discharged Hamilton and Benton, whether by reason of the extension of time for payment, or by the substitution of a new and sole principal.

We have referred to some of the facts of this case, as now presented, merely to illustrate the principles which controlled the final decision of it. They are admitted, or practically so, at least, and as thus put before us without substantial controversy as to what they are, we conclude that they authorize Judge Connor's judgment.

As to the questions of law reserved, including those relating to the counterclaim of Benton and the judgment in favor of Hamilton against him, the decision of the judge thereon is approved. The counterclaim will be stricken out, and the judgment in favor of Hamilton against Benton will stand, and process to enforce it will be issued, as ordered by the judge. In all other respects, the judgment is also affirmed.

The case is remanded with directions to proceed further therein, as ordered by the court below in its final judgment, and as the law requires.

No error.

LEANDER LEE ET AL. v. G. M. LEE ET AL.

(Filed 29 September, 1920.)

1. Trespass—Estates—Life Estates—Evidence—Nonsuit.

A tenant for life in possession of the lands may recover nominal damages for trespass thereon, and a motion for judgment as of nonsuit upon the evidence is properly disallowed.

2. Trespass—Evidence—Admissions—Survey—Court's Supervision.

Held, under the admissions in this action of trespass, a certain portion of the land awarded to the defendant should be marked under the supervision of the court to avoid future litigation.

APPEAL by defendant from *Connor, J.*, at the November Term, 1919, of HARNETT.

This is an action to recover damages for trespass on land by entering thereon and cutting valuable timber trees.

The plaintiff alleges that he is the owner in fee of the land described in the complaint, and in possession of the same, which allegation is denied by the defendant.

It is not denied that the plaintiff was the owner of the land for life at the commencement of the action.

At the conclusion of the evidence, the defendant moved for judgment of nonsuit on the ground that the action is one to recover damages for injury to the inheritance, and that the plaintiff, as life tenant, cannot maintain the action.

The motion was overruled, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Godwin & Williams, Baggett & Mordecai, and C. L. Guy for plaintiff.
E. F. Young and Clifford & Townsend for defendant.

ALLEN, J. There is authority for the position that a tenant for life may recover all of the damages to the inheritance, but this does not seem to be the prevailing rule (*Rogers v. Atlantic Company,* Anno. Cases, 1916, c. 877, and note), although it was held in *Wheeler v. Tel. Co.,* 172 N. C., 11, that one in possession, nothing else appearing as to title, may recover the entire damages against a wrongdoer, but however this may be, one in possession may, in any event, recover nominal damages for the wrongful entry into the land, although he suffers no substantial damage. *Frisbee v. Marshall,* 122 N. C., 763.

This being true, the plaintiff, as life tenant, can maintain this action for an entry upon the land of which he was in possession, and he has in

this Court waived all claim to recover substantial damages, and has agreed that his recovery of damages be stricken from the judgment.

The pleading is sufficient, as it not only alleges title but possession, but if it was otherwise, we would grant the motion of the plaintiff to amend as it appears to us the action has been tried on its merits and the defendant has not been deprived of any defense.

The judgment, therefore, will be affirmed, except the recovery of damages will be stricken out, and it will be further modified so that the plaintiff will not recover "that portion of the land in dispute represented by the said triangle on the court map, which is included in the defendant's cultivated field," as this is in accordance with the admission of the plaintiff appearing of record.

The cultivated field covered by this admission ought to be marked under the supervision of the court, so that future litigation may be avoided.

Modified and affirmed.

J. H. JERNIGAN ET AL. v. L. B. EVANS ET AL.

(Filed 29 September, 1920.)

1. Estates—Husband and Wife—Life Estates—Entireties—Wills.

A life estate held by the testator's son and his wife under a devise made to them jointly, holds the estate in entirety.

2. Wills—Estates—Remainders—Contingencies—Powers of Sale—Deeds and Conveyances.

A testator devised lands to his two sons, J. L. and J. H., for life, and by codicil, added the name of the wife, upon the same conditions and limitations, to be equally divided, then to their children, and upon the contingency that should one of them die without leaving a child, then to the other son of the testator for life, and at his death to his children, and to revert to the testator's general heirs should the grandchildren die without issue; but a conveyance by the grandchildren would "be good" in the case of their death without children. Both J. L. and J. H., the two sons, being dead, the children of the latter and the grandchildren of the testator, together with their mother, would convey the purchaser a good fee-simple title, there being no possibility of future children of the marriage of J. H.; and that the clause in the will under which the conveyance was made would prevent the land going over under the prior clause of the will.

Appeal from *Devin, J.*, at April Term, 1920, of BERTIE.

Plaintiffs agreed to sell certain land to the defendants, who refused to comply with the contract because, as they alleged, the title conveyed

to them by the deed tendered is defective. If the title is good and indefeasible, they are ready and willing to pay the purchase money and take the deed.

The question as to the title arises upon the construction of the second clause of Mrs. Sallie D. Holley's will, dated 25 November, 1885, and the codicil to the will, dated 15 March, 1892, which are as follows:

"2nd. I loan to my two sons, D. L. Jernigan and John H. Jernigan, during their lives, all the real estate given me by my late husband, Augustus Holley, to be equally divided between them in value, and after their death I give it to their children in fee simple, except in case of their death without issue, and in case of the death of either J. L. Jernigan or Jno. H. Jernigan without a living child at his death, I loan the share of the real estate of the one dying first to his surviving brother during his life, and after his death I give it to his children, and in the case of the death of my grandchildren without children, then the real estate so devised and given to them shall revert or come back to my heirs at law; but in the case the real estate so devised or given to my grandchildren shall be sold by them, the title conveyed by them to the purchaser shall be good in case of their death without children. In the division of my real estate, I desire and direct that Ashland, and the place known as Gaskins, be allotted to D. L. Jernigan as a part of his half interest, and that the Hermitage be allotted to Jno. H. Jernigan as a part of his half interest. The fishery known as the Hermitage fishery I loan to them jointly, to be enjoyed by them equally and alike, and after their death I give it to their children in the manner the other real estate is given."

"I add the following codicil to my will: The share of my estate which in my will I have given to my son John H. Jernigan, I give instead to the said John H. and his wife, Lizzie B. But I impose upon the estate in the hands of the two exactly the same conditions and limitations which I imposed on the same in the hands of John H. Jernigan alone. The only change I mean to make by the codicil is to add Lizzie B. Jernigan's name to that of John H. Jernigan whenever in said will property is given to him."

J. H. Jernigan bought the interest, other than his own, in the Hermitage farm and fishery, and has died since this proceeding was begun.

The deed which was tendered to the plaintiffs is signed by L. B. Evans, Francis Gilliam, John H. Jernigan, Elizabeth B. Jernigan, Alexander Bell and wife, Elizabeth J. Bell, the latter, who was Elizabeth Jernigan, being the only child of John H. and Elizabeth B. Jernigan. It is alleged in the complaint that D. L. Jernigan died on 28 July, 1893, and left surviving him a son, George C. Jernigan, and a daughter, Sallie Jernigan Mitchell, wife of J. R. Mitchell, who claim a contingent inter-

est in the land, under the will of Mrs. Holley, as her heirs, and who have been made parties by publication, they being nonresidents, living in Washington, D. C. Sallie J. Mitchell is the nonresident guardian of George Jernigan, who is *non compos mentis,* S. W. Kenney has been appointed guardian *ad litem* of James J. Mitchell, Dennie Lewis Mitchell, who are minors, and George C. Jernigan.

The court being of the opinion that plaintiffs cannot convey a good and indefeasible title to the defendants, L. B. Evans and Francis Gilliam, dismissed their action and taxed the costs against plaintiffs, who excepted to the judgment and appealed.

Wm. Leigh Williams for plaintiffs.
Winston & Matthews for defendant.

WALKER, J., after stating the case: We do not understand why the plaintiffs cannot pass a good title to the defendants Evans and Gilliam to the land described in the contract. By the will and codicil, the land in question was devised to J. H. Jernigan and his wife Lizzie B., for their lives, and they held by entireties, although they had but life estates. *Todd v. Zachary,* 45 N. C., 286; *Jones v. Potter,* 89 N. C., 220; *Simonton v. Cornelius,* 98 N. C., 433. They held the land just as did J. H. Jernigan by the terms of the original will, before the codicil was added. J. H. Jernigan is dead, and, of course, he and his wife can have no more children. The deed of Mrs. Jenigan, and her daughter, Mrs. Bell, and her son-in-law, Alexander H. Bell, will pass a good title, unless their estate is affected by the clause devising the land over to testatrix's heirs provided Mrs. Bell, her grandchild, should die without children. But this cannot be, as there is a further provision that a sale and deed by the grandchildren shall be sufficient to pass a valid title to the purchaser, in case of the grandchildren's death afterwards without children. This language is very plain and easily understandable. It can have but one meaning, which is, that though it is provided in the will that, if the grandchildren should die without children, the land should go to the testatrix's own heirs, yet if the grandchildren shall have sold and conveyed the land, the purchaser shall acquire a good title. This would, of course, prevent the land from going over under the prior clause in the will.

It is therefore unnecessary to consider or discuss the other question suggested as to how, if at all, the rule against perpetuities may affect the question, as there could be no perpetuity. The further limitation to ulterior devisees would be cut off.

Our opinion is that there was error in the ruling and judgment of the court, which is reversed, and judgment will be entered in the court below for plaintiffs accordingly.

Reversed.

W. W. COLE AND WIFE, ALICE, v. GEO. E. THORNTON.

(Filed 29 September, 1920.)

Estates — Estates Tail— Statutes— Fee— Limitations— Contingencies— Heirs at Law.

An estate to testator's wife for life, then to their named daughter and her children, if any, but should the latter die leaving no children, then to the heirs at law of testator's wife. The wife being dead, and the daughter being her only heir, and there never having been children born of the daughter, the latter takes an estate tail converted by the statute into a fee-simple title, and should she never have children she would take as the heir at law of her mother; and, in either event, her deed would be a valid conveyance of an absolute fee-simple title.

APPEAL by defendant from *Devin, J.*, at the August Term, 1920, of JOHNSTON.

This is an action to recover the purchase price of a tract of land, the defendant refusing to pay and to accept the deed tendered upon the ground that the plaintiffs do not own an indefeasible title in fee.

The plaintiff, Alice Cole, claims under item seven of the will of W. G. Yelvington, which reads as follows:

"Item 7. I give and devise all the remainder of my real estate, wherever situate, to my wife, Mary J. Yelvington, during her natural life; then to my daughter Alice and her children, if any; but if my daughter Alice die leaving no living issue, then to the heirs at law of my wife, Mary J. Yelvington."

It is agreed by the parties:

"1. That the said W. G. Yelvington was the owner in fee of the above described lot at the time of his death, and that it was a part of the lands conveyed by said item seven above set out.

"2. That Mary J. Yelvington died on ..... June, 1920, and that Alice Cole, one of the parties hereto, is the same person named as 'my daughter Alice in the above item of said will, and that she is the only child and heir at law of both W. G. Yelvington, deceased, and Mary J. Yelvington, deceased; and that she has no children, and has never had any child or children."

Judgment in favor of the plaintiff, and defendant appealed.

Ed. S. Abel for plaintiff.
Parker & Martin for defendant.

ALLEN, J. The doubt that arises as to the title is upon the contingency that children of the plaintiff Alice may be hereafter born, and

would be well founded if the devise to the children was in remainder to take effect after the death of Alice, as "a bequest or use limited to the children of A. after an estate to her for life remains open, so as to take in all the children she may have at her death." *Dupree v. Dupree,* 45 N. C., 168, approved in *Powell v. Powell,* 168 N. C., 562.

The devise is to "Alice and her children," and "As early as the time of Lord Coke, it was held in *Wild's case,* 6 Rep., 17, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said that 'the intent of the devisor is manifest and certain that the children (or issues) should take, and, as immediate devisees, they cannot take, because they are not in *rerum natura;* and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore, such words shall be taken as words of limitation.' But, it is said in the same case, that 'if a man devise land to A. and his children or issue, and he then has issue of his body, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary; and, therefore, in such case they shall have but a joint estate for life.'" *Moore v. Leach,* 50 N. C., 90.

The principle that an estate to A. and her children, when there are children, "vests the present interest in them as tenants in common" is affirmed in *Candor v. Secrest,* 149 N. C., 205, and in *Cullens v. Cullens,* 161 N. C., 344, and that if there are no children, that A. would take an estate in tail at common law, which has been converted into a fee by statute, in *Silliman v. Whitaker,* 119 N. C., 92; *Lewis v. Stancil,* 154 N. C., 326, the Court saying in the last case: "In *Silliman v. Whitaker,* 119 N. C., 92, it was said: 'It was settled in *Wild's case,* 6 Rep., 17 (3 Coke, 288), decided 41 Elizabeth, that a devise to B. and his or her children, B. having no children when the testator died, is an estate tail. If he have children at that time, the children take as joint tenants with the parent. This has been uniformly held in England.' The late case in the House of Lords, *Clifford v. Koe,* 5 App., 447, was cited, which approved *Wild's case,* opinions being delivered *seriatim* by Lord Chancellor Selborne, Lord Hatherly, Lord Blackburn, and Lord Watson, who unanimously sustained *Wild's case,* stating that 'for these three hundred years it has been the uniform ruling in England.'"

This being the correct rule of construction, and it being kept in mind that the life tenant, Mary J. Yelvington, is dead, and that no children have ever been born to the daughter Alice, the devise would read to "my daughter Alice in fee, but if she die leaving no living issue, then to the heirs at law of my wife, Mary J. Yelvington," and, if so, if children are

born, she has the fee, and if there are no children, she would still be the owner in fee as the only heir of Mary J. Yelvington, and, in either event, can convey in fee.

We are therefore of opinion the deed of the plaintiffs will pass a good title.

Affirmed.

S. A. STARR AND WIFE v. J. L. O'QUINN AND WIFE.

(Filed 29 September, 1920.)

1. Arbitration—Notice—Evidence—Right of Party—Invalid Award.

A party to an agreement to arbitrate a controversy wherein a third person shall be called in in case of disagreement of the two selected by the parties, is entitled to notice of the disagreement and the selection of the third person, and to introduce his evidence; and where he has been deprived of this right the award will be invalid.

2. Same—Trial by Jury.

When an arbitration has been entered upon by the parties to a controversy, and the award arrived at is declared invalid by the court, a party thereto may not rightfully demand that the matter be referred to the arbitrators for their action, or complain of the trial by jury.

3. Same—Evidence—Declarations.

A statement filed by a party before arbitrators as to the amount of his damages is but his own unsworn declaration or statement on a trial by jury, in the Superior Court, where the controversy is being tried after the award has been declared invalid, when offered as substantive evidence alone, and its admission as such is reversible error.

APPEAL by defendants from *Bond, J.*, at the May Term, 1920, of WAYNE.

The defendants leased to the plaintiffs, for five years, at a fixed rent of $660 a year, payable in monthly installments of $55 each, a lot in Goldsboro, N. C., on Ash Street and Carolina Avenue, on which was standing a greenhouse and other buildings and improvements. It was stipulated that upon six months notice from the defendants, the plaintiffs should vacate the premises and surrender them to defendants, the question of damages sustained by the plaintiffs to be determined by arbitration, each party to select one of the arbitrators, and in case of disagreement between them, the arbitrators, they to select a third person as an additional arbitrator. Notice to quit was given by the defendants, and plaintiffs surrendered the premises at the expiration of the six months. Arbitrators were selected by the parties, according to the terms of the contract, and proceeded to hear the parties and their witnesses, and to

assess the damages, but they disagreed. A third party was called in, but no notice of his appointment was given to the defendants, and no notice of the further proceedings. There is an allegation that the arbitrator selected by the defendants did not assent to his appointment. An award was made, and this action was brought to enforce it. At the trial the presiding judge held that the award was invalid, and proceeded, without apparent objection, to try the case by a jury upon the following issues, which were answered as stated:

"1. Is the alleged award referred to in the complaint in this cause valid and binding on the parties? Answer: 'No.'

"2. What damage, if any, are plaintiffs entitled to recover of defendants because of having to remove buildings and surrender possession of the land referred to in the complaint? Answer: '$2,152.'"

The defendants moved to set aside the award and recommit the case to the arbitrators, which motion was denied. Defendants excepted. They then moved to nonsuit at the close of plaintiffs' testimony, and at the close of all the testimony. This motion was also denied. Defendants excepted.

The plaintiffs were permitted, during the trial, over defendants' objection, to introduce in evidence a statement of his damages, which had been theretofore filed with the arbitrators, and in which he stated his damages to be, in his opinion, as much as $3,698. Defendants excepted.

The plaintiff testified: "I did not issue any papers to Mr. O'Quinn of the time and place of meeting of the arbitrators, and so far as I know he had no notice of it, and did not appear and give evidence. I filed with the arbitrators the statement handed to me."

The court instructed the jury to answer the first issue "No," and proceeded to charge the jury as to the damages.

The prayer of defendants' answer is as follows:

"1. That the award made by the arbitrators be set aside.

"2. That they be permitted to offer evidence and be given the opportunity to hear the evidence and contentions of the plaintiffs, and, after hearing the contentions of both parties, that a jury be allowed to pass upon the issue of damages.

"3. For the costs of this action, and for such other and further relief as to the court may seem just and proper."

J. L. Barham and Dickinson & Land for plaintiffs.
J. M. Broughton for defendants.

WALKER, J., after stating the case: The defendants were entitled to notice of the appointment of the third arbitrator, and the place where the case would again be heard, and to an opportunity for intro-

ducing testimony and being heard in the case. This is the accepted principle (*Bray v. Staples,* 149 N. C., 89), but it was not observed in the trial before the arbitrators. The judge, therefore, was right when he held the award to be invalid, and he was also right when he proceeded to try the case upon its merits with a jury, and refused to remand the case to the arbitrators. The defendants asked for a trial by jury in their answer, and, having assented to the same, they will not now be heard to claim that they were entitled to a trial by the arbitrators, taking thereby two chances for success in the case. This rule was clearly stated and applied in *Brown v. Chemical Co.,* 165 N. C., 421.

But we are of the opinion that the learned judge erred in admitting in evidence the statement of his damages filed by plaintiff with the arbitrators. It was not used to corroborate the witness, S. A. Starr, because he testified to nothing requiring corroboration, nor was it offered for any such purpose. The record merely shows that plaintiff offered the statement as substantive evidence of his damages, and defendants interposed an objection, which was overruled, and defendants excepted. It was not substantive evidence of the truth of its contents, but merely an unsworn declaration, or a statement of his damages, and it should not have been permitted to be introduced as evidence to establish the *quantum* of the plaintiffs' damages, it not being competent for that purpose.

This is sufficient to dispose of the appeal, and, therefore, we need not consider the other questions, and especially the one raised as to the rule for assessing plaintiffs' damages, as it may not be presented on the next trial in precisely the same form as it is now. If we should express our opinion concerning it, we may find hereafter that we were deciding hypothetically upon a very important question, and only have "our labor for our pains." We may refer, without expressing any opinion upon the matter, to *Sloan v. Hart,* 150 N. C., 269, where a somewhat similar question was discussed.

The case will be remanded with directions for a new trial because of the error indicated by us.

New trial.

GEORGE EXUM ET AL. V. R. E. CHASE.

(Filed 29 September, 1920.)

1. Courts—Jurisdiction—Clerks of Court—Statutes—Issues—Processioning—Title.

When, upon answer filed in a processioning proceeding, the clerk, without objection, transfers the cause for trial, the Superior Court acquires jurisdiction under Rev., 614, to determine the matter, and a motion to remand for failure of the defendant to raise an issue as to title is properly refused.

2. Same—Pleadings.

A denial of the boundaries of the land in a processioning proceedings, and allegation in the answer of title to a strip of the land by adverse possession, raise an issue of title upon which the clerk should transfer the cause for trial to the Superior Court.

3. Courts—Jurisdiction—Waiver—Processioning.

Where a processioning proceedings has been transferred for trial to the Superior Court, and set for trial three times without objection, the objection that an issue of title had not been raised is waived, and a motion to remand to the clerk is properly denied.

4. Issues—Processioning—Title—Appeal and Error—Evidence.

Objection that an issue as to title had not been submitted to the jury, on appeal in a proceeding to procession land cannot be sustained when the party so objecting has tendered no issue or offered any evidence as to title.

5. Clerks of Court—Processioning—Transfer to Term—Entry—Order.

An entry on the docket by the clerk that proceedings to procession land had been transferred for trial, in term, in the Superior Court, is sufficient order to transfer it.

APPEAL by defendant from *Connor, J.*, at November Term, 1920, of WAYNE.

Processioning proceeding begun before the clerk, 29 August, 1917, and transferred by the clerk, on answer filed, March, 1918, and tried by jury November Term, 1919, who found the boundary to be as claimed by the plaintiff. From judgment thereon, the defendant appealed.

Dickinson & Land and J. F. Thomson for plaintiff.
Langston, Allen & Taylor for appellant.

CLARK, C. J. When the cause was transferred by the clerk to the trial docket, there was no exception noted. The cause was set for trial at three terms. At November Term, 1918, when reached, there was a motion and refusal to remand upon the ground that no issue of title had been raised by the answer. This is the chief point raised by the appeal,

and we are not called upon to decide it, for even if not waived, Rev., 614, provides that "Whenever any civil action or special proceeding, begun before the clerk of any Superior Court, shall be for *any ground whatever* sent to the Superior Court before the judge, the judge shall have jurisdiction," and provides further that he may proceed to try the case in every respect, or decide it upon the particular point involved.

If the answer raised the issue of title, there was no necessity for the statute, and if the answer did not raise such issue, it was competent for the judge, under the statute, to retain the case and try it, as he did.

Moreover, in this particular case, while it is true that the defendant denied the boundaries, as alleged in the complaint, to be correct, which made the issue cognizable in the processioning proceeding, the defendant set up as a further defense that there was a strip of land which he claimed by adverse possession. This raised an issue of title as to land within the disputed boundaries, and the cause was properly transferable to the Superior Court for trial, and the motion to remand was properly denied. *Rhodes v. Ange,* 173 N. C., 25; *Whitaker v. Garren,* 167 N. C., 658; *Brown v. Hutchinson,* 155 N. C., 205; *Davis v. Wall,* 142 N. C., 452; *Woody v. Fountain,* 143 N. C., 66.

The defendant also contends in his brief that there was no formal order transferring the cause to the Superior Court at term. We think the entry on the clerk's docket was sufficient, but if not, it was waived on the facts of this case, as above stated, the case being set for trial for three times without objection. If objection had been raised in apt time, the judge could have permitted the clerk to amend the order *nunc pro tunc.*

Only one issue was submitted by the court, but the defendant did not tender any issues, and did not except to the one submitted, and he cannot now complain that no issue as to title was submitted, especially in view of the fact that he offered no evidence to support his allegations of title.

No error.

POCAHONTAS GUANO COMPANY v. W. B. BRYANT AND T. B. ALLEN.

(Filed 29 September, 1920.)

Contracts, Written—Parol Evidence—Vendor and Purchaser—Damages—Counterclaim—Principal and Agent.

The defendant sold fertilizer as plaintiff's agent under a written contract containing the statement that no conflicting verbal promise would be recognized, and that no agreement would be valid and binding unless countersigned by an officer of the plaintiff corporation. The action is to recover upon notes given for the sale of the fertilizer: *Held,* there

was no sufficient evidence to sustain defendant's counterclaim for damages for failure of plaintiff to ship a carload of fertilizer for his own use subsequently ordered, which the plaintiff promptly declined, and which the plaintiff's agent had said that he would see that the defendant would get it.

APPEAL by plaintiff from *Devin, J.*, at July Term, 1920, of LEE.

The plaintiff sued to recover the balance due on a note dated 28 June, 1917, which was given in renewal for three notes previously executed by the defendant for fertilizer consigned to him for sale as agent during the spring of 1916. The account fell due that fall when Bryant executed said three notes in settlement. He testified that he had sent these three notes in a letter claiming that they were sent without prejudice to his right to recover damages for an alleged breach of a verbal contract made with him by a salesman of the plaintiff to ship him another carload of fertilizer for his own use, by reason of the failure to do so he had sustained damages to his crop.

After demand had been made for the payment of the three notes given to the plaintiff the defendant asked for further indulgence, and gave a single note of $896.02 on 28 June, 1917, for the entire amount with his brother-in-law, the defendant Allen, as surety. At the execution of this note Bryant made no claim of any sum due him by the plaintiff. Thereafter he made other payments in 1917 and 1918, reducing the balance due on the note to $330, but made no complaint or demand on the plaintiff for any alleged damages for failure to ship the additional carload of guano until this action was brought, when the defendant Bryant set up a counterclaim for $1,000 damages. Verdict for the defendant on the counterclaim, and from judgment for the balance in favor of the defendant, the plaintiff appealed.

Seawell & Milliken and R. H. Dixon for plaintiff.
Hoyle & Hoyle and Williams & Williams for defendants.

CLARK, C. J. There was no evidence sufficient to go to the jury in support of the counterclaim set up by the defendant. The contract between the plaintiff and the defendant was in writing, and a copy retained by the defendant, was for shipment to him of fertilizers to be sold as agent. The note sued on by plaintiff was for balance due on that transaction, as to which there was no controversy. That contract contained the clause, "No verbal promises that conflict with the terms of this contract will be recognized by this company," with a further provision that any agreement would not be binding on the company until countersigned by an officer of the company.

Subsequently, the defendant ordered another carload of fertilizer, which he testified was for his own use. He testified that he wrote the company several letters, to which they replied that they could not ship him at that time; that then they sent one of their agents to see him, who suggested that he order the fertilizer from another company in Wilmington, who declined to ship him; that he then told the agent that he had 30 or 40 bags of fertilizer which he had received as agent still on hand, and he claimed that the agent told him to sell it and he "would see that he got another carload." On the other hand, he put in evidence telegram and letter from the plaintiff, and said agent, acknowledging the receipt of his telegram and letter, but stating that owing to prior orders the company was unable to accept the defendant's order for another carload. It was simply a case where the defendant ordered a carload of fertilizer, which order the plaintiff company declined to accept and fill.

There was no evidence that it was in the scope of the agency of the company's representative to bind it to ship the fourth carload. When he reported the order to the company, both the company and the agent promptly notified the defendant that the company could not accept and fill the order. This notification was prompt and was received by him in April, and he was not misled by any reliance upon his order being filled. He had no right to rely upon the unauthorized statement of the agent, if made, that if the defendant sold the 30 or 40 bags which he had on hand for sale as agent, he "would see that a carload was shipped to the defendant for his own use." The defendant had in hand the contract, which showed that no agreement was binding until countersigned by an officer of the company, and both the company and the agent promptly notified the defendant by letter and by wire that owing to the scarcity of fertilizer, and prior orders, his order could not be accepted.

It was error to refuse the plaintiff's motion to nonsuit the defendants at the conclusion of all the evidence. The judgment below will be corrected by letting the judgment stand in favor of the plaintiff for the amount due upon the note sued on by plaintiff, as to which there is no controversy, and by striking out the recovery upon the counterclaim. To that end the cause is remanded.

Error.

CITY OF GOLDSBORO v. T. H. HOLMES AND EDNA HOLMES.

(Filed 29 September, 1920.)

Municipal Corporations—Cities and Towns—Condemnation—Damages—Removal of Houses—Special Agreement.

In the absence of statutory provision in this State authorizing it, a municipal corporation may not condemn the owner's land for a city street, and require him to move a dwelling therefrom onto his adjoining land; and it is necessary for the city to acquire and to compensate the owner for the house as well as for the land, in the absence of a special agreement.

APPEAL by plaintiff from *Bond, J.*, at May Term, 1920, of WAYNE.

This was a petition before the clerk for the condemnation of land for the extension of a street, heard by the judge on appeal. The defendants demurred *ore tenus* to the complaint upon the ground that it failed to state a cause of action in that the plaintiff sought to condemn the land without condemning and paying for the building situated thereon, which it proposed that the plaintiff should remove from the lot sought to be condemned. His Honor sustained the demurrer, and the plaintiff appealed.

D. C. Humphrey and Dickinson & Land for plaintiff.
Langston, Allen & Taylor for defendants.

CLARK, C. J. The city of Goldsboro is seeking to condemn a strip of land 50 feet wide for the extension of a street. On this strip of land is located a large two-story dwelling-house in which the defendants are living. The plaintiff is seeking to condemn said land without paying for the house thereon, which it proposes that the defendants may remove from the premises.

His Honor properly adjudged that "The plaintiff, in condemning land for public use, must condemn and pay for the same as it is found, and it has not the authority to condemn the land without the house." In this there was no error.

The doctrine of the cases is thus summed up in 2 Lewis Em. Dom. (2 ed.), sec. 248: "The legislature may authorize the taking of land without the building or trees thereon, but in such case the measure of damages would seem to be the value of the whole property less the value of the buildings or trees for removal. In absence of express authority, land cannot be taken without the buildings. The condemnor must take it as it is." It has been held in many cases, "The legislature may constitutionally provide that the public, in taking land for highways, may take the buildings on the land absolutely, or require them to be moved back if the owners have enough land left for that purpose." *S. v. Hudson County* (N. J.), 17 L. R. A., 787.

In 20 C. J., 590, and 15 Cyc., 604, the law is thus summed up: "In the absence of a statutory prohibition a dwelling-house or other building may be taken or removed under the right of eminent domain like any other species of real estate; and the legislature may provide that in taking the land the buildings may be taken absolutely, or that no interest in the building shall be taken, but that the owner may be compelled to remove them off the part taken, in case he has land left upon which they may be removed." Citing cases in the notes.

In this case the owners had adjoining land upon which they could have removed the dwelling, but in absence of any provision in our statute authorizing the condemnor to require the owner to remove the building back, and any agreement between them to that effect, C. S. 2792; we think the law is correctly stated in *Paul v. Newark* (N. J.), 6 Am. Law Review, 576: "A house wholly within the lines of the proposed street must (if the owner so wishes) be taken and paid for in full by the city, and the city cannot compel him to remove it by paying the cost of the removal and restoration, even although the owner has immediately adjacent land sufficient to accommodate the house." Our statute might so require, but it has not been so enacted.

Affirmed.

A. J. DUNNING v. JESSE A. POWELL.

(Filed 29 September, 1920.)

Contracts—Options—Sales—Commissions—Auction Sales—Consideration—Vendor and Purchaser.

Plaintiff took an option on defendant's entire tract of land at a fixed minimum price, and agreed with real estate agents that they would divide it into lots to be sold at auction within the option period on commission to the selling agents, and thereafter contracted with the defendant that plaintiff was to have a certain sum in cash and a certain allowance on any lots he himself should purchase at the agreed sale. He bid in one of these lots, and the sale as to the others failed for lack of bidders. The plaintiff was not ready, able, and willing to comply with his bid: *Held*, plaintiff's compensation was conditioned by the terms of the contract, upon the success of the sale of all of the lots in the entire subdivided tract to be taken from the proceeds of sale and not in consideration of his release of his option within the stated period, and he cannot recover in his action.

APPEAL by plaintiff from *Devin, J.*, at April Term, 1920, of HERTFORD.

This is an action to recover upon two contracts by which it is alleged that the defendant agreed that upon the sale of his land at auction,

plaintiff was to receive $2,000 in cash, and a credit of $4,000 on any tract of land which the plaintiff might buy at that sale.

The jury found, upon the issues submitted, against the plaintiff that the land was not sold at auction prior to 15 December, 1915, and that the plaintiff was not ready, able, and willing to comply with the terms of the sale.

Thereupon the judge directed a nonsuit, and the plaintiff appealed.

Winston & Matthews and Gillam & Davenport for plaintiffs.
T. T. Hicks and Stanley C. Winborne for appellees.

CLARK, C. J. On 26 October, 1918, the defendant gave a 30 days option to the plaintiff on his farm in Hertford County, supposed to contain 750 acres at the price of $26,000, of which $10,000 was to be paid in cash, and the balance on time. On 18 November, 1918, the plaintiff made a contract with Allen Brothers and Fort to cut the farm up into lots and sell the same at auction, on a commission of 10 per cent. Thereupon the plaintiff and the defendant made this other contract reciting that the defendant had given to the said plaintiff an option at the price of $26,000 on the Powell farm, "Now the said Dunning agrees that he will take $2,000 cash on the day this is sold at auction, which shall not be later than 15 December, 1918, and a credit of $4,000 to be used on any tract of land which said Dunning may buy at this sale, and in consideration of this money and credit, said Dunning is to release his rights under said option, but the said option is to be extended until the day of the sale, and the option will remain in force until that day, but will in no way interfere with the sale."

The land was laid off into five lots, and on 3 December was put up at public auction, and the home tract of 85 acres was knocked off to the plaintiff at the sum of $13,252.50. The other portions of the land could not be, and were not sold. The plaintiff seeks to recover $2,000 in cash, alleging that this was paid for a release of the option, and that he was ready, able, and willing to comply with the terms of sale of the home tract on that day, and that $4,000 should be credited on his bid, and asks specific performance.

The defendant admitted the execution of said contracts, but alleges that when the second contract was made there was a further agreement that the $2,000 in cash and $4,000 credit were conditioned upon the land being sold at a minimum price of $35,000, and the jury have found that the contemplated sale was not made, but fell through, and further that the plaintiff was not ready, able, and willing, at the sale, to complete his purchase of the only lot sold, and which was knocked off to the plaintiff.

The court instructed the jury "that the contract contemplated the sale of the entire tract of land, all of it; and, therefore, the agreement by Dunning to take $2,000 in cash and $4,000 credit the day the land was sold at auction would mean that his rights under this contract would accrue only in case the land was sold, all of it."

The court is of the opinion that the construction placed by his Honor upon the contract is correct. The whole transaction was based upon the sale of the entire tract, which has not been made. The defendant did not agree to pay the plaintiff $2,000, but the plaintiff agreed that he would take $2,000 out of the proceeds of the sale, and he was to have a credit of $4,000 on any tract of land he should buy. The consideration to the defendant was the sale of the entire tract of land. That has not taken place, and the fund out of which the plaintiff agreed to receive $2,000 has not been created. The jury further find that the plaintiff was not ready, able, and willing to complete the purchase of the 85 acres at the sum bid by him. The transaction was, therefore, never completed which would have entitled the plaintiff to receive $2,000 cash and a credit of $4,000 on any land bought.

It is true that the plaintiff claimed that the $2,000 was to be paid for a release of the option, but the contract did not so express. The sale of the tract of land was the condition upon which the plaintiff was to receive $2,000 cash "on the day this land is sold at auction," and "a credit of $4,000" on any tract of land which the plaintiff might buy at the sale, and upon the consideration of such sale of the tract being made, the money and the credit were to be allowed the plaintiff, who was to release his option, which option was to be extended until the day of the sale.

The sale of the tract not having been made, the defendant has not received the consideration for which the plaintiff was to receive the $2,000 in cash, and the credit of the $4,000 in purchase of any part of the land. Upon the findings of the facts by the jury, and a just construction of the contract, the judgment of nonsuit must be

Affirmed.

J. D. SESSOMS ET AL. V. A. G. BAZEMORE AND WIFE, SYDNEY.

(Filed 29 September, 1920.)

Contract— Option — Description of Land — Evidence — Identification — Equity—Specific Performance.

An option to sell the owner's only farm, described therein as "my farm," for a certain price, within a specified time upon the payment of the sum

named, sufficiently describes the land to admit of parol evidence of identification of the subject-matter of the contract, in an action for specific performance by the purchaser.

CIVIL ACTION, tried before *Devin, J.*, at April Term, 1920, of HERTFORD.

The action is for specific performance of a written contract to convey land, duly executed by defendant and his wife, the pertinent portions of said contract being in terms as follows: "I do hereby agree to sell my farm to Mr. J. D. Sessoms for $7,000 any time within 30 days. This the 3d day of October, 1917. If he pays me the money, me and my wife will make him a deed, or to whom he may direct.

A. G. BAZEMORE.
SYDNEY BAZEMORE."

On the issues presented in the pleadings, there was verdict for plaintiff. Judgment, and defendants excepted and appealed.

Rogers & Williams and Winston & Matthews for plaintiff.
Roswell C. Bridger and Stanly Winborne for defendants.

HOKE, J. The due execution of the contract, including the privy examination of the *feme* defendant, is admitted in the pleadings. The tender of the purchase price within the time, and the plaintiff's readiness and ability to perform, and the identity of the land claimed as the subject-matter of the contract are also clearly established, and the question presented and chiefly argued before us is whether the language of the written contract is sufficiently definite to permit the reception of parol evidence to fit the description to the property claimed as the subject-matter of the contract. On that question, the decisions of our Court are in full support of his Honor's ruling in the admission of the testimony and the judgment of the Superior Court is affirmed. *Norton v. Smith,* 179 N. C., 553; *Lewis v. Murray,* and authorities cited.

No error.

MARY MOORE HOWE ET AL. v. DR. W. L. HAND.

(Filed 29 September, 1920.)

Wills—Afterborn Children—Deeds and Conveyances—Purchasers—Statutes.

A wife devised her lands to her husband, and afterwards children were born of the marriage. After the death of his wife the husband conveyed the lands in question to the defendant, and has since died. No provision

having been made for the afterborn children, they entered suit for the lands against the purchaser: *Held*, they are entitled to recover under the provisions of Rev., 3145. *Flanner v. Flanner*, 160 N. C., cited as controlling.

CIVIL ACTION, tried before *Connor, J.*, at May Term, 1920, of CRAVEN, upon the following issues:

"1. Are the plaintiffs the owners and entitled to the possession of the property described in the complaint? Answer: 'Yes.'

"2. Is the defendant in the wrongful possession thereof? Answer: 'Yes.'

"3. What is a fair rental value for said property since 11 October, 1918? Answer: '$20 per month.'"

From the judgment rendered the defendant appealed.

H. C. Tyler and D. L. Ward for plaintiffs.

Moore & Dunn for defendant.

BROWN, J. The plaintiffs are the infant children of Elliott Hampton Howe and his wife, Mary Moore Howe, both of whom are dead.

The property belonged to the mother, Mary Moore Howe, and was devised by her to her husband, E. H. Howe. The will was executed before the birth of the children. Elliott Hampton Howe, after the death of his wife, conveyed the property to the defendant Hand, who has been in possession of it for 10 years under the deed of E. H. Howe. After the death of their father, the plaintiffs bring this action to recover the land which consists of three lots in the city of New Bern, under sec. 3145 of the Revisal. This section reads as follows: *"Void as to after-born children.* Children born after the making of the parent's will, and where parent shall die without making any provision for them, shall be entitled to such share and proportion of such parent's estate as if he or she had died intestate and the rights of any such after-born child shall be a lien on every part of the parent's estate until his several share thereof is set apart," etc.

It does not appear that Mary Moore Howe made any provision whatever for plaintiffs, who are her only children.

We have given this case very careful consideration because of its very great importance to the defendant, who, it seems, has paid for the property and been in possession of it for 10 years. We are unable to see any distinction between this case and that of *Flanner v. Flanner,* 160 N. C., 127. The facts are practically the same, and the well considered opinion of *Mr. Justice Hoke* covers the matter fully.

It is the misfortune of the defendant that he was ignorant of the statute and of its effect upon the will of Mrs. Howe.

The judgment is

Affirmed.

IN RE FLONNIE MAY TART, ADMINISTRATRIX OF P. G. A. TART, DECEASED.

(Filed 29 September, 1920.)

Gifts—Causa Mortis.

A death-bed statement by a dying person that he wanted his wife to have his store or stock of merchandise, with something vague said about her having the income; that when his wife told him to tell a bystander what he wanted and he would fix it, he replied, "I have waited too long," is insufficient to evidence the intent of the person dying to transfer the possession by delivery, so as to make a gift to the wife *causa mortis*. *Askew v. Matthews*, 175 N. C., 187, cited and applied.

PROCEEDING before *Connor, J.*, at Fall Term, 1920, of HARNETT, upon this issue:

"Did the deceased, P. G. A. Tart, in his lifetime give to his wife, Flonnie May Tart, the store property described in the papers in this proceeding?"

The court held that the administratrix had failed to show title to the property, rendered judgment for the defendants, the distributees, and directed a distribution of the proceeds of sale of the stock of goods in controversy, together with the other personal property of the deceased, according to the statute of distributions.

The widow, Flonnie May Tart, appealed.

E. F. Young and Godwin & Williams for plaintiff.
Clifford & Townsend for distributees, defendants.

BROWN, J. The plaintiff is the second wife and widow of P. G. A. Tart, who died in spring of 1917 intestate, leaving defendants, children by his first wife, his heirs at law, and, together with plaintiff, his distributees.

The plaintiff, widow, qualified as administratrix and filed her inventory of his personal property, which consisted for the most part of a stock of general merchandise, inventoried at something over $3,000. The widow claims the stock of merchandise under what she alleges to be a gift from her husband on his death bed. His Honor dismissed her claim at the close of her evidence upon the ground that there was not sufficient evidence of the gift, and especially of the delivery, to sustain her claim.

The evidence, in its most favorable light to the claimant, shows that on his death bed, an hour or so before his death, he called for a pencil and stated that he wanted Flonnie to have the store and its income; that he said something about income, but witness could not understand what he said; that he told his nephew, Loftin Tart, that times were critical now and to his wife, "I want to make you a right to the store property."

Witness said that there was a good deal of his talk that he could not catch the exact meaning. His wife told him to tell Loftin Tart what he wanted and he would fix it, and the dying man said, "I have waited too late."

There is abundant evidence signifying that the intestate desired his wife to have the stock of goods in the store building, but not enough to show an actual or constructive delivery. The goods were not present within the reach or vision of deceased. There is nothing in the evidence to justify a finding that there was any kind of delivery. There is no declaration or other evidence upon which to base a constructive delivery.

In order to constitute a valid gift of personal property there must be an actual or constructive delivery with the present intent to pass title.

As said by *Justice Allen* in his instructive opinion in *Askew v. Matthews,* 175 N. C., 187: "Delivery is essential to a gift of personal property, whether it be *inter vivos* or *mortis causa.* This means passing over the property with intent to transfer the right and the possession of the same." *Newman v. Bost,* 122 N. C., 524; *Wilson v. Featherstone,* 122 N. C., 747; *Medlock v. Powell,* 96 N. C., 499; *Duckworth v. Orr,* 126 N. C., 676, approved in *Patterson v. Trust Co.,* 157 N. C., 14.

Affirmed.

HUBERT H. BENSON ET AL. V. B. J. BENSON ET AL.

(Filed 29 September, 1920.)

Descent and Distribution—Deeds and Conveyances—Warranty—Heirs.

A paper-writing, whether operating as an absolute fee-simple or quitclaim deed, with covenants of title against any claims of the grantors and heirs, and purporting to bar them, made by a son concerning the lands of his father whom he predeceased, cannot deprive his own children of their inheritance, for they take directly from their grandfather as his heirs, and not as the heirs of their own father.

PETITION for partition, in which issue of title is raised, and which was heard before *Bond, J.,* at April Term, 1920, of JOHNSTON, upon the following agreed facts:

1. That J. U. Benson died intestate in Johnston County, North Carolina, on 6 May, 1917.

2. That said J. U. Benson was seized and possessed, at the time of his death, of a certain tract or parcel of land lying and being in Banner Township, Johnston County, North Carolina, and described as follows: Bounded on the north by the lands of C. E. Allen, on the east by J. A.

Lee, on the south by Elizabeth Phillips and J. R. McLamb, and on the west by J. P. Adams, containing 166 acres.

3. That said J. U. Benson was the father of nine children, to wit: B. J. Benson, J. S. Benson, J. W. Benson, N. H. Benson, W. Z. Benson, Mrs. Sarah Edwards (nee Sarah Benson), Mrs. Bettie Thomas (nee Bettie Benson), Mrs. Lula C. Allen (nee Lula Benson), Mrs. Louie McLamb (nee Louie Benson).

4. That J. W. Benson died intestate Johnston County, North Carolina, prior to the date of the death of his father, to wit: on ..... day of ....., 19.....

5. That said J. W. Benson executed and delivered to N. H. Benson a paper-writing in words and figures as follows, to wit:

STATE OF NORTH CAROLINA—JOHNSTON COUNTY.

Know all men by these presents, that we, J. W. Benson, Preston Thomas, and Lula E. Benson and Bettie C. Thomas, their wives, of Johnston County, State aforesaid, for diverse good causes and considerations thereunto moving, and more particularly for two hundred eleven dollars each, amounting to four hundred twenty-two and no-100 dollars, received of N. H. Benson, have remised, released, and forever quitclaimed, and by these presents do for ourselves and heirs, executors, administrators, justly and absolutely remise, release, and forever quitclaim unto the said N. H. Benson, and to his heirs and assignees forever, all such right, title, and interest as we, the said W. J. Benson, Preston Thomas, and Lula E. Benson and Bettie C. Thomas, their wives, have or ought to have in or to all that piece, parcel, tract, or lot of land lying in the county and State aforesaid, in Banner Township, and described as follows:

All the land belonging to J. U. Benson, bounded as follows: On the north by C. E. Allen, on the east by J. A. Lee, on the south by Elizabeth Phillips and J. R. McLamb, on the west by J. P. Adams, containing 166 acres.

To have and to hold the above released premises unto him, said N. H. Benson, his heirs and assigns, to his and their own proper use and behoof forever, so that we, nor either of us, or any other person in any name and behalf, shall or will hereafter claim or demand any right or title to the premises or any part thereof. But they, and every one of them, shall by these presents be excluded and forever barred.

In witness thereof we have hereunto set our hands and affixed our several seals, this 3 October, A. D. 1905.

J. W. BENSON. [SEAL.]
LULA BENSON. [SEAL.]
PRESTON THOMAS. [SEAL.]
BETTIE C. (her × mark) THOMAS. [SEAL.]

The question presented to the court for decision is whether the children of J. W. Benson, to wit: Hubert H. Benson, Stella Benson, Mrs. C. A. Grubbs, and Rebecca Benson are the owners of or are entitled to any interest in said (land) owned by their grandfather, the late J. U. Benson.

This 1st day of May, 1920.

JUDGMENT.

This cause coming on to be heard before his Honor, W. M. Bond, judge presiding, at the April Term, 1920, the Superior Court of Johnston County, and heard upon agreed statement of facts filed with the papers, and after reading the statement of facts agreed and hearing counsel, the court is of the opinion that the quitclaim deed executed by J. W. Benson and wife on 3 October, 1905, to N. H. Benson, and set out in agreed statement of facts, does not estop the petitioners from claiming their interest in the lands of J. U. Benson, deceased, their grandfather, because the said J. W. Benson died before his father, J. U. Benson, and the court being of the opinion that the petitioners inherited said lands through their grandfather, J. U. Benson, and not through their father, J. W. Benson, and therefore holds it a matter of law that the said petitioners, Hubert H. Benson, Stella Benson, Mrs. C. A. Grubbs, and Rebecca Benson are the owners of one-ninth undivided interest in the lands of their grandfather, J. U. Benson.

And this cause is remanded to the clerk of the Superior Court of Johnston County, to the end that he may proceed with the partition of the lands as prayed for in the petition.

Douglass & Douglass for plaintiffs.
F. H. Brooks, James Raynor and Murray Allen for defendants.

BROWN, J. We think the learned judge rested his decision upon the correct ground, viz., that plaintiffs do not take any estate from their father, who predeceased his own father, but take the inheritance by direct descent from their grandfather, J. U. Benson.

The deed executed by J. W. Benson and set out in the case was executed by him prior to death of his father, J. U. Benson, who owned the land in fee. J. W. Benson was never vested with any estate or interest in the land whatever, for he died before his father. Therefore, the plaintiffs being, after J. W. Benson's death, the heirs at law of J. U. Benson, took the land as heirs of the grandfather, and not as the heirs of their father.

It is immaterial whether the deed from J. W. Benson to N. H. Benson be a quitclaim or a deed of bargain and sale with covenants of warranty,

it constitutes no estoppel on plaintiffs, as they do not claim under or through him. *Mastin v. Marlow,* 65 N. C., 702; Cak. Lit., 352-b.

It is possible the deed of J. W. Benson may be sufficient to have estopped him from claiming the land had he survived his father, and the land descended upon him, for it is very generally held that a conveyance by an heir apparent, operating through its covenants, estops him from recovering the property when it subsequently descends to him, 10 R. C. L., 681, sec. 9, but it is nowhere held that such deed can estop one from taking the property who does not claim under him.

The land in controversy never descended upon J. W. Benson, and he never owned any estate in it. It descended directly upon the plaintiffs or the heirs at law of J. U. Benson.

That is the broad distinction between this case and *Hobgood v. Hobgood,* 169 N. C., 485, and other cases cited by defendants.

Affirmed.

T. M. THOMAS AND WIFE, LAURA, v. COUNTY OF CARTERET, UNITED STATES FIDELITY AND GUARANTY COMPANY, AND W. A. MACE, ADMINISTRATOR OF ALONZO THOMAS.

(Filed 29 September, 1920.)

Appeal and Error—Issue Set Aside—Fragmentary Appeal—Final Judgment.

Where, in his discretion, the trial judge has set aside the verdict on a determinative issue of several issues submitted to the jury, and given the several parties lieve to amend the pleadings upon which to try the issuable matters, an appeal from his action is a fragmentary one, and not reviewable until final judgment has been obtained.

CIVIL ACTION, tried before *Connor, J.,* at June Term, 1920, of CARTERET, upon these issues:

"1. In what amount, if any, is Thomas Thomas, trustee of the courthouse bond sinking fund, indebted to Carteret County? Answer: '$13,236.49, with interest.'

"2. What sum, if any, is Carteret County entitled to recover of the United States Fidelity & Guaranty Company as surety for Thomas Thomas, treasurer of Carteret County? Answer: 'Nothing.'

"3. What sum, if any, is Carteret County entitled to recover of Mace, administrator of Alonzo Thomas, deceased, on the bond of Thomas Thomas, trustee? Answer: '$5,000.'

"4. Were the note and mortgage of T. M. Thomas and wife, Laura, executed to Thomas Thomas and assigned to Carteret County, taken and accepted with the understanding and agreement that the same should

be used only after the other securities held by the county for Thomas Thomas, trustee, has been exhausted, as alleged in the complaint? Answer: 'No.'

"5. What sum, if any, is Carteret County entitled to recover of T. M. Thomas and wife on account of the note for $13,500, secured by mortgage assigned to said county by Thomas Thomas? Answer: ....."

There was motion by plaintiffs to set aside the verdict and for new trial. Motion refused. On plaintiff's motion, the court set aside the verdict on fourth issue.

Defendant Mace, administrator, moves judgment of the court on the verdict. Motion denied. Exception. Judgment tendered by defendant as appears in the record refused; exception. Verdict as to fourth issue set aside; defendant excepts, and again moves for judgment on the verdict; denied; exception.

Defendant, United States Fidelity & Guaranty Company, moves judgment on the verdict; denied; exception; judgment tendered; refused; exception.

Both named defendants appeal from refusal of judgment on verdict. Notice of appeal in open court. Appeal bond fixed at $50.

Whereupon the following order was entered by the court:

ORDER (at June Term, 1920).

This cause coming on to be heard upon the verdict rendered by the jury, the plaintiffs move his Honor to set aside the verdict for errors to be assigned. Motion is denied, and plaintiffs except.

The plaintiffs move that the verdict be set aside on the fourth issue. The motion is allowed, and the verdict is set aside as to the fourth issue in the discretion of the court.

This cause is continued to the end that such further issues may be tried as may be necessary to determine the rights of the parties, with leave to the plaintiffs to file within thirty days any reply and further pleadings as they may deem necessary, and to the defendants to file such further pleadings as they may desire within 60 days thereafter. Defendants Mace, administrator, and United States Fidelity & Guaranty Company excepted to said order, and again move for judgment on the verdict; motion denied; defendants appeal.

Ward & Ward and H. S. Ward for plaintiffs.

C. L. Abernethy and M. Leslie Davis for Carteret County and Davis, Treasurer.

Julius F. Duncan for Mace, administrator.

J. L. Randleman, D. L. Ward, and J. F. Duncan for United States Fidelity & Guaranty Company.

BROWN, J. We are of opinion that this appeal is premature, and under the rules of the Court it must be dismissed *ex mero motu*. It is well settled by numerous decisions that this Court will not entertain premature or fragmentary appeals. *Cameron v. Bennett,* 110 N. C., 77; *Milling Co. v. Finley,* 110 N. C., 412. In the last case it was held that an appeal only lies from a judgment. *Taylor v. Bostic,* 93 N. C., 415. No judgment of any kind appears in the record. Of course there are cases in which an appeal will lie from a refusal to sign judgment upon issues that have been found by the jury, but this is not one of them. His Honor in his discretion set aside the verdict on the fourth issue, and continued the case to the end that such further issues may be tried as may be necessary to determine the rights of the parties. The court granted leave to plaintiff and defendants to file further pleadings. There was a motion made by the plaintiff to set aside the verdict on all issues, which motion was refused, and the plaintiff excepted. It may be that the plaintiff desires to appeal from the rulings of the judge upon the trial of the issues which have not been set aside. They cannot do so until a final judgment is rendered. The cause must be remanded to the end that the order made by his Honor be carried out, and a final judgment rendered. The costs of this Court will be paid by the appellants Mace, administrator, and the United States Fidelity & Guaranty Company.

Dismissed and remanded.

B. A. CRITCHER, TRUSTEE, J. B. GILLIAM, AND F. M. DUNSTON v. P. A. BALLARD.

(Filed 29 September, 1920.)

1. Bills and Notes— Negotiable Instruments — Covenants — Equities — Statutes.

The character of a promissory note in the hands of a holder in due course will not be destroyed or impaired by the mere statement thereon of an executory contract on the part of the payer growing out of the transaction in which it is given, when it otherwise complies with the requirements of paper of that class; and where the instrument, given for a horse, otherwise complies with the requirements of negotiability, a certain statement of warranty of the horse therein will not admit of the application of any equities existing between the original parties when the instrument is in the hands of an innocent purchaser for value in due course; and the principle as to whether such person were put upon inquiry of the equity of the matter by the statement he had made upon the face of the instrument has no application to transactions of this character. Rev., 2153.

2. Bills and Notes—Negotiable Instruments—Title—Endorsement.

In order to a proper negotiation of a commercial instrument payable to order, so as to shut off equities and defenses existing between the original parties, it must be endorsed by the holder, or by some one for him duly authorized, by writing the name of the holder on the instrument itself, usually on the back thereof, or on some paper physically attached thereto at the time the endorsement was made. Rev., 2178, 2198, 2206, 2212.

3. Same—Equity.

Where the title to a negotiable instrument, payable to a certain person, or order, has not been transferred to a purchaser, by endorsement, the latter has acquired only an equity to have the transaction completed by endorsement, and until then he takes subject to the equities existing between the original parties.

CIVIL ACTION, tried before *Bond, J.*, and a jury, at June Special Term, 1920, of MARTIN.

The action is by Gilliam & Dunstan, claiming to be holders for value in due course of a promissory note for $300 executed by defendant, P. A. Ballard, to one O. Ames.

In the verified complaint of plaintiff, the note and the facts pertinent to the acquisition of same, by Gilliam & Dunstan, are set forth as follows:

$300.00. WILLIAMSTON, November 17, 1915.

On or before the 1st day of November, 1916, I promise to pay to the order of O. Ames the sum of three hundred dollars, with interest from date till paid, at 6 per cent per annum, payable annually. For value received. The payment whereof is secured by a deed of trust to B. A. Critcher, trustee, on real estate and personal property of even date herewith. This note is for the purchase of stallion, and said Ames warrants him to be free from incumbrances, and that he is solid, sound, and gentle, and work anywhere. P. A. BALLARD. [SEAL.]

Endorsements: Pay to J. B. Gilliam and F. M. Dunstan, without recourse to me.

Credits: ..... day of ....., 19..... $.....

"2. That the plaintiffs, J. B. Gilliam and F. M. Dunstan, are purchasers for value of said note, without notice of any equities or defense that may exist in favor of the maker, P. A. Ballard."

In the answer the defendant admits the execution of the note sued on, denies the acquisition for value by Gilliam & Dunstan, and sets up a counterclaim growing out of breach of warranty in the sale of horse referred to on the face of the paper.

The following issues were prepared for submission to the jury:

"1. Was there a breach of the warranty made as to the stallion by O. Ames, as alleged?

"2. If so, what damage, if any, did the defendant Ballard sustain thereby?

"3. Did plaintiffs take said note in due course, for value, before maturity and without notice of any equities existing in favor of defendant Ballard, as alleged?"

On the hearing the execution of the note and possession thereof by Gilliam & Dunstan were admitted, and there were facts in evidence tending to show that the purchasers of the note had acquired the same for full value, and before maturity.

His Honor, being of opinion that the warranty of the stallion appearing on the face of the note did not destroy or impair its negotiability, charged the jury that if they believed the testimony and should find the facts to be as the evidence tended to prove, they would answer the third issue "Yes," and, in that case, they need not consider the first and second issues.

The jury answered the third issue "Yes," and, thereupon, judgment was entered for plaintiffs Gilliam & Dunstan, the amount of the note reduced by proceeds of certain personal property, sold pending litigation and applicable to its payment.

Defendant excepted and appealed, assigning errors.

No counsel for plaintiff.
Dunning & Moore for defendant.

HOKE, J. It is recognized in the better considered decisions on the subject that the mere statement of an executory contract on the part of the payee, growing out of the transaction in which a promissory note is given, will not, of itself, and without more, destroy or impair the negotiability of the note when it otherwise complies with the requirements of that class of paper.

The question was presented to this Court in *Bank v. Hatcher,* 151 N. C., 359, where defendant, the promissor, sought to set up a claim for damages for breach of contract in the sale of goods by sample, and it was shown that the bank that held the notes by endorsement and for value before maturity was aware of the stipulations of the executory contract out of which defendant's claim arose, but not of any breach of the same, and it was held that the counterclaim was not available as against the bank. After referring to several decided cases in support of the position, the Court cites, as controlling on the subject in this jurisdiction, the section of the negotiable instrument act more directly applicable, to the effect that a definite promise to pay is not rendered conditional so as to impair negotiability by a statement of the "transaction which gives rise to the instrument." As said in *Mayers v. Mc-*

Rimmons, 140 N. C., 640-642: "This statute, enacted in 1899 with a view of introducing some uniformity in this important feature of the law-merchant, is in the main only a compendium of established custom concerning negotiable instruments as construed and applied in the best considered decisions of the Courts," and the clause in question here, sec. 2153, and the cases it embodies and interprets, is in full support of his Honor's ruling that the negotiability of the note was not destroyed or sensibly impaired by reason of containing a statement of a warranty on the part of Ames, the original payee. *Bank v. Hatcher, supra,* and cases cited; *McKnight v. Parsons,* 136 Iowa, 390; *Hakes v. Thayer,* 165 Mich., 476; *Black v. Bank,* 96 Md., 399; *Buchanan v. Wren,* 10 Texas Civ. App., 560; *Jennings v. Todd,* 118 Mo., 296; *Cooper & Co. v. Chicago Trust Co.,* 131 Ill., 569; Calvert's Daniels on Negotiable Instruments, sec. 795-b.

It was earnestly insisted for defendant, in support of his position, that the appearance of the warranty on the face of the note was sufficient to put a prudent man on inquiry, and that he should be charged with knowledge of all the pertinent facts that such inquiry would have disclosed, but where a commercial paper has been properly negotiated, this principle of putting a prudent man upon notice is not the rule by which the rights of one claiming to be a holder in due course shall be determined. In *Smathers v. Hotel Co.,* 162 N. C., 346, in which section 2205 of the negotiable instrument act was construed and applied, the Court held: "That to constitute notice of infirmity of a negotiable instrument, the holder or transferee for value before maturity must have had actual knowledge thereof, or of such facts that his action in taking it amounted to bad faith and notice that would put a reasonably prudent man upon inquiry is insufficient."

While we approve his Honor's charge in the respects suggested, we are of opinion that there was error in withdrawing the question of the breach of warranty from the consideration of the jury, on the ground that on careful perusal of the record it appears that the note has not been properly negotiated, in that same has never been endorsed by the payee, or by any one for him, and, therefore, the plaintiffs, Gilliam & Dunstan, cannot maintain the position of holders in due course. In various sections of the negotiable instruments act, Rev., ch. 54, and authoritative decisions construing the same, it is contemplated and clearly provided that in order to a proper negotiation of a commercial instrument, payable to order, so as to shut off equities and defenses, as between the original parties, it must be endorsed by the payee, or by some one for him, duly authorized, and this endorsement must be made by writing the name of the payee on the instrument itself (usually on the back of same), or on some paper physically attached thereto at the time of

endorsement made. Rev., ch. 54, secs. 2178, 2198, 2206, 2212; *Midgette v. Basnight,* 173 N. C., 18; *Banking Co. v. McEachern et al.,* 163 N. C., 333; *Mayers v. McRimmon,* 140 N. C., 640; *Tyson v. Joyner,* 139 N. C., 69. In section 2178 it is expressly provided: "That an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is transferred by delivery; if payable to order, it is negotiated by the endorsement of the holder, and completed by delivery." And in section 2198: "Where the holder of an instrument payable to his order transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the endorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made." Without such endorsement, the cases uniformly hold that the holder only acquires the equitable title, and his claim is subject, as stated, to the equities and defenses existent between the original or prior parties. *Bank v. McEachern, supra; Jenkins v. Wilkinson,* 113 N. C., 532.

In section 1 of the complaint, which purports to set out the note and all entries thereon in *ipsissimis verbis,* the alleged endorsement is given as follows: "Endorsements: Pay to J. B. Gilliam and F. M. Dunstan without recourse on me." And the allegations of section 2 are as follows: "That plaintiff, Gilliam & Dunstan, are purchasers for value of said note without notice of equities," etc.

It thus appears that the signature of the payee has never been placed on the instrument by the payee or by any one for him, and that plaintiffs being only the holders of the equitable title, the defense set up in the counterclaim should be considered and determined.

For the error indicated, there must be a new trial of the cause, and it is so ordered.

New trial.

W. B. SMITH v. J. L. JACKSON AND J. S. DAIL.

(Filed 6 October, 1920.)

Appeal and Error—Outlet to Lands—Adverse User—Evidence—Title—Damages—Prejudicial Error.

Where the plaintiff's testimony tends to show title by sufficient adverse user to a way across defendant's land to his farm, it is reversible error for the trial judge to admit evidence in defendant's behalf as to the damages caused him by the location of this outlet, and that he had opened

another for the plaintiff's use, these being collateral matters to the question of the title set up, and irrelevant, incompetent, and calculated to mislead the jury, to the plaintiff's prejudice.

CIVIL ACTION, tried before *Kerr, J.*, at Spring Term, 1920, of LENOIR, upon this issue:

"Is the plaintiff the owner of an easement entitling him to use the road or way over defendants' land described in the pleadings? Answer: 'No.'"

From the judgment rendered, plaintiff appealed.

T. C. Wooten for plaintiff.
Rouse & Rouse and T. I. Sutton for defendant.

BROWN, J. This action is brought to enjoin the defendants from closing up a right of way over the defendants' land. The plaintiff claims to be the owner of an easement entitling him to use the road over defendants' land, and in support of his title, plaintiff offered evidence tending to prove that the lane in controversy runs from his farm over the defendants' land to the public road; that from where the lane enters the land of the defendants to the public highway is about 100 yards, and that the defendant had wrongfully closed it up. The plaintiff offered testimony tending to prove that he bought the place where he resides 40 years ago, and that the lane was there then, and that it was used by those under whom he claimed for 40 years before plaintiff purchased, as a way out from his plantation to the public road.

Plaintiff testified that when he went in possession of his farm he used this right of way continuously as a matter of right. There is other evidence tending to prove that the plaintiff is the owner of the easement described in the complaint.

The assignments of error relate to evidence introduced over the objection of the plaintiff tending to prove that the right of way was injurious to the defendant's land. One of the defendants testified, over the plaintiff's objection, that he, Jackson, has recently purchased the land over which the lane ran, and that he closed it in with a wire fence and ploughed up the right of way.

The defendant, under objection, was permitted to testify and to detail why he fixed the fence, and why he ploughed up the right of way, detailing that the lane was a damage to his land; that it made short rows and caused washes, and that this shortened the route from Mr. Smith's farm to the public highway. That he had built a new outlet that was more beneficial to his farm, and also one over which Smith could reach the public highway.

The ruling of the learned judge permitting the introduction of such testimony cannot be sustained. The evidence offered was plainly irrelevant and incompetent and calculated to mislead and prejudice the jury. It was the title to the easement which was the issue to be decided, and not whether it was injurious to the defendants' farm. It matters not how detrimental the lane was to the defendants' land, if the plaintiff had acquired title to the use of that lane by prescription it is as effective as if he had acquired title by deed. The defendants could not deprive him of his easement by providing another outlet.

New trial.

ALEX. BURNETT AND WIFE v. DUNN COMMISSION AND SUPPLY COMPANY.

(Filed 6 October, 1920.)

1. Mortgages—Trusts—Powers of Sale—Wrongful Sale—Damages.

Where a mortgagor or trustee in a deed of trust of lands given to secure borrowed money executes a power of sale in the instrument after the money has been repaid, the instrument is void and the attempted sale thereunder is invalid, and the mortgagor may ratify the sale and accept the proceeds thereof in settlement; or maintain an action to set the sale aside when the purchaser is one with notice, or acting in repudiation of the sale, or sue the mortgagee or trustee for the wrong done him therein, and recover the true worth of the property.

2. Same—Equity—Estoppel.

When the mortgagee or trustee in a deed of trust to secure borrowed money has wrongfully executed the power of sale of the mortgaged land, under the protest of the mortgagor that the money has been repaid, and thereafter the mortgagor seeks, in his action, to recover the true value of the land, his merely attending the sale without protesting it is not alone sufficient to estop him in equity from successfully maintaining his action.

CIVIL ACTION, tried on appeal from the recorder's court of Dunn, N. C., before *Bond, J.*, and a jury, at February Term, 1920, of HARNETT.

The action was instituted to recover $317, alleged to be due plaintiff for money had and received for usurious interest, collected by defendant of plaintiff, and damages on account of illegal sale of land under a mortgage. There was denial of liability by defendant.

On the hearing there was evidence for plaintiff tending to show the taking of usurious interest from plaintiff; evidence *contra* by defendant.

There was also evidence of plaintiff tending to show that, in 1913, plaintiff traded with defendant, and, to secure advances of money and supplies, had executed a mortgage on two unimproved lots in or near

Dunn for $74.65, of which $15 was usurious, and that plaintiff paid off and satisfied said mortgage in full to defendant; that later defendant advertised the lots under a power of sale contained in the mortgage, plaintiff insisting that there was no longer anything due, and, over plaintiff's protest, defendant proceeded with sale and lots were purchased at the sum of $83 by one N. A. Bell, a third party, and deed therefor made to the purchaser; that the said lots, on day of sale, were reasonably worth three or four hundred dollars.

The evidence of defendant was to the effect that said mortgage had not been paid, but, on an accounting, there was a balance due at time of sale of $40; that defendant postponed sale once, at plaintiff's instance, to give him an opportunity to procure the money; that plaintiff attended the sale and said nothing in protest that was heard by bidders, plaintiff testifying that he had failed to raise the money, but claimed and insisted, to defendant, there and at all times, that the mortgage had been satisfied.

On the question of payment, his Honor, among other things, charged the jury, in effect, that if the mortgage had been paid and satisfied by plaintiff before the sale, as he claimed, he could recover of defendant on the basis of the reasonable value of the lots, no matter how much more that was than the amount realized at the mortgage sale. Defendant excepted.

The jury rendered the following verdict:

"1. Is defendant company indebted to plaintiff for money received by defendant, including sale of lots in excess of sum due to defendant by plaintiff, and if so, in what amount? Answer: 'Yes, $212.'

"2. Is defendant company indebted to plaintiff for money received from plaintiff by said company by way of charges for usury; and if so, in what amount? Answer: 'Yes, $30.'"

Judgment on verdict, and plaintiff excepted and appealed.

E. F. Young for plaintiff.
Clifford & Townsend and R. L. Godwin for defendant.

HOKE, J. Under the charge of his Honor, the jury have necessarily found that, prior to the sale, the mortgage had been satisfied, and, this being true, the attempted sale thereunder was invalid. *Blake v. Broughton,* 107 N. C., 220; 27 Cyc., 1396. In such case it was open to plaintiff to ratify the sale and accept the proceeds, or settle on that basis; or he could maintain an action to set the sale aside, assuredly so as against defendant, and one purchasing with notice; or, acting in repudiation of the sale, he could sue the trustee or mortgagee for the wrong done in making such a sale, and hold him liable for the true worth of the property. The latter course has been pursued by plaintiff in the present

action, and both sound principle and approved precedent are in support of his Honor's ruling on the question presented. *Nance v. King,* 178 N. C., 574; *Poe v. Bright,* 172 N. C., 838; *Warren and Wife v. Susman,* 168 N. C., 457; *Rodgers v. Barnes,* 169 Mass., 179; *Froneberger v. Lewis,* 79 N. C., 426; *S. c.,* 70 N. C., 456; 19 R. C. L., 616, title, "Mortgages," sec. 432; Perry on Trusts (6 ed.), sec. 843; Jones on Mortgages (6 ed.), sec. 1907.

In 19 R. C. L. it is said: "And a mortgagor may elect to recover full damages on account of the unlawful sale of the land under a power of sale in the mortgage, when there was no default, and thus ratify the title of the purchaser."

And, in the well considered case of *Warren v. Susman, supra,* where a trustee had purchased at his own sale, *Associate Justice Walker* thus refers to the principle applicable: "The plaintiff could elect to have the sale set aside and the property returned to the trust fund, or recover of the defendant, who had sold and bought at the same time in breach of his trust, the value of the land where the trustee insists on the validity of the sale, and his right to retain the property, and has conveyed it to a third person, whose title he also insists is unassailable; otherwise, the trustee would be allowed to speculate upon his trust and make an unfair profit out of it, which will not be tolerated in a court of equity."

Defendant cites and relies upon the case of *Austin v. Stewart,* 126 N. C., 525, as a decisive authority in support of the position that plaintiff, on the present adjustment, is restricted to the amount for which the property sold at the mortgage sale. In that case, the Court held that an order of reference over defendant's objection could not be maintained when there was an undetermined plea in bar appearing in the record, and in sending back the case for further proceeding, the Court adverting to an allegation in plaintiff's complaint, "that he elected to affirm the sale," laid down the principle, undoubtedly true as a general proposition, that, when plaintiff has elected to affirm the sale, he must settle on the basis of the sale price, but *Austin v. Stewart* may not be recognized as authority for defendant on the facts of this record, where plaintiff, in repudiation of the sale, seeks to recover of the mortgagee the damages for wrongful transfer of his property to a third person under color of a mortgage which had been, in fact, paid in full.

It is urged for defendant that, as plaintiff was present at the sale and made no open protest, he is concluded as to its validity. There is a wholesome principle in our law to the effect that one who stands by and witnesses in silence a wrongful sale of his property, under circumstances that call on him to speak, will not afterwards be heard to impugn the validity of the sale in so far as the title of the purchaser is concerned. The position depends on the doctrine of equitable estoppel, that under

certain conditions will not allow an owner to impeach the purchaser's title when the latter has been misled to his hurt, but, on the facts of this record, the principle has no place as between the plaintiff and the defendant company, the evidence showing that plaintiff, an ignorant colored man, merely attended a sale of his property, made over his protest; that he said or did nothing at the sale to mislead any one; has insisted throughout to the company and its agents that the mortgage debt has been fully paid, and has established his claim at the trial. In such case, we are clearly of opinion that the plaintiff, as against the defendant, is entitled to a settlement on the basis of the actual value of the property, and the verdict and judgment to that effect should be upheld.

We find no error to defendant's prejudice, and the judgment for plaintiff is affirmed.

No error.

SALLIE K. ELMORE v. L. A. BYRD AND FRED R. MINTZ.

(Filed 6 October, 1920.)

Election—Husband and Wife—Deeds and Conveyances—Statutes—Void Deeds.

A testator devised generally, without specific description, to his wife, among other things, the lands of which he should be seized at the time of his death, his wife having previously conveyed to him certain of her own lands under a deed void for the lack of her privy examination as provided by Rev., 952, and the want of her special examination under the provisions of Rev., 2107. She qualified as executrix under the will of her husband: *Held*, her qualification as executrix would have put her to her election were this equity otherwise applicable; but as her deed to her husband was void, he was not seized of this land at the time of his death, and the right of election was not within the terms or expression the husband had employed in making his will, as none of her land was devised by him. The principles of the equity of election discussed by WALKER, J.

APPEAL by defendants from *Devin, J.*, at August Term, 1920, of WAYNE.

The plaintiff, Sallie K. Elmore, and W. S. Elmore were married 1 October, 1868, and lived together until 3 August, 1883, when the husband died. They had several children, some of whom are living, and others have died, leaving children. On 1 April, 1883, she conveyed to her husband in fee by deed, consideration being love and affection and one dollar, a tract of land in Wayne County, containing one hundred and twenty-five acres, and situated on the south side of the Mount Olive and White Hall public road. This was all the land she owned. Since the death of her husband, Mrs. Elmore has been in possession of the

land so conveyed by her. It is admitted that she is the owner of the land, the deed being void, as she was not privately examined as provided by law (Rev., 952, nor was she specially examined, Rev., 2107), unless, under the will of her husband, she was put to her election and has so exercised it as to have lost the ownership of it, which has passed from her to others by the terms of the will.

The plaintiff, Sallie K. Elmore, has contracted to sell the land to the defendants, Byrd and Mintz, who are ready and willing to comply with the contract if her title to the land is valid, or if she is the true owner of it, which they deny, and allege that, as they are advised, she has lost her right and title by electing to take other property under the will, the testator having devised her land, or a remainder therein, to others. Her husband in his will devised all of *his* lands, or, to use his language, "the lands of which he was seized," to the plaintiff for life, for the support and maintenance of herself and children, with remainder to his children and grandchildren after her death. He also bequeathed to his wife his personal property for life, upon the same terms and conditions as the land. Plaintiff was appointed executrix, and duly qualified as such after the probate of the will.

The defendants answered the complaint, and asserted that the title to the land was not sound and good, as plaintiff had elected to take under the will, and had qualified as executrix, and, therefore, that the title to the land passed to the children of the testator under his will and after her death.

The parties, after this case was heard, agreed in writing to the following facts:

"1. W. S. Elmore died seized and possessed of about one hundred and fifty (150) acres of land in his own name, besides the land in controversy in this action, the title to which is in question.

"2. Sally K. Elmore qualified as his executrix soon after his death, but there is no record in the clerk's office of any inventory or final account, he having bequeathed to her all the personal property owned.

"3. The testator died leaving some personal property, the amount of which is unknown, and also owing certain indebtedness, which was paid by Sally K. Elmore."

The court sustained the demurrer to the answer, and defendants appealed.

Langston, Allen & Taylor for plaintiff.
Fred J. Cohn for defendants.

WALKER, J., after stating the case: It does not appear that the plaintiff had ever actually received any of the personal property or

reduced it into her possession as her own, if she did receive it, but she did qualify as executrix of the will. Assuming that this would be sufficient as an election, we are of the opinion that there was no election on her part for other reasons. It is perfectly evident, upon the facts admitted, or not disputed, that both she and her husband believed that the title to the land had legally passed to him by her deed. They were ignorant of the law, as they might well be, and so most of laymen are, though, strangely enough, they are generally to be judged by the presumption that they know it all. But that fiction does not apply here, because the doctrine of election is based upon a more reasonable, if not stronger presumption, that, nothing else appearing, the parties knew the facts and their bearing upon the right in question. It is founded upon the idea that two benefits are presented to the party required to elect, and that they are inconsistent with each other, and, therefore, where the beneficiary selects one of them as his own it is but just and fair that he be deprived of the other. He will not be permitted to take under the will and also against it, but must make his choice and retain his own property, which has been given to another by the will, or take that which the donor has given to him out of his own estate. He cannot take both. By electing to accept the gift, he is estopped to claim his own property.

The doctrine has been variously expressed, and we will attempt to state with commensurate brevity the substance of what has been said upon it by the courts and text-writers. An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same paper. The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing. Bispham Eq. (6 ed.), p. 413, sec. 295. The doctrine, it is said, requires that there should be alternative benefits between which the donee is to make his choice once for all. It is also necessary, in order to put any one to an election, that the testator should give by his will property owned by himself to the person required to elect, or, as it is put, some free disposable property which can become compensation for what the donor seeks to take away. Bigelow, 676; Fetter, 52 and 54; Eaton, 185. This doctrine of equity has grown out of the fundamental maxim that he who seeks equity must do equity, and it does not arise when the conscience of the alleged refractory donee is not so affected as to require him to surrender something of his own for that which his donor has conferred upon him. 1 Pom. Eq., Jr., sec. 461; Snell, p. 202. Ever since the case of *Noyes v. Mordaunt,* 2 Ves., 581, which was decided

in 1706, it has been held to be an established principle of equity that where a testator by his own will confers a bounty on one person and makes a disposition in favor of another prejudicial to the former, the person thus prejudiced shall not insist upon his old right, and at the same time enjoy the bounty conferred by the will. The intention of the testator is apparent that both dispositions shall take effect, and the conscience of the donee is affected by the condition thus implied that he shall not defraud the design of the donor by accepting the benefit and disclaiming the burden, giving effect to the disposition in his favor and defeating that to his prejudice. *Melcher v. Burger,* 21 N. C., 634. The doctrine of election, as applied to the law of wills, simply means that he who takes under a will must conform to all of its provisions. He cannot accept a benefit given by the testamentary instrument and evade its burdens. He must either conform to the will or wholly reject and repudiate it. No person is under any legal obligation to accept the bounty of the testator; but if he accepts what the testator confers upon him by his will, he must adhere to that will throughout all its dispositions. Underhill on Wills, sec. 726. This Court held it to be a familiar principle of equity that a devisee or legatee cannot claim both under a will and against it. If the will give his property to another, he may keep his property, but he cannot at the same time take anything given to him by the will; for it was given to him upon the implied condition that he would submit to the disposition of his property made by the testator. *Weeks v. Weeks,* 77 N. C., 421.

When one elected to take a benefit under the will, with burdens attached, he is bound, although it turned out that the burden was greater than the benefit. *Brown v. Knapp,* 79 N. Y., 136. One who accepts a devise or bequest does so on condition of conforming to the will. No one is allowed to disappoint a will under which he takes a benefit, and every one claiming under a will is bound to give full effect to the legal disposition thereof, so far as he can, and when one is thus put to his election under a will it matters not that what he takes turns out to be greater or less in value than that which he surrenders. *Caulfield v. Sullivan,* 85 N. Y., 153. Certainly this must be so where the person knows at the time she elects to take under the will the value of the property. In *Syme v. Badger,* 92 N. C., 706, *Judge Badger,* for the purpose of providing for the payment of a debt due his wife, devised and bequeathed to her real and personal property in payment of the debt. Mrs. Badger qualified as executrix, and took possession of the property. It turned out that the property given her was of insufficient value to pay the debt. This Court held that by proving the will and qualifying as executrix she elected to take under the will, and was thereby precluded from resorting to other assets of her testator to pay her debt. An elec-

tion once made by a party bound to elect, and under no apprehension as to his rights, and with knowledge of the value of the properties to be affected by such election, is irrevocable, and binds the party making it, and all persons claiming under him, and also all donees under the instrument whose rights are directly affected by the election. Eaton Eq., 199; *Cory v. Cory,* 37 N. J. Eq., 198.

If the donee elects to take under the will, he must carry out all of its provisions, and transfer his own property disposed of thereunder to the person named as the recipient thereunder. Eaton's Eq., 66. 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 speaking of this very point, and in reply to a suggestion that a testator might have made a different disposition if he had been aware of the true state of the title, *Lord Eldon* declared, in *Thelluson v. Woodford,* 13 Ves., 221, that the law was too plain, that no man should claim any benefit under a will without conforming and giving effect to every other provision contained therein, as far as lay in his power, and that the question, whether the testator believed he had title to the property and the right to dispose of it, had nothing to do with the case; that the only question was, Did he intend the property mentioned to go in the manner indicated? and not whether he had power to direct it, or would have done so if he had known that he thereby imposed a condition upon another; and he added that nothing could be more dangerous than to speculate upon what a testator would or would not have done if he had known one thing or another. Where the testatrix had a third interest in the house and lot, having expended that much of her own money in its purchase, and it was insisted that under such circumstances she will not be presumed to have intended to give more than she had a right to; the Court replied that this, too, is a question of construction for the court, and the case of *Padbury v. Clark,* 2 Mac. and G., 298, seemed to be directly in point, and to lay down the rule correctly. There it was held that when a man who had an undivided moiety in a house devised it by a particular description, such as "my messuage or tenement with the garden thereunto belonging," the whole was intended to pass.

In *Miller v. Thurgood,* 33 Beav., 496, it is said there are many cases on the subject, but they all resolve themselves into this: "If a testator, having an undivided interest in a particular property, devises the same specifically, a case of election will arise and the co-owner must elect between his interest in the property and any other interest he may take under the will," and what was said in *Wilkinson v. Dent,* 6 L. Rep., is to the same effect. Mr. Pomeroy, in his excellent treatise on Equity Jurisprudence (3 ed.), 1 vol., at p. 792, sec. 475, says: "The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own, for in such cases the testator intends that the devisee shall have both, though he is mistaken as to his own title to one." He cites as authority for this statement of the law, *Cull v. Showell,* Ambler, 727 (*S. c.,* 27 Eng. Reports, Full Reprint, p. 470), where it was said, according to the syllabus (and the case is well reported): "One devised to A. for life an estate, which she supposed she had a power to dispose of, but in fact had not. She also gave a life interest in other estates to A. A. claimed the first estate under an old entail. *Held,* he is not put to his election," citing Lib. Reg., 1772, A. fo. 574-a; 3 Woodes Prec. App., 1. *Lord Apsley,* Chancellor, said in that case: "Henrietta conceived she had a power to dispose of the copyholds, and meant to give what she had a right to give, not to give what she had not. (*Vide Forrester v. Cotton,* 6, 9, 10 Dec., 1760; *ante Pulteney v. Lord Darlington.*) There is no direct proof that she meant to dispose of the copyholds, if she had no power to dispose of them. It is not matter of election. *Herle v. Greenbank* is very strong. In *Greaves v. Boyle,* covenant to settle real estate and devise of personal in satisfaction, Lord Hardwicke doubted whether it was a satisfaction; but being a condition expressed, he held it a satisfaction on the authority of *Jenkins v. Jenkins,* but said the Court ought to go no further." In a note to the decision, the Reporter says: "The doctrine laid down in this case, on the first point, has been overruled, though it has been thought that the decision might be supported on the ground of length of time, *Whistler v. Webster,* 2 Ves. Jun., 370, 371, in which case the Master of the Rolls said: 'I am to say Cull and Showell is erroneous if founded on the argument first urged; but there is another point in that case very material, viz., the length of time. It was impossible to tell of what the personal estate consisted, and no person can be put to elect, without a clear knowledge of both funds.' See *Thelluson v. Woodford,* 13 Ves., 221; *Welby v. Welby,* 2 V. & B., 199. In *Moore v. Butler,* 2 S. & Lef., 267, *Lord Redesdale* would, however, seem to have recognized the principle laid down in the principal case."

There was a second point made in that case, it will be seen, as to the length of time which had elapsed, it being thirty years after the surrender of the copyholds, so that the note of the Reporter applied to the question of election, which was the first question raised in the argument. Referring to that case (*Moore v. Butler, supra*), we find that *Lord Redesdale* cited *Noys v. Mordaunt,* 2 Vern., 582, and note, and quoted from the opinion of *Lord Rosslyn* therein, where the latter stated the ground of election to be that "No person puts himself in a capacity to take under an instrument without performing the conditions of the instrument; and they may be express or implied; if it is stated, or can be collected, that such was the intention of the parties to the instrument, that intention must be complied with." And *Lord Redesdale* added: "It may be doubtful whether such was the intent—as, if a conveyance be made under a total ignorance of one's right; in such a case the party is not bound to elect; of that description was the case in Ambler (*Cull v. Showell*), upon a will; where it did not appear to be the intent of the party *to act on the property;* and there may be cases of the same kind upon settlements."

In our case the testator has not "acted on the property" by a description of it, but merely describes it as "the land of which I am seized at my death," and the land of the wife would not answer this description. Therefore, his intention to devise it does not appear. *Cull v. Showell, supra,* would seem to be opposed to *Isler v. Isler,* 88 N. C., 581, already cited and commented upon by us, and so does *Lord Redesdale's* opinion in *Moore v. Butler,* 2 S. & Lef., 267. In *Cull v. Showell, supra,* the land given to the nephew of the testatrix was described specifically, as "all the copyhold messuages, land, etc., held or lying within the manor of Crondal," so that it appeared that she intended to dispose of that particular land, and not merely her interest therein, provided she had any, and therefore a case for an election arose.

But we need not stop to reconcile divergent authorities, if there are any in conflict, or to select from them which ones we will follow or adhere to. The foregoing account of the cases will serve the good purpose of showing how the courts may have differed concerning this doctrine of election, or to enable those so inclined to bring them together into harmony.

We can decide this case upon a different ground, peculiar to itself. It will be observed that, by agreement of the parties, the testator was seized in his own right of other lands than those described in the deed from his wife to him, which is void, and he devises to his wife as follows: "The land of which I am seized at my death," so that his description of the land he intended to devise does not include the land in question. We will not press his own description of the land beyond a fair and

reasonable interpretation of the words, as used by him. Their meaning is clear, and beyond doubt, that he intended thereby to devise only his own lands, or those of which he was legally seized at his death. There is no specified description of either his own land or that described in the deed of his wife to him. If he had described the latter tract by metes and bounds, or by any language which would identify it, a very different question might be raised, but he did not do so. He used plain words, whose meaning is unmistakable, namely, "Land of which I am seized," and he was not seized of the land in question, because his wife's deed to him was void, the privy examination of the wife, as required by law (Rev., 952), not having been taken (*Smith v. Bruton,* 137 N. C., 79; *Towles v. Fisher,* 77 N. C., 443; *Green v. Branton,* 16 N. C., 500; see Pell's Edition of Revisal, sec. 952, and notes), and further, because the examination of the wife was not made according to Rev., 2107. *Norwood v. Totten,* 166 N. C., 648. The lack of privy examination would, of itself, have invalidated the deed, or made it void as a conveyance to the wife. It is evident the testator did not wish, nor did he intend, to devise land that did not belong to him, and, therefore, it was that he used appropriate, and even technical, language to express his purpose clearly. "Land of which I am seized" means to which I am legally entitled, and this is palpably the true meaning of his words, as he intended them to have. It follows, therefore, that there was no election imposed upon his wife, for he did not will anything belonging to her, but only what he owned himself. Plaintiff's qualification as executrix was sufficient to estop her from claiming lands devised otherwise than under the will. *Tripp v. Nobles,* 136 N. C., 99 (67 L. R. A., cited in notes to 49 L. R. A. (U. S.), 1081, 1105); but her land was not devised, as we have shown, and, therefore, there is nothing for such an estoppel to operate upon. She filed no inventory, and there is no statement that she actually appropriated the property bequeathed to her.

It may be profitable for those desiring to consult the authorities more extensively that they consider the following cases decided by this Court: *Craven v. Craven,* 17 N. C., 338; *Sanderlin v. Thompson,* 17 N. C., 539; *Redmond v. Coffin,* 17 N. C., 437; *Ford v. Whedbee,* 21 N. C., 16; *Melcher v. Burger,* 21 N. C., 634; *Wilson v. Arny,* 21 N. C., 376; *Flippen v. Banner,* 55 N. C., 450; *McQueen v. McQueen,* 55 N. C., 16; *Robbins v. Windly,* 56 N. C., 286; *Bost v. Bost,* 56 N. C., 484; *McDaniel v. McDaniel,* 58 N. C., 351; *Morrison v. White,* 67 N. C., 253; *Weeks v. Weeks,* 77 N. C., 421; *Isler v. Isler,* 88 N. C., 581; *Sigmon v. Hawn,* 87 N. C., 450; *Gray v. Williams,* 130 N. C., 53; *Price v. Price,* 133 N. C., 494.

The doctrine was not applied in the case of a homestead. *Fulp v. Brown,* 153 N. C., 531. It applied to minors, for whom the Court will

elect, as they are wards of the Court (*McQueen v. McQueen, supra; Flippen v. Banner,* 55 N. C., 450), and to *femes covert* (*Robertson v. Stevens,* 36 N. C., 247); but it seems not to have been applied in the case of a widow, who was a lunatic, *Lewis v. Lewis,* 29 N. C., 72, cited in note to *In re Estate of Andrews,* 17 L. R. A., 296, because of her incapacity to dissent from the will, the right of dissent being personal. *Hinton v. Hinton,* 28 N. C., 274. But this law was changed by Rev. Code, ch. 118, sec. 1, so that the dissent may be in person, by attorney or by guardian, as the case may be. Code of 1883, sec. 2108; Revisal of 1905, sec. 3080.

The defendants admitted that the plaintiff is the owner of the land, unless there is some provision of the will affecting her title, or preventing her from claiming it. There is none, as we have shown, and the judge properly entered the judgment as he did, compelling defendants to comply with the contract of sale. It will be so certified.

Affirmed.

FIRST NATIONAL BANK OF TARBORO v. TARBORO COTTON FACTORY ET AL.

(Filed 6 October, 1920.)

Attachment—Insolvent Corporations—Evidence—Fraud.

Allegations in affidavits for attachment against an insolvent corporation's property, that executions had been issued against it, and that it had failed to make use of a small piece of its land, and not paid the taxes thereon; or that its president claimed this land, or its proceeds is insufficient upon the question of fraud of the corporation, for the granting of the warrant.

PETITION to rehear.

John L. Bridgers and Henry C. Bridgers for plaintiff.
Don Gilliam and Henry Staton for defendant.

BROWN, J. This case is reported 179 N. C., 203. The petitioner does not deny the correctness of the propositions of law stated in the opinion, but claims that we overlooked the supplemental affidavit presented to the judge at the time when the attachment was dissolved. We considered the entire record, and have again examined the same, and are of opinion that neither the original affidavit upon which the attachment was issued nor the supplemental petition or affidavit used on the hearing before Judge Connor are sufficient to sustain the warrant

of attachment. The ground upon which the attachment was originally issued was that the defendant was about to assign, dispose of, and secrete its property with the intent to defraud creditors. The plaintiff failed to set out the grounds upon which this belief was based so as to enable the Court to pass upon their sufficiency. We find nothing in the supplemental petition which induces us to revise our opinion. In this further answer, or petition, the plaintiff sets out four alleged facts as grounds for its assertion that the defendant is about to assign, dispose of, and secrete its property:

(1) That the defendant has made no effort to pay the debt sued on. (2) That execution was issued on certain judgments against the defendant. These certainly do not tend to prove any fraudulent transfer of property. (3) That the plaintiff has failed to make use of a small piece of land belonging to it, and failed to list the same for taxation. The record shows that the defendant had ceased to do business for more than two years before this action was brought, after all of its assets except this small piece of land were sold under deed of trust. The fact that the insolvent corporation made no use of this little piece of land and failed to pay taxes on it is no evidence of fraud. (4) It is contended that the defendant, L. L. Staton, president of the defendant corporation, stated that the proceeds attached belonged to him, and that he intended to have them for his own use. This statement of Dr. Staton amounts to nothing so far as the defendant corporation is concerned. It is a mere expression of opinion as to whom the fund belongs, and is no evidence of any fraudulent disposition of property upon the part of the defendant.

Petition dismissed.

LOUIS HOBBS v. NEW BERN-GHENT STREET RAILWAY COMPANY.

(Filed 6 October, 1920.)

Instructions—Employer and Employee—Master and Servant—Evidence—Appeal and Error.

It is reversible error for the trial judge to charge the jury that the plaintiff was an employee of the defendant to whom the latter owed the duty to furnish a safe place to work, when there was evidence that the plaintiff was at work as an independent contractor.

APPEAL by defendant from *Connor, J.*, at the April Term, 1920, of CRAVEN.

This is an action to recover damages for personal injury, the plaintiff alleging that he was an employee of the defendant, and that while in

the performance of his duty, taking down certain wires on poles, that a pole broke because of its rotten condition, and he was thrown to the ground and seriously injured.

The defendant denied that the plaintiff was in its employment, and alleged that he was an independent contractor.

His Honor charged the jury that if they believed all of the evidence, the plaintiff was an employee of the defendant, and that it was the duty of the defendant to furnish him a reasonably safe place to work, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Moore & Dunn for plaintiff.
W. D. McIver and R. A. Nunn for defendant.

ALLEN, J. We are of opinion, upon an examination of the whole evidence, that there is a conflict in the testimony, and that there is some evidence that plaintiff was an independent contractor, and, therefore, that his Honor committed error in giving a peremptory instruction to the jury.

We refrain from discussing the evidence, because, in doing so, we might give undue weight to certain phases of it, and prejudice the rights of the parties upon another trial.

New trial.

O. L. MATTHIS v. J. D. JOHNSON.

(Filed 6 October, 1920.)

1. Fires— Tramroads—Railroads—Negligence—Defective Locomotives—Burden of Proof.

When it is shown that defendant's tramroad locomotive set out sparks from its smokestack or fire box which caused an injury to the plaintiff's land, the burden of proof is on the defendant, having better means of knowing the facts, to show that its smokestack was reasonably well equipped with a proper spark arrester, and that the fire box to the engine was also reasonably safe; and it is competent to show, in this connection, that the locomotive in question had a short time previously been seen throwing out sparks.

2. Same—Foul Right of Way.

Evidence that the defendant's tramroad locomotive dropped sparks on a foul place of its right of way, causing a fire which was communicated to plaintiff's land and damaged it, is sufficient as proof of the defendant's

negligence in permitting this condition to exist on its right of way, without showing that its spark arrester was defective.

3. Evidence—Declarations—Evidence—Fires—Hearsay.

Testimony of a statement made by a witness who has since died, relative and material to the inquiry in a fire damage case, is incompetent as hearsay.

APPEAL by defendant from *Kerr, J.*, at Fall Term, 1920, of SAMPSON.

This action was brought to recover damages for setting fire to plaintiff's lands and the timber thereon, in April, 1916, and burning the same. The fire came from defendant's engine, which was operated on his tramroad. There was evidence tending to show that the fire was set out by defendant's engine, and that it burned plaintiff's property, and that it started at the side of the tramroad and near to it, or at a trestle on the road where there were tree tops, grass, and other dry and combustible material, and that it burned over a large area of land. One witness stated that the engine passed him about one-half mile from where he first saw the smoke rising from the fire; and when he went to the place, it had burned some distance from the trestle. There was further evidence tending to show that defendant's engine was the cause of the fire, but it is not necessary to recite it here in detail. The wind carried the fire from the tramroad to the dirt road, and all land between the two had been burned over, and some of the evidence tended to show that the engine had passed the place shortly before the fire and smoke were first seen. The engine was seen to set out fire a week before this fire in question occurred. This testimony was objected to by defendant, and his objection was overruled by the court, and an exception taken upon the ground that there was no evidence that the engine was in the same condition on the two occasions. The witnesses for plaintiff stated that defendant's right of way had not been burned off, but was very foul.

The defendant's evidence tended to show that the fire was not started on its right of way, or by its engine, but that it originated elsewhere, and also that defendant had not been guilty of any negligence.

The jury returned a verdict for the plaintiff, and assessed his damages at $1,000. Judgment thereon for plaintiff; defendant appealed.

Fowler & Crumpler and George A. Smith for plaintiff.
Butler & Herring and H. E. Faison for defendant.

WALKER, J., after stating the case: We will consider the exceptions in the order of their statement in the record:

The testimony of Martin Hairr and Susan H. Hairr was competent, and was properly admitted. The burden was upon the defendant to show that his engine was provided with a spark arrester, or other ap-

pliances, reasonably sufficient to prevent the escape of sparks or live coals from the smokestack, or the fire box, and this is rested upon the ground that the defendant necessarily has, or should have, peculiar knowledge of the facts, and is better informed as to the condition of his engine operated on his tramroad than a plaintiff, who would generally be ignorant of it. This Court, in *Aycock v. R. R.*, 89 N. C., 329, stated the principle governing in such cases. In *Aycock v. R. R., Chief Justice Smith,* writing the opinion for the Court, cited *R. R. v. Schultz,* decided in 1880, and reported in 2 Am. & Eng. R. R. Cases, at p. 271, and notes, and then said of it: "The doctrine there announced by *Gordon, J.*, is 'that if reasonable precautions are taken in providing them (the locomotives) with those appliances which are deemed best for the prevention of such damage (from fire communicated), the company, or persons using them, cannot be made liable, though they fire every rod of the country through which they run.' Adding: 'That the mere fact of the firing of a property will not of itself prove negligence, where it is shown that approved spark arresters were in use.' A numerous array of cases is cited in the note in support of each side of the question, as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which imposes the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this State, that the burden of proof is upon the defendant, when it appears that the sparks, or coals, came from the engine, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, you have burned my property, and if you are not in default show it, and escape responsibility. We therefore sustain the judge in this part of his charge. Again, there was negligence in permitting the inflammable material in which the fire began to remain so near the track, and liable to ignite from emitted sparks. *Troxler v. R. R.*, 74 N. C., 377; Whart. Neg., sec. 873; Thom. Neg., 162; *Salmon v. R. R.*, 20 Am. Rep., 366, and note." That decision would seem to cover this case completely in its principal points. It has been cited and approved frequently in subsequent cases, and must govern our decision here. The most recent citation of it will be found in *Cashwell v. Bottling Works,* 174 N. C., 324-327, where we referred to it as follows: "In *Simpson v. Lumber Co.*, 133 N. C., at pp. 101 and 102, we said: 'Where the plaintiff shows damage resulting from the defendant's act, which act, with

the exercise of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless,' " citing *Aycock v. R. R.*, 89 N. C., 321; *Lawton v. Giles*, 90 N. C., 374; *Piggot v. R. R.*, 54 E. C. L., 228; *Craft v. Timber Co.*, 132 N. C., 151; *Ins. Co. v. R. R.*, 132 N. C., 75. See, also, *Moore v. Parker*, 91 N. C., 275; *Haynes v. Gas Co.*, 114 N. C., 203; *Currie v. R. R.*, 156 N. C., 419; *Kornegay v. R. R.*, 154 N. C., 392; *Cox v. R. R.*, 149 N. C., 118; *Simmons v. Lumber Co.*, 174 N. C., 220; *Williams v. R. R.*, 140 N. C., 623; *Fitzgerald v. R. R.*, 141 N. C., 530-534; *Stewart v. Carpet Co.*, 138 N. C., 60; *Ross v. Cotton Mills*, 140 N. C., 115; *Womble v. Grocery Co.*, 135 N. C., 474. Besides, there was testimony of the plaintiff's witnesses which showed that the same engine had cast sparks before, and this was some proof of its bad condition. *Dail v. Taylor*, 151 N. C., 284.

This case and *Knott v. R. R.*, 142 N. C., 238, are much alike, as there it was held that the emissions of sparks from the smokestacks on former occasions, and near the time of the fire that did the damage complained of, was competent, and, besides, that if the smokestack was in good condition, and sparks fell upon a foul right of way and caused the fire, the railroad company was responsible in damages. *Simpson v. Lumber Co.*, 133 N. C., 95; *Troxler v. R. R.*, 74 N. C., 377; *Craft v. Timber Co.*, 132 N. C., 151; *Wise v. R. R.*, 85 Mo., 178, where it is said that in no view of the matter is it material to inquire how the sparks happened to fall on the right of way if the latter was in bad condition, and that was the cause of the fire. See, also, *Cox v. R. R., supra*, and cases cited with it. These exceptions cannot, therefore, be sustained.

The testimony of K. A. Robinson was properly excluded, because he proposed to speak solely of a statement, not only of a third person, but of a person who had since died, which was made to him. This was hearsay and incompetent, it having none of those safeguards required by the law for the maintenance of truth. The same may be said of the testimony of Charlie Cromartie and T. F. Fowler.

The other exceptions are merely formal.

The court's rulings were correct throughout, and we therefore affirm the judgment.

No error.

JOHN F. CROOM v. J. H. GROVES.

(Filed 6 October, 1920.)

Courts—Contempt—Notice to Show Cause—Insufficient Compliance—Alleys—Obstruction.

Under a rule to show cause why the defendant should not be attacked for contempt in failing to obey an order of court for him to remove a building from an alley way, which he was thus unlawfully and wrongfully obstructing, it is an insufficient answer that the defendant had cut an opening through the building in his own opinion sufficient for the plaintiff's purposes, as such would not be in full compliance with the order of the court.

APPEAL by defendant from *Kerr, J.*, at March Term, 1920, of DUPLIN.

This is an appeal by defendant Groves from a judgment of the Superior Court of Duplin County, adjudging him in contempt of court for failure to remove a certain building from over an alley-way in the town of Magnolia.

From the order of Kerr, judge, defendant appealed.

Stevens & Beasley for plaintiff.

Gavin & Blanton and B. H. Crumpler for defendant.

BROWN, J. In the judgment of Stacy, J., August Term, 1917, Duplin Superior Court, it was adjudged that "the defendant, J. H. Graves, who now unlawfully and wrongfully obstructs said alley-way, proceed and he is hereby commanded and directed to remove said building from said alley-way, and he is hereby given until 1 May, 1918, to remove the same, and open said alley-way, and this cause is retained for further orders, and the assessment of the plaintiff's damages incurred to be inquired of by a jury."

In response to a rule to show cause why he should not be attached for failing to obey said order, the defendant says that he has cut an opening in his building 12 feet wide and 12 feet high, and avers that this is a full compliance with the order of the court.

We do not think that what the plaintiff has done is in any sense a compliance with the judgment. He has merely opened a pathway through the first story of the building and left the second story intact, extending across the alley-way. It is manifest that this is not a compliance with the judgment of the court.

Affirmed.

LOUIS M. BOURNE AND JOHN L. BRIDGERS v. MRS. R. I. FARRAR ET AL.

(Filed 6 October, 1920.)

1. Estates—Contingent Remainders.

An estate for life, with remainder over to designated persons in being, A. B. C., one-third each, living at the death of the first taker, or to their children then living, and if no living children at that time, to the survivors of A., B., and C., before the termination of the life estate: *Held*, A., B., and C. take an estate in one-third of the land contingent upon their being alive at the death of the first taker, and each one a further estate contingent upon the event of the death of the others, or one of them, before the death of the life tenant without leaving children.

2. Farm—Wills—Deeds and Conveyances—Judicial Sales—Estoppel—Purchasers.

A., B., and C. took by will a remainder in lands contingent upon their being alive at the time of the death of the first taker, and a further contingent estate depending upon the others being dead at the designated time without leaving issue. A. and B. conveyed, for a sufficient consideration, their right, title, and interest to the land, and the purchaser acquired at a sale under decree of court by deed without warranty from the commissioner, all the right, title, and interest of C. to the identical land, referring to the devise to C.: *Held*, the conveyances of A. and B. were of their whole estate in the land, including both of their contingent interests, and the commissioner's deed was of the entire estate of C., and that A., B., and C. were estopped by their deeds to claim any interest whatsoever in the land, and the purchaser could convey a fee-simple title.

APPEAL by defendants from *Lyon, J.*, at June Term, 1920, of EDGECOMBE.

K. H. Dickens devised to his sister, Mary E. Dickens, the lot in question in Tarboro, N. C., "During her life, and upon her death I give and devise the same to John L. Bridgers, Jr., Routh Hassardshort, and Louis M. Bourne, as tenants in common," one-third to each; "and in event of any one or more of them being dead, leaving issue, at the time of Mary E. Dickens' death, then such issue shall take such part of said real estate as his, her, or their parents would have taken if then living, but if one or more of them be then dead without issue surviving, then his or her share shall then go to survivor or survivors of my said devisees."

Mary E. Dickens, in December, 1880, conveyed her interest in lot No. 59 in the plat of said town to O. C. Farrar by deed duly recorded. John L. Bridgers and his wife, and Routh Hassardshort and her husband, on 5 January, 1881, by warranty deed, duly recorded, and in consideration of $6,000, conveyed "All their interest in a tract or parcel of land in Edgecombe County, N. C.," describing said lot by number and by metes and bounds, and adding, "Interest in said half of town

lot being an undivided two-thirds, subject to the estate of O. C. Farrar of a part thereof during the life of Mary E. Dickens."

On 22 November, 1889, H. C. Bourne, commissioner, pursuant to a decree of the Superior Court of Edgecombe, and in consideration of $3,000, conveyed to O. C. Farrar, by warranty deed, duly recorded, "All the right, title, and interest of the said L. M. Bourne in the said property, being one third interest" (describing the above property), and adding, "It being the identical real estate devised by K. H. Dickens to said L. M. Bourne, and reference hereby made to said will and testament." L. M. Bourne, on arriving at age, received from his guardian, said H. C. Bourne, the purchase-money from the sale of the lot by said guardian and commissioner, with full knowledge that all his right, title, and interest in said property had been sold to said Farrar.

Said O. C. Farrar, after purchasing the life estate of Mary E. Dickens, and the interest of M. L. Bourne, John L. Bridgers, Jr., and Routh Hassardshort, believing that he had a good and indefeasible deed in fee simple for said real estate, purchased 41 feet of an adjoining lot owned by A. Braswell and built on the whole lot a three-story brick hotel, with stores on the ground floor.

Routh Hassardshort died September, 1907, leaving as her only heir at law, a daughter, Kate Hassardshort, who died without issue 10 December, 1910, and Mary E. Dickens, the life tenant, died 16 December, 1916.

This is an action by the plaintiffs Bridgers and Bourne to recover the one-third interest which Routh Hassardshort would have had in said property if she had survived the life tenant, alleging that it was not conveyed by their deeds to O. C. Farrar of their interest in the said property. The judge being of opinion with the plaintiff, the only issue submitted to the jury was in reference to the width of the lot.

Judgment for plaintiffs; appeal by defendants.

Jos. B. Cheshire, Jr., and Allsbrook & Philips for plaintiffs.
W. O. Howard and James Pender for defendants.

CLARK, C. J. The appeal presents two questions:

(1) Do the deeds from Bridgers and Bourne pass their contingent interest in the share devised to Routh Hassardshort by way of equitable assignment?

(2) Bridgers having described his interest as two-thirds, and warranted it, is he estopped as to one-half, which finally vested in him under the will of K. H. Dickens on the death of Routh Hassardshort?

If this property had been devised to Mary E. Dickens for life, with remainder to the three parties named, then a conveyance by either one

of the three of all "his right and interest" in said property would have conveyed only the interest which he had at the time of such conveyance, for the possibility that Mrs. Hassardshort and her daughter should die without selling or devising the property was not an interest therein.

But by the will of K. H. Dickens each of the devisees acquired something more than a one-third interest in said property. He devised to Bridgers and Bourne a contingent interest in Mrs. Hassardshort's one-third, of which neither she nor her daughter could deprive them, either by conveyance or by will.

This contingent interest was not subject to sale under execution, but nevertheless it could be conveyed, and was conveyed by the deed embracing "All their right, title, and interest in said property." In *Hobgood v. Hobgood,* 169 N. C., 489, it is said by *Hoke, J.,* "Our decisions upon the subject are to the effect that when the holders of a contingent estate are specified and known, they may assign and convey it, and, in absence of fraud or imposition, when such deed is made, it will conclude all who must claim under the grantors, even though the conveyance is without warranty or any valuable consideration moving between the parties," stating that this has been held in *Kornegay v. Miller,* 137 N. C., 659, in which case "The contingent conveyance of Annie Slocum was held to pass by her quitclaim deed, and for the recited consideration of $1." In the present case the consideration was $9,000, and there was a warranty, and it was further admitted that there was no fraud or imposition. *Judge Hoke* further stated that there "were many decisions that in order to validate the conveyance of a contingent interest, there must have been a valuable consideration or a warranty, estopping the heir by way of rebuttal," citing *Wright v. Brown,* 116 N. C., 26; *Foster v. Hackett,* 112 N. C., 546; *Watson v. Smith,* 110 N. C., 6; *Southerland v. Stout,* 68 N. C., 446; but he added "that a majority of the Court, after full consideration, had come to a different conclusion," in *Kornegay v. Miller, supra,* and "that case should be no longer questioned, and might be considered by the profession as a rule of property." It will be seen that the dissent in *Kornegay v. Miller* has no bearing on this case for the further reason that here there was a valuable consideration and a warranty. In that case the conveyance of the contingent estate was held valid by way of an equitable assignment, though there was no warranty.

In *Smith v. Moore,* 142 N. C., 299, it was held that the deed passed the contingent remainder by way of equitable assignment, and did not operate merely as an executory contract to convey. In *Gray v. Hawkins,* 133 N. C., 4, under a devise such as in this case, the life tenant and the remainderman joined in a deed conveying the land with a warranty. It was held that the deed passed the fee simple.

In *Foster v. Hackett,* 112 N. C., 555, it was held that a warranty deed by one having only a contingent remainder passed the title by way of estoppel to the grantee as soon as the remainder vested by the happening of the contingency upon which such vesting depended. To the same purport as the above decisions, *Bowen v. Hackney,* 136 N. C., 193; *Brown v. Dail,* 117 N. C., 43; *Watson v. Smith, supra.*

The plaintiffs insist that the deeds of all three remaindermen—Bridgers and wife, Mrs. Hassardshort and husband, and Bourne, commissioner—conveyed only the two-thirds interest vested in Bridgers and Bourne, but did not convey their contingent interest in the one-third devised to Mrs. Hassardshort. They concede the deeds passed whatever interest Bridgers and Bourne had, except their contingent interest in the one-third devised to Mrs. Hassardshort. But what interest did Bridgers and Bourne have? Each had a contingent remainder in one-third dependent upon their surviving the life tenant, or leaving issue surviving her. Each had also a contingent remainder as survivor in the one-third devised to Mrs. Hassardshort, dependent upon their surviving the life tenant, and upon Mrs. Hassardshort not surviving the life tenant, and leaving no issue surviving her. Both interests were contingent.

If the deeds passed the plaintiffs' contingent interest as to one-third devised to each, it must have passed their contingent interests in the one-third devised to Mrs. Hassardshort. The joint deed of Bridgers and Mrs. Hassardshort conveyed "All their interest, . . . being an undivided two-thirds," and the Bourne deed, "All his rights, title, and interest, being one-third interest, it being the *identical real estate devised by K. H. Dickens* to said L. M. Bourne, and reference is hereby made to said will and testament." These deeds show no intent to except their interest in Mrs. Hassardshort's one-third. The deed in which Bridgers joined conveyed two-thirds, and warranted it, and the Bourne deed, while describing it as being one-third, further described it as "The identical real estate devised to Bourne by Dickens," and reference was made to the will.

The words, "All the interest" and "All their right, title, and interest," control even if the interest described in the Bourne deed was more than one-third. In *Murphy v. Murphy,* 132 N. C., 360, where the grantor owning an undivided one-fifth interest in a tract of land, executed a deed of his entire interest in the land, but described it as being a one-sixth undivided interest, it was held that his deed passed his whole interest in the land. The reason is given in *Cox v. McGowan,* 116 N. C., 131, that "when language in a deed is of doubtful meaning, that which is most favorable to the grantee will control."

The words, "All their interest," and "All their right, title, and interest" are inconsistent with the contention that Bridgers and Bourne conveyed only their contingent interest in one-third each, and not their contingent interest in the entire property. Bridgers joined in a deed which warranted and conveyed two-thirds, but his interest proved to be only one-half. Bourne's deed described the interest conveyed by him as a one-third, but the happening of the contingency devolved upon him also one-half, which, under the ruling in *Murphy v. Murphy, supra,* passed to Farrar by his deed.

The conveyance of "All the grantor's right, title, and interest in certain described property is a conveyance of all his *estate* in such property." 13 Cyc., 655. In construing the word "interest" in a statute, it was held to include a contingent remainder, *Young v. Young,* 89 Va., 675; 23 L. R. A., 642; and includes also every right, legal and equitable. *Hurst v. Hurst,* 7 W. Va., 289.

The Bourne deed, conveying "all right, title, and interest of L. M. Bourne," and describing this as "being the identical real estate devised by the late K. H. Dickens to said L. M. Bourne," conveyed to Farrar whatever interest was devised to Bourne by Dickens.

We concur with the learned counsel for the defendant that we have been unable to find any case holding that a conveyance of "all my interest" does not include a contingent remainder. On the contrary, the cases above cited show that this is equivalent to conveying, as to the grantor, his *estate* in the property.

The plaintiffs rely upon *Blanchard v. Brooks,* 12 Pick., 47, that where there was a deed of all the grantor's right, title, and interest with warranty, only the vested interest passed, on the ground that by the common law, a contingent remainder could not be conveyed directly by deed, and, therefore, the warranty protected only the vested remainder. But later the same Court held that a contingent remainder can be conveyed if the person who is to take the remainder is definitely ascertained. *Putman v. Story,* 132 Mass., 205.

The plaintiffs also cite *Gilbert v. James,* 86 N. C., 249, where the grantee conveyed all his right, title, and interest, and later acquired an interest by descent. The Court pointed out that the distinction is that he acquired the latter interest from some other source, and did not own it when he made the deed, and hence it did not pass. But in this case both the interest in the one-third and the contingent in the rest of the devise were acquired at one and the same time and under the same instrument—the will of K. H. Dickens, though the extent of such interest was not demonstrated, as to either contingent estate, until the death of the life tenant.

The Bridgers deed having warranted his interest, which he describes as "a two-thirds undivided interest," he is estopped to claim any interest in the land. Where a party owned one-fourth and conveyed one-half, and later inherited another fourth, he is held estopped. *Buchanan v. Harrington*, 141 N. C., 39; *Halliburton v. Slagle*, 132 N. C., 950; *Burns v. Womble*, 131 N. C., 175.

It is true that in the Bourne deed there is no warranty, but the property ordered to be sold by a decree of the court, and which the commissioner conveyed, was described as "the identical real estate devised by the late K. H. Dickens to the said L. M. Bourne," which meant the whole interest which he received under the will.

The deeds to O. C. Farrar by the life tenant and all three of the remaindermen were evidently intended by all the parties, and both sides, to convey to Farrar the entire interest in the land in question as fully as it was devised by K. H. Dickens.

It is unnecessary to discuss the exceptions as to the issue in regard to the width of the lot. There is error, and it will be entered here.

Action dismissed.

IN RE WILL OF MILTON R. LOWE.

(Filed 6 October, 1920.)

Wills—Caveat—Undue Influence—Suggestions to Make Will—Physicians.

A suggestion by a physician to his patient to write a will, after telling him he would not live, is not evidence of undue influence to set aside the will made in consequence, when the mental condition of the testator was sufficient at the time, and he, without intimation from the physician or others, selected the beneficiaries and gave each of them the portion of his estate they were to take.

BROWN, J., concurring; WALKER, J., dissenting; ALLEN, J., concurring in dissenting opinion.

APPEAL of caveators from *Stacy, J.*, at January Term, 1920, of PERQUIMANS.

Caveat to the will of Milton R. Lowe, heard before *Stacy, J.*, and a jury, at January Term, 1920, of Perquimans. The jury found that the execution of the paper-writing purporting to be his last will and testament was not procured by fraud and undue influence, as alleged by the caveators, that at the time of its execution he had sufficient capacity to execute the same, and that the said paper-writing, and every part thereof, was the last will and testament of Milton R. Lowe. Judgment accordingly. Appeal by caveators.

Ward & Grimes, Charles Whedbee, and Ehringhaus & Small for propounders.

Aydlett & Simpson and Meekins & McMullan for caveators.

CLARK, C. J. The testator, a bachelor 62 years of age, died 31 October, 1918, leaving neither brother nor sister, and by this will devised his property to his nearest living kin, Mrs. Jordan and daughters, one of whom was an invalid, and her son, with a family. He also left $1,000 each to two churches in the county, of the communion to which he belonged, and $500 to the widow of another cousin. His other relatives were the children of other first cousins of whom there were eight, all of whom predeceased him, some of them having moved away, and some leaving no children. The testator lived much to himself, and for the last five or six years was not in good health.

The will was written by a member of the bar in good standing, whose testimony, together with that of a tenant who lived on his land a few hundred yards from him, if believed, showed the testator was entirely uninfluenced, and was possessed of a sound and disposing mind when he executed the will. He was taken ill on 29 September with pneumonia. On 17 October his physician informed him that he could not live, and suggested that he write his will, and thereupon he sent for a lawyer, who drew the will under his directions, and, according to the testimony, entirely without suggestion from any one. Testator died 31 October. The attack is made by collateral relations on the father's side, Mrs. Jordan being his only living first cousin, and was on the mother's side.

There was conflict of evidence as to his competency to make a will, which the jury found in the affirmative. The sole allegation as to undue influence was that the physician who had attended him for years suggested to him that he should make a will, and was closeted with him with the doors shut for a few moments. There is no evidence to show that at any time the physician suggested to him any provision in the will, and he testified that he did not. The physician was not devisee in the will, but was designated therein as his executor. He was not present when the will was written.

There are many exceptions and voluminous testimony, but the law involved is practically reduced to one point, which is that the court instructed the jury that if they should find that the physician merely suggested to the testator the making of his will, but did not suggest how he should make it, nor any of the provisions therein, that this would not be undue influence. If merely to advise a friend to make a will invalidates it, many wills will be made void.

"The influence which is exerted merely to induce the making of a will, while leaving the testator free from influence as to the provisions thereof, is not undue influence in the legal sense." *Struth v. Decker*, 100 Md., 368.

"Mere advice or suggestion, where directed only to the making of a will, in general, does not constitute undue influence unless so strongly and persistently urged that the testator was unable to resist the adopting it." 40 Cyc., 1146, and notes 57 and 62. "A will is not executed under undue influence because a person, at instance of beneficiaries named therein asks the testator to make a will when nothing was said by them to such person, or by him to testator, as to what the will should contain." *In re Seagrist,* 37 N. Y. Supp., 496; Aff. 153 N. Y., 682.

After the fullest consideration of all the exceptions, we find

No error.

BROWN, J., concurring: I did not have the advantage of hearing the argument in this case, but as my brethren are equally divided, from necessity I must give the casting vote.

After a careful examination of the record and briefs, I am convinced that there is no evidence of undue influence. It is therefore immaterial whether his Honor erred or not in his instruction upon the first issue, the jury having found in response to the second issue that the testator had mental capacity sufficient to execute the will. The contention is that the undue influence was exerted by Dr. Smith in an effort to induce the testator to make a will. There is evidence that the physician advised the testator that he could not probably recover and pressed upon him the necessity of making a will, and that the physician brought a lawyer to the testator for that purpose. There is not a scintilla of evidence that Dr. Smith exerted any influence whatever as to what disposition the testator should make of his property. Not a single devise appears to have been the result of even a suggestion upon the part of the doctor. There is no evidence that the influence of the physician was of such an overpowering kind that it subjugated the mind of the testator and made him express the will of the physician rather than his own. It seems to be very generally held that advice or suggestion do not constitute undue influence unless they are so strongly urged that the testator is unable to resist adopting them. *Yorty v. Webster,* 205 Ill., 630; *Herbert v. Long,* 15 Ky., 427; *O'Brien's Appeal,* 100 Me., 156.

This rule is especially true where the suggestion is directed only to the making of a will in general, and not as to what it should contain. It is not contended that Dr. Smith exerted his influence in favor of any particular person. There is not a scintilla of evidence that he exerted any influence whatever in shaping the disposition made of the testator's property. It is contended that when he urged the testator to make a will that he was using his influence adversely to the interest of the heirs at law. I am not impressed with the force of this suggestion for the reason that the testator had a perfect right to devise his property to his

heirs at law if he saw fit to do so. There is nothing in the record tending to prove that there was any influence exerted upon the testator to prevent such devise.

The testimony of Mr. Whedbee, who wrote the will, and who is a lawyer well known to be of the highest personal honor, indicates clearly that the testator knew to whom he was giving his property, and the extent of his benefactions. He remembered the churches that he was associated with and the parties nearest in blood and affection. The relatives to whom he gave his property, as soon as they heard of his sickness, came from a distance and braved the dangers attendant upon his disease. They stayed with and nursed him, though one of them was herself an invalid. These objects of his bounty were not with him at the time, and never knew of the execution of the will until after it was made.

I am of the opinion that the judgment should be affirmed.

WALKER, J., dissenting: It is not possible for me to assent to the last proposition stated in the opinion of the Court, that where the execution of a will is caused by undue influence it does not invalidate it, unless also it extends to the provisions of the instrument, and I do not think that the authorities cited by the Court sustain the principle now distinctly asserted, for the first time. Although the undue influence may be confined to the mere making of the will, it must be seen at once that the provisions in it would not have been made had its execution not have been induced wrongfully. The prejudice is to those heirs, who, by the destruction of the course of descent, are disinherited by the will. If the testator had made the will by reason of fraud or duress, the principle must be the same as if it had been by undue influence. Any difference must be in kind, and not in degree, the result being the same. A man may make a will under duress, or the fear of physical injury threatened by another if he does not, and may provide therein only for particular persons, not being induced to favor them by any special undue influence exercised for the purpose of having the particular devise, or bequest, made, when the testator did not want to make a will at all, but wanted his heirs to have his property. In such a case, his act is not voluntary. He chose to make it as he did because he was compelled to make *a* will, and yet if he had been allowed to follow his own inclination there would have been no will, and consequently no devise. The heirs are just as surely deprived of their inheritance wrongfully as if the wrongdoer had coerced him to make a particular disposition of his property. Any other doctrine would be an extremely dangerous one. A man should be perfectly free in the entire process of disposition. This case is a striking illustration of the correctness of my position. The testator here was not satisfied with the will, and so stated himself, and expressed his sorrow

at having made a will at all. He was acting throughout under the effect upon his will power which was caused by the undue influence, and this was as effectual to subject it to that influence as if the undue influence has been exerted only to cause a special disposition of his property.

In the *New York case,* cited by the Court (37 N. Y. Suppl., 496), there was no undue influence exerted to have the testator make the will; he merely requested the making of the will by the testator, but not unduly. The head-note is thus: "A will is not open to the objection of having been executed under undue influence because, at the request of beneficiaries named therein, a person asked testator to make a will, nothing being said by them to such person, or by him to testator, as to what the will should contain." And the same was the ruling in the *Maryland case* (100 Md., 368), as the influence employed to induce the making of the will was not undue, because undue influence is a coercion produced by importunity, or by a silent, resistless power, which the strong will often exercise over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear; whatever destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left to himself; that which overpowers the will without convincing the judgment; an influence which acts to the injury of the person who is swayed by it, or of those whom he would, if left to himself, have benefited. 39 Cyc., 681-682. We said of this undue influence, that to constitute such influence it is not necessarily required that there should exist moral terpitude, or even an improper motive; but if a person, from the best of motives, having obtained a dominant influence over the mind of the grantor, thereby induces him to execute a deed or other instrument materially affecting his rights, which he would not have made otherwise, exercising the influence obtained to such an extent that the mind and will of the grantor is effaced or supplanted in the transaction so that the instrument, while professing to be the act and deed of the grantor, in fact and truth only expresses the mind and will of the third person, the actor who procured the result. *Myatt v. Myatt,* 149 N. C., 137, 141; 62 S. E., 887. Undue influence exists wherever, through weakness and dependence, or implicit reliance by one on the good faith of another, the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment. *Caven v. Agnew,* 186 Pa. St., 134, 328; *In re Douglass,* 162 Pa. St., 567, 569. There can be no fatally undue influence without a person incapable of protecting himself as well as a wrongdoer to be resisted. *Latham v. Udell,* 38 Mich., 238, 242. Undue influence means wrongful influence. But influence secured through affection or persuasion is not wrongful. *Sears v. Vaughan,* 230 Ill., 572, 589; *Dowie v. Sutton,* 227 Ill., 183, 197; *Burt v. Quisenberry,* 132 Ill., 385, 399.

But in the New York and Maryland cases, there was no undue influence practiced to induce the making of the will, so that the question did not arise, but the context of those decisions indicate that, if there had been undue influence, the Courts would have held the wills to be void. I have searched most carefully and exhaustively to find a case in the reports, or an intimation in the text-books, to the effect that undue influence employed to force the making of a will, without any being exerted to shape its provisions, will not invalidate the instrument, but my search has been in vain, and I can safely affirm that no such case or authority can be found at all, and, at least, no such well considered precedent.

The effect of the ruling here will be to say that if a man makes his will while under the control of undue influence, it will not be set aside, if the influence did not govern him in the disposition of his property, when, if he had not made the will at all, the heirs would not be deprived of their inheritance, because no disposition of his property would have occurred. It follows that the undue influence indirectly caused the particular disposition of his property to be made, and this being both logically and practically true, how can it make any difference whether the disposition of it was caused directly or indirectly by the wrongful influence.

The judge charged the jury against the view I have taken of the matter, when there was evidence to show undue influence in procuring the execution of the will alone, and in this there was error prejudicial to the caveators. I do not mean to imply that there was no evidence of undue influence exerted to control the provisions of the will in favor of certain persons, for I think there was, and strong evidence of such wrongful and illegal conduct, but I have sought to confine myself to the instructions as to the making of the will itself without regard to its contents or the special disposition of testator's property, for the court charged plainly and emphatically that such influence would not be undue and would not vitiate the will. This, in my opinion, was palpable error, because the result was the same even if the physician did not go beyond this and unduly induce the testator to will his estate in a particular way. I am so sure in my mind of this being the law, that I might well stop here and rest my dissent solely upon this ground. There is evidence that the testator had persistently pleaded to have the will returned to him that he might destroy it, as he regretted that he had made it, showing that he was unwilling that his property should go as the will directed, and even if he wished only to change it, as propounders contend, how, and in what way, did he wish to change it. He could not even change it very well unless he gave a different direction in his will, that is, to his last desire as to the disposition of his property. Morphine was ad-

ministered to him for the ostensible purpose, as caveators contend, that his nerves and sensibilities might be deadened, so that he might painlessly pass through what would otherwise have been to him the terrible agony of death. All the circumstances attending the execution of this will cast a grave suspicion upon the transaction, and there was more than ample evidence that it was not the will of the testator. When he had passed from under the baneful influence and regained possession, as well as he could, of his normal faculties, and of his self-control, his first appeal was for the document which wrongly expressed his last and true desire, that being for a just and fair distribution of his property among those of his blood according to the provisions of the law, which he thought was sometimes wiser than testator's, as it often is in many instances. Such a disposition of his property was, at least, more in consonance with his wishes, and his sense of justice and right.

It will better illustrate my view if I make reference here to some of the outstanding facts in this very important case:

Milton R. Lowe, the testator, died on 31 October, 1918. At the time of his death he was a bachelor, 62 years of age. Practically all of his life he had lived alone, having hardly had any association with others. During the last five or six years of his life he had been in extremely feeble health; suffering from Bright's disease, a dilated heart, and fainting spells, and lapses of memory, and being in a generally debilitated condition. On 29 September he was stricken down with pneumonia, which shortly afterwards was complicated with gangrene of the lungs, and he was "from the first as sick a man as ever died." During the whole period of his sickness he was very weak, and grew progressively worse, being unable to raise himself in bed, and speaking to those about him only occasionally when aroused temporarily for some purpose, or to make some request. On 17 October he was informed by the doctor, who had been his confidential physician for years, and who attended him during his last illness, that he was bound to die. This greatly excited the testator, and his whole soul and mind seemed to be concentrated with fear and anxiety upon the hereafter, without further thought of earthly things. On the same day the doctor, having administered professionally to the needs of the testator, came out of the sick room on to the porch, and inquired of testator's nurse and male attendance if he ever made a will. Being informed that he had not, the doctor then inquired who were his nearest relatives, and having been misinformed that the Jordans, the propounders, were his nearest relatives, requested the attendants to remain away from the sick room as he wished to have some talk with the old man. The doctor then returned to the sick room, and, contrary to his usual custom, closed the door, presumably so that they on the porch could not hear. He remained in the sick room on

this occasion about thirty minutes. During this time he was heard to repeatedly and insistently urge upon the testator that he make a will. The testator was repeatedly heard to protest against making a will, stating that he would wait until he was better, and that if he then decided to make a will, it would be all right. Parts only of this conversation were heard by the witnesses. On the next day the doctor returned, bringing an attorney with him. On this occasion he again, after administering professionally to the testator, requested the attendants to remain outside of the room, and again closed the door. On this occasion he remained with the testator about forty minutes, and was heard again urgently and repeatedly insisting that the testator make a will. Testator was again heard protesting, as on the first occasion. After about forty minutes of this colloquy, the doctor emerged from the sick room, and in response to an inquiry from the attorney, stated that the testator had decided to make a will. The attorney then, very properly, went into the sick room, and wrote the paper-writing propounded as the testator's will; the testator naming as his chief beneficiaries those who the doctor had been misinformed were his nearest kin, and naming the doctor as executor. During the writing of the will, the doctor was constantly present, and after it was signed and witnessed, the testator, who had been raised bodily in bed for the purpose of signing it, folded it and handed it to the doctor, who immediately bade the testator farewell. On the night before the will was written the testator seemed to be unusually nervous and upset, and was heard praying, muttering, and moaning to himself all night. During the ten days which elapsed between making the will and the death of the testator, he repeatedly told witnesses that the doctor had caused him to make a will, which he didn't intend to make; that he wished to get hold of it to destroy it, and furthermore made statements repeatedly that he had always liked the doctor before, but didn't like him now. He further told one of the witnesses that the doctor had told him during the two conversations aforesaid that if he didn't make a will his heirs would be litigating over the property, and the lawyers would get half of it. All the property owned by the testator at his death he got from his father, with the exception of one farm, which he purchased with the accumulations from his father's property. His heirs at law and next of kin were two first cousins on his mother's side, a child of another first cousin on his mother's side, and the children of six first cousins on his father's side. All of his kindred on his father's side were disinherited, and all upon his mother's side except Mrs. Louisa Jordan, one of his first cousins on his mother's side, and her four grown children. Of those disinherited upon his father's side, there were several sets of minor children; some nearly, and some absolutely dependent; while the Jordans

were not only possessed of some little property, but three of them were earning good salaries. At the time of the testator's death, the Jordans had been living in Norfolk, Va., about a year, during which time the testator had not seen them.

This recital of only some of the facts, there being others which reinforce them, shows how necessary it was that the charge of the judge should have been given with careful and clear discrimination, and how fatal to the caveators was the instruction as to undue influence, which was merely exerted in securing the making of the will.

Lastly, let me say, that testimony of the doctor as to the mental capacity of the testator, and relevant to that issue, was permitted, by inadvertence, of course, to be used on the issue as to undue influence, and evidence as to undue influence was permitted to be given by him, when he was an incompetent witness, all against the objection of the caveators. It is difficult sometimes to separate the testimony and assign each part of it to its proper place and function, but it must be done, else the jury will be free to decide the issues upon incompetent evidence. What the person, whose mental condition is in question, says may be considered by the jury as evidence of such condition, although it is not competent as evidence of the truth of what he says, and the court should carefully discriminate between the two, but the evidence should be admitted, as to the state of his mind and his capacity to make a will, deed, or contract, or to commit a crime (*capax doli*), even though his statements may be self-serving, or otherwise incompetent as evidence of their truth. Sometimes, and very generally, the falsity of them is the very thing that indicates aberration of the mind or impaired mental faculties. If it is expert testimony that is resorted to for the purpose of showing mental condition, the witness must be allowed freely to state not only what the subject stated to him, but what he did, so that the value of his opinion may the more clearly appear. This is elementary learning, and hardly calls for the citation of authority. Rogers on Expert Testimony (2 ed.), pp. 479, 480; especially the opinion of *Justice Washington* in *Lessees of Hoge v. Fisher,* 1 Peters' C. C. (U. S.), 163. The value of the expert's opinion depends very largely upon his opportunities for seeing and conversing with the person whose mental condition is the subject of inquiry, as appears in the authorities cited, and as common sense suggests, but while this is true, the judge should most carefully instruct and caution the jury not to consider the testimony in the light of evidence as to facts detailed by the witnesses, but only as bearing upon the question of mental condition. These principles are strongly supported by the clear and emphatic language of *Chief Justice Smith* in *McLeary v. Norment,* 84 N. C., 235, a case which has been much cited and approved by this Court. He said: "The conversation offered was

not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body and mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must conclusions of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which these are the outward manifestations. The admissibility of the witness's opinion, resting, as it necessarily must, upon past opportunities of observing one's conduct, requires, in order to a correct estimate of the value of the opinion, an inquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded." One of the last cases affirming it is *Bissett v. Bailey,* 176 N. C., 43, where the point here considered is stated and fully explained with reference to *McLeary v. Norment.* The case of *Bissett v. Bailey, supra,* is also authority to the effect that such testimony is not competent in cases when the issue is as to undue influence and the witness is interested in the event of the action, testifying to transactions or communications with the deceased, citing *Hathaway v. Hathaway,* 91 N. C., 139; *Linebarger v. Linebarger,* 143 N. C., 229; *Bunn v. Todd,* 107 N. C., 266; and especially *In re Chrisman's Will,* 175 N. C., 420, where the point was directly raised and decided, *Justice Brown* writing the opinion.

There are other exceptions to evidence and to the charge deserving attention, but to consider them in detail would extend this opinion far beyond its proper limits. The principal error is the instruction we have already fully considered as to undue influence merely in the making of the will.

The testator at the time he signed the instrument had been greatly wasted by disease, which had well nigh sapped his vitality. He was entirely too weak even to resist persuasion or importunity, and certainly not strong enough to overcome the dominating influence of one who had all his faculties unimpaired, both mental and physical, and who had been his attending physician. He was verily fast approaching the shadow of death, almost in its immediate presence, as he had been advised, and was much agitated and unnerved by his sudden knowledge of it. He was in no condition to act with a proper sense of his duty to those who were entitled to favorable consideration in the disposition of his estate. His declaration that he did not want to make a will, and his call for the will that he might destroy it, or even change it, showed plainly that undue influence had done its work, and that his free agency

had been subdued by a superior power operating upon him, when he was as clay in the hands of the potter, ready to yield without any attempt at opposition to any request as to what he should do. I do not say that those were the facts, but that there was strong evidence of them, which was rendered of little or no force by the errors committed. There is evidence, which if believed, shows that the instrument was not his voluntary and untrammelled act, as a will should be, but the product of another's will, to whose every suggestion he had readily submitted.

I am greatly perplexed to understand how it can be successfully asserted, or maintained, that there is no evidence of undue influence to make the will, when the record is replete with such evidence. It cannot be said that the making of the will was not unduly influenced and procured. His Honor assumed that there was evidence of it when he gave the instruction. There is not only ample, but abundant evidence of it, and the cries of the testator that the paper be restored to him, so that it might be canceled or destroyed, is not the least of it. It was not by any means a mere suggestion to the testator to make the will, but far more than that. Many wills have been set aside upon far less evidence. Of course, the testator could will his estate to his heirs, but he did not do so, and if he had done so, they would still take as heirs, as if by descent. He willed it to some of his heirs, but not, in a natural way, to those in the paternal links, who would have taken it, had he not made a will, as it would have gone to those who were of the blood of the first purchaser, his father, and they have been prejudiced. By undue influence in procuring the making of the will, that line of descent has been ignored.

Suggestion, or fair persuasion, which does not subject the testator's will to that of a third person, making it the will of the latter and not that of the testator, will not, of course, do. That is not this case, but a very different one. The declarations of the testator show what influence had been exerted upon him. Nothing could manifest it more surely.

The effect of the instruction is that, if the execution of the will was "unduly influenced" by the physician, and he was appointed executor by reason of it, his appointment would be void, but the will would still be valid, if the disposition of the testator's property was not unduly influenced, which was exactly the same as saying that, if the making of the will was obtained by undue influence, the will would nevertheless be valid unless the particular disposition of his property came under the same influence and was induced by it, except as to the executor's appointment.

My conclusion is that there should be another trial of the case for the errors pointed out.

ALLEN, J., concurs in the dissenting opinion of WALKER, J.

MRS. MARY W. DUFFY v. MRS. EMMA HARTSFIELD ET AL.

(Filed 8 October, 1920.)

1. Pleadings—Nonsuit—Appeal and Error—Objections and Exceptions—Final Judgment.

Exception to the refusal of the trial judge to grant a motion for judgment of nonsuit upon the pleadings should be noted, and appeal taken from the final judgment.

2. Lessor and Lessee—Landlord and Tenant—Contracts—Damages—Crops—Caveat Emptor.

It is incumbent upon the lessee of lands to observe the lands beforehand with regard to fences and other like or apparent matters, and protect himself in his lease as to their repair, etc., and when he has not done so the doctrine of *caveat emptor* applies and he may not recover of his lessor damages to his crops caused by the condition of the fence during the period of the lease for farming purposes.

APPEAL by defendant from *Connor, J.*, at the June Term, 1920, of CRAVEN.

This is an action to recover rent.

The plaintiff alleges in her complaint that prior to 1 January, 1918, the plaintiff rented to the defendant, J. L. Hartsfield, a certain farm in Craven County for the year 1918 for the sum of $250, and that the defendant went into possession of the land and cultivated it and disposed of the crops without paying the rent, or accounting for the same.

The defendant, answering the complaint, admitted that he had rented the farm from the plaintiff, and from his codefendant for *agricultural purposes* during the year 1918, and that he went into possession of it and cultivated it, and admitted that he removed the crops therefrom, but denied that such removal was wrongful, and as a further defense alleged that after he had made all preparations to cultivate the farm he discovered that the fences were insufficient and broken down and unfit, to such an extent that cattle entered upon the lands and did great damage to the crops, and that he repeatedly made demands upon the plaintiff to provide sufficient fences to ward off the stock, and that she repeatedly refused to do so.

The defendant also alleges additional damages by reason of the loss of fertilizers and seed, but all growing out of the alleged failure of duty on the part of the plaintiff to repair the fences.

The plaintiff moved for judgment on the pleadings on the ground that the defendant admitted that the rent was due and unpaid, and that his alleged counterclaim for damages did not state a cause of action.

The motion was refused, and the plaintiff excepted and appealed.

R. A. Nunn for plaintiff.
Guion & Guion for defendant.

ALLEN, J. The refusal of a motion for judgment on the pleadings is not appealable. This is expressly decided in *Cameron v. Bennett,* 110 N. C., 277; *Duffy v. Meadows,* 131 N. C., 33; and *Barbee v. Penny,* 174 N. C., 572.

The reason for the rule is stated in these cases, and it is pointed out that the correct practice is to note an exception to the refusal to grant the motion, which will be considered on appeal from the final judgment.

We will, however, express an opinion on the merits of the motion, as it will doubtless prevent further litigation.

The principle is well settled that "In the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant that the premises will be kept in repair, or that the same are fit or suitable for the purposes for which they are rented," and that, " 'Ordinarily the doctrine of *caveat emptor* applies to leases of realty, and throws on the lessee the responsibility of examining as to existence of defects on the rented premises and providing against their ill effects.' Propositions that are approved by direct decision with us, and which prevail generally in jurisdictions where the rights of the parties are dependent on common-law principles. *Smithfield Improvement Co. v. Coley-Bardin,* 156 N. C., 255; *Edwards v. R. R.,* 98 N. Y., 245; *Mullen v. Rainear,* 45 N. J. L., 520; *Doyle v. R. R.,* 147 U. S., 413; *Walsh v. Schmidt,* 206 Mass, 405; *Thomas v. Lane,* 21 Mass., 47; *Philan v. Fitzpatrick,* 188 Mass., 237; *Calvin v. Beals,* 187 Mass., 250; *Howard v. Water Power Co.,* 75 Wash., 255; 3 Sherman & Redford on Negligence, sec. 709; 16 R. C. L., 772; in the Landlord and Tenant, sec. 268." *Fields v. Ogburn,* 178 N. C., 408.

As stated in 16 R. C. L., 1032, the tenant "takes the premises for better or for worse, and cannot involve his landlord in expense for repairs without his consent."

The facts alleged by the defendant bring him clearly within this rule, and there is greater reason for enforcing it against him because the defects of which he complains, insufficient fences, were apparent and easily discovered before he made the contract of renting, and he had ample opportunity to protect himself by covenants in the lease, and having failed to do so, he must abide by the law.

We are of opinion, therefore, that the defendant has not alleged a counterclaim which he can maintain, and that the plaintiff is entitled to judgment for the rent due.

Appeal dismissed.

E. C. TISDALE v. GEORGE EUBANKS.

(Filed 13 October, 1920.)

1. Attachment—Libel and Slander—Slander—Injury to Person—Statutes.

The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and will sustain a proceeding for an attachment within the intent and meaning of Rev., 728 (4), as an "injury to the person by ..... wrongful act."

2. Same—History of Legislation.

A history of the statutes providing for the writ of attachment and the various amendments to the same, Code of 1868, sec. 197; Code of 1883, sec. 347; Laws of 1893, ch. 77, shows that the present statute is in full support of the above position, and the objection that it is but a return to legislation existing under the Code of 1856, ch. 7, sec. 16, granting the writ for injuries only to "proper person and property," is untenable. *Webb v. Bowler*, 50 N. C., 362, cited, distinguished, and applied.

3. Courts—Jurisdiction—Special Appearance—Motions to Discharge—Attachment—Slander.

Where the jurisdiction of the court in an action for slander depends upon the validity of the attachment under our statute, Rev., 728 (4), the defendant may challenge the right of the court to proceed by special appearance, and move to discharge the attachment and dismiss the case without subjecting himself, generally, to the jurisdiction of the court.

CIVIL ACTION for libel, heard on motion to discharge an attachment transferred from the clerk, before *Bond, J.*, at September Term, 1920, of CRAVEN.

On the hearing it was made to appear that the action is for libel; that no personal summons has been thus far obtained, and plaintiff is proceeding by publication; that, on proper affidavits, plaintiff has procured an attachment in the cause, and same has been levied on property of the defendant, situate within the jurisdiction of the court; that defendant has entered a special appearance, and moved to discharge the attachment on the ground that, under the law of this State, no attachment lies in the action for libel, and the court being of this opinion, judgment was entered that the writ of attachment be discharged, and that, thus far, no personal service of summons had been obtained.

Plaintiff, having duly excepted, appealed.

R. E. Whitehurst and Guion & Guion for plaintiff.
D. L. Ward and Moore & Dunn for defendant.

HOKE, J. Our statute on the subject, Rev., 728, provides that an attachment lies in actions for:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.

3. Any other injury to real or personal property in consequence of negligence, fraud, or other wrongful act.

4. Any injury to the person by negligence or wrongful act.

The approved writers on the subject, Blackstone, Kent, Cooley, and others, generally maintain the security of one's reputation and good name as among the personal rights of the citizen entitled to the protection of the law, and, in this view, the language of the fourth clause of this section is broad enough to include, and, in our opinion, does include and extend to an action for libel.

The decided cases on the subject, in this and other actions involving substantially the same principle, are to like effect, *Hoover v. Palmer,* 80 N. C., 313; *Riddle v. McFadden,* 201 N. Y., 215; *Times Democrat v. Moyer et al.,* 136 Fed., 761; *Johnston v. Bradstreet Co.,* 87 Ga., 79; *Varnum v. Townsend,* 23 Fla., 355; *Kenzie v. Doran,* 39 Mont., 593, and see numerous additional authorities cited in Words & Phrases, sec. 2, vol. 3, p. 1004. And, in authoritative decisions construing various bankruptcy statutes, wherein judgments and claims growing out of willful and malicious injuries to person and property are exempted from the effect and operation of a discharge, libel has been held to come within the exemption, being classed and considered as an injury to the person. *McDonald v. Brown,* 23 Rh. Is., 546; *Sanderson v. Hunt,* 116 Ky., 435; *Thompson v. Judy,* 169 Fed., 553.

In *Johnston v. Bradstreet Co., supra,* the question presented was whether a statute, withdrawing from principle of abatement, by death of the litigant, "actions for homicide, injuries to the person, and injury to property," extended to and included actions for libel, held that same came within the provisions of the law, and *Lumpkin, J.,* delivering the opinion of the Court, said:

"If, however, the meaning of the words 'injury to person' cannot be determined by the position of the amended section in the Code, it may be arrived at by reference to the common law. At common law, absolute personal rights were divided into personal security, personal liberty, and private property. The right of personal security was subdivided into protection to life, limb, body, health, and reputation. 3 Blackstone Com., 119. If the right to personal security includes reputation, then reputation is a part of the person, and an injury to the reputation is an injury to the person. Under the head of 'security in person,' Cooley includes the right to life, immunity from attacks and injuries, and to reputation. Cooley on Torts (2 ed.), 23, 24. See, also, Pollock on the Law of Torts, 7. Bouvier classes among absolute injuries to the person, batteries, injuries to health, slander, libel, and malicious prosecutions. 1 Bouvier, L. Dic. (6 ed.), 636. 'Person' is a broad term, and legally includes not only the physical body and members, but also every

bodily sense and personal attribute, among which is the reputation a man has acquired. Reputation is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or a leg. If it is not to be classed as a personal right, where does it belong? No provision has been made for any middle class of injuries between those to person and those to property, and the great body of wrongs arrange themselves under the one head or the other. Whether viewed from the artificial arrangement of law writers, or the standpoint of common sense, an injury to reputation is an injury to person. And oftentimes an injury of this sort causes far more pain and unhappiness, to say nothing of actual loss in money or property, than any physical injury could possibly occasion."

And, in *McDowell v. Brown, supra, Tillinghast, J.*, speaking to the question, said: "In view of these definitions, we think it is clear that a libel is a wrong and injury committed against the person of another. As a part of the right of personal security, the preservation of every person's good name from the vile arts of detraction is justly included, and for a violation of this right ample remedies are provided.

"The law, which is supposed to be good common sense crystallized, looks upon and treats a person's character as an inseparable part of the person himself. If that is injured, he is necessarily injured; if that is wronged, he is wronged. Indeed, it is frequently said, and with much truth, that 'Character makes the man.' And, in this connection, we may say that it is difficult to conceive of a greater injury which could be done to a person than to wrongfully and maliciously tarnish or blacken and destroy his good character in the community where he lives. Wounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person."

A history of our legislation on this subject lends support to the position, if further support were required. Under the Code of 1868, sec. 197, an attachment could only be issued in an action arising on contract for the recovery of money only, and for wrongful conversion of personal property, and construing the section, it was held that no attachment would lie for unliquidated damages, even in case of breach of contract. Later, in the Code of 1883, sec. 347, the attachment law was amended so that the writ would lie in actions to recover a sum of money only, and damages in one or more of the following causes:

1. Breach of contract, express or implied.
2. Wrongful conversion of personal property.
3. And other injury to personal property by reason of negligence, fraud, or other wrongful act.

In ch. 77, Laws 1893, the words "real or" were inserted just before personal, in clause 3 of the section, and thereafter the issuance of the writ was upheld in actions for money, and for liquidated damages in the causes specified, and none other. *Judd v. Mining Co.*, 120 N. C., 397; *Long v. Ins. Co.*, 114 N. C., 465; *Winfree v. Bagley*, 102 N. C., 515.

Again, in 1901, the attachment law was amended by adding the section substantially as it now appears in clause 4, Rev., 758: "Any injury to the person caused by negligence or wrongful act," thus showing the intent of the Legislature to broaden the right to this writ, and make the same well nigh coextensive with any well grounded demand for judgment *in personam*. And no valid reason occurs to us for distinction between actions for slander and libel, and any other demand for unascertained and unliquidated damages for injuries to the person.

"It is earnestly contended for defendant that this fourth clause of the section is but a return to the pertinent legislation on the subject as it prevailed in the Code of 1856, ch. 7, sec. 16, granting the writ for injuries to the 'proper person and property' of another, and attention is called to an intimation by *Pearson, C. J.*, then Associate Justice, in *Webb v. Bowler*, 50 N. C., 362, that the law as it then existed did not extend to slander."

As stated, the point was not presented in *Webb v. Bowler*. The statement is but an intimation of the learned judge, and, on a statute granting the writ for injuries to the "proper person of another (which might very well be restricted to physical injuries), is by no means decisive on the present law, allowing attachment in broader terms for injuries to the person by any wrongful act." And so, in reference to the argument that in the statute on arrest, the process is provided for injuries to "person and to character." The statute on arrest from the beginning was much more extensive than that on attachment, and the Legislature has since had little, if any, occasion to amend it, but the distinction adverted to should not be allowed significance in the present law, which, as we have seen, has been again and again amended, and is now expressed in language fully broad enough to include all injuries to the person.

On the record, as it now appears, the jurisdiction of the court being dependent entirely on the validity of the attachment, the authorities are to the effect that defendant, by special appearance, may challenge the right of the court to proceed by motion to discharge the attachment, and without subjecting himself generally to the jurisdiction of the court. *Davis v. Cleveland, etc., R. R.*, 217 U. S., 907; *Johnston v. Whilden*, 166 N. C., 104.

Being of opinion, however, that, under the law of this State, attachment lies in actions for libel, we hold that there was error in discharging the writ, and this will be certified that the cause be further proceeded with as the law directs.

Error.

L. BROGDEN, EXECUTOR OF ELIHU SATER ET AL., EX PARTE.

(Filed 13 October, 1920.)

1. **Wills—Sale of Lands—Conversion—Equity—Personalty—Courtesy.**

When, under the direction in the will, the lands of the testator have been sold, the property becomes personalty, and not subject to the tenancy by the courtesy of the husband of a deceased beneficiary.

2. **Wills— Devise— Sales— Named Beneficiaries— Equal Division — Per Capita—Equal Degree of Kin.**

A devise that the remainder of testator's property be sold and the proceeds equally divided between the named children of his "two sisters"; the children so named, without further light being shed upon this devise by other portions of the will, take *per capita*, the words, "children of my two sisters," being merely descriptive, and were this intent of the testator doubtful, the fact that the persons so designated were in equal degree of kin to the testator may be considered.

APPEAL by all parties, except the executor and Marcom heirs, from *Kerr, J.*, at September Term, 1920, of WAKE.

This was an action submitted without controversy, for the construction of the following clause in the will of Elihu Sater:

Item 3. "The remainder of my real estate, with all my personal property, I desire to be sold, and to be equally divided between my two sisters' children, Johnie Rogers and Fannie Buchanan, and Will Marcom, Luther Marcom, Felix Marcom, and Walter Marcom, Lena Conyers, and Lula Upchurch."

Johnie Rogers and Fannie Buchanan were the children of one of the testator's sisters, and the six others named in this item were the children of the other sister.

The executor has settled the estate and sold the land, and has in hand for distribution under said item 3 about $10,000. No other provision in the will sheds any light on this item. All the persons named in item 3 are alive except Fannie Buchanan (who died after the testator, leaving a husband, Luther Buchanan, who is a party to this action). She had seven children, one of whom, Mrs. W. T. Rowland, died before the testator, leaving five children, all of whom are under age, and are represented in this action by L. T. Buchanan as next friend duly appointed.

The other six children of Mrs. Buchanan, and also Luther Marcom, Will Marcom, Felix Marcom, Walter Marcom, Lena Conyers, and Lula Upchurch are parties to this action.

The following questions were presented to the court for its decision, upon the foregoing facts: (1) Is Luther Buchanan, husband of the said Fannie Buchanan (she having survived the said Elihu Sater), entitled to courtesy in the said fund? (2) Do the parties named in item 3 of the will take *per stirpes* or *per capita?* That is to say, does Johnie Rogers take one-eighth, or does he take one-half of one-half, and do the Marcom children take one-eighth each, or do they each one-eighth of one-half?

From the judgment thereon the parties, other than the executor and the Marcom heirs, appealed.

Winston & Brassfield for L. L. Brogden.
Douglass & Douglass for L. T. Buchanan.
Armistead Jones & Son for J. R. Rogers.
R. W. Winston for Marcom heirs.

CLARK, C. J. The court below properly held that neither of the two husbands surviving take anything as tenants by courtesy. The will having directed the realty to be sold and proceeds divided, it became personalty.

The court also properly held that the provision that the proceeds should be *equally divided* between the persons referred to should be construed as a devise *per capita,* and not to the children of the sisters *per stirpes. Culp v. Lee,* 109 N. C., 677, and numerous cases there cited. This is simply a devise to the eight persons named, the words "two sisters' children" being merely descriptive.

The words "equally divided" can mean nothing except *per capita. Hastings v. Earp,* 62 N. C., 5. Besides, the legatees are all named in the will, and such being the case, they always take *per capita. Waller v. Forsythe,* 62 N. C., 353, cited and approved, *Howell v. Tyler,* 91 N. C., 212. This is a general rule, except when a contrary intent appears "by looking into the other provisions of the will." *Howell v. Tyler, supra,* 213, citing note to *Bryan v. Scott,* 21 N. C., 155. To the same purport, *Marsh v. Dellinger,* 127 N. C., 364, and 40 Cyc., 1473, 1491, and cases cited. These legatees named are of equal degree to the testator, which is taken into consideration in cases where the intent of the testator is at all doubtful.

"Whenever, as a class, the beneficiaries are individually named or designated *by their relationship to some ancestor,* living at the date of the will, whether to the testator or to some one else, they share *per*

capita by natural inference, and not *per stirpes*. Schouler on Executors, p. 683; *Shull v. Johnson,* 55 N. C., 202.

Fannie Buchanan, who was living at the death of the testator, was entitled to one-eighth, which is to be divided between her seven children, the children of her daughter, Mrs. Rowland, taking their mother's share (one-seventh of one-eighth) between them. Her brother, Johnie Rogers, is entitled to one-eighth, and the six children of the other sister of the testator, *i. e.,* the four Marcoms, Lena Conyers, and Lula Upchurch each take an eighth.

Affirmed.

J. C. LEWIS v. F. R. NUNN AND CHARITY NUNN.

(Filed 13 October, 1920.)

1. Mortgages—Extension of Time of Payment—Contracts—Consideration.

Promise of the mortgagee to extend time to the mortgagor for the payment of the mortgage note, without money, has no legal consideration, and is unenforcible.

2. Mortgages—Serial Notes—Default—Tender.

Where several notes secured by mortgage are in series, and due at different dates, with provision that upon default in payment of one, all shall become due and payable with interest, after such default in the payment of the note first becoming due, a tender of payment of the note thus due, and interest on all of them in the series, is an insufficient tender.

3. Mortgages—Sales—Silence of Mortgagor—Equity—Estoppel.

When the mortgagor attends the sale of the land under the mortgage, and while claiming the sale to be unlawful by reason of tender of payment of the mortgage debts, stands by and says and does nothing to put bidders upon notice thereof, he will be estopped in equity, and not afterwards heard to impugn the title of the one purchasing for value and without notice of his claim.

4. Contracts—Deeds and Conveyances—Expressions of Parties—Ambiguity—Evidence.

The designation of the character of a written contract, as therein expressed by the parties, may be received as evidence thereof in case of ambiguity permitting an interpretation of the instrument.

5. Mortgages— Written Contracts— Contemporaneous Agreements— Options—Election of Rights.

A mortgagor and mortgagee, contemporaneously with the execution of the mortgage, executed a collateral written contract, called an option by the parties, and signed only by the mortgagee, giving the mortgagee the right to purchase the lands described at a certain price, in the event of the mortgagor's default in the payment of any note in a series that the mortgage secured, with further provision allowing the mortgagor to pay

this sum within a prescribed time. The mortgage was to enable the mortgagor to take up a prior mortgage, and to obtain an additional sum of money: *Held*, the mortgage and collateral written contract should be construed together, and thus interpreted, the written contract was merely an option which the optionee might elect to exercise under its provisions, or sell the lands under the terms of his mortgage.

APPEAL by plaintiff from *Daniels, J.*, at the November Term, 1919, of LENOIR.

This is an action to recover possession of a tract of land, and to declare the plaintiff the owner thereof.

The defendants, Nunn and wife, being the owners of the land, subject to a mortgage to one Edwards, procured F. F. Loftin to pay off the Edwards debt, and to make them an additional loan of $191, making the total amount due Loftin $1,075, and on 1 November, 1917, they executed a deed of trust to the Kinston Insurance and Realty Company, conveying said land to secure said debt, which was divided into four payments, $75 being due 1 November, 1918; $200 1 November, 1919; $200 1 November, 1920; $600 1 November, 1921.

The deed in trust contained provision that on failure to pay either of said notes or interest thereon when due, the whole debt should become due, and in that event authorized a sale under the power in the deed.

The defendants failed to pay the first note, and the land was sold on 15 February, 1919, when the plaintiff became the purchaser at the price of $1,805, and, having complied with the terms of the sale, a deed was executed conveying said land to him.

The defendants insist that the sale was invalid, and that they have the right to redeem on the following grounds:

1. That they tendered the amount of the first note, and interest on the whole debt, before the sale.

This contention is based on the following evidence of the defendant Nunn:

"The first note secured by the deed of trust became due on 1 November, 1918. I saw Mr. Loftin about it, and he agreed to extend, and did extend, the time of payment of the note and interest due upon the indebtedness. The matter of payment was thereafter mentioned between us, and Mr. Loftin gave further extension of time for the payment. While I was trying to get up the money to pay the note and interest agreeably to my understanding with Mr. Loftin, my attention was called to an advertisement of my said lands for sale. Soon thereafter I succeeded in getting up the money sufficient to pay the note and interest due, which I tendered to Mr. G. C. Moore, attorney for Mr. F. F. Loftin, on 8 February, 1919, his said attorney, Mr. Moore, at the time making the following entry on the deed of trust:

"'2/8/1919, Charles F. Dunn, for Fred Nunn, offered $143.71 in cash in settlement of the $75 note, and interest on same to date; and interest on the balance until 11/1/18. G. G. M.'

"At the time the land was being advertised for sale under the deed of trust, but the sale day had not arrived. I attended the sale and saw Mr. Moore, attorney for F. F. Loftin, knock the land off to the plaintiff Lewis."

There is no evidence that the plaintiff had notice of the tender, and the defendant, although present at the sale, and knowing that the plaintiff was there buying, said nothing about it.

2. That on the day the deed in trust was executed, but prior thereto, they executed and delivered to the creditor Loftin the following paper-writing, which they insist is a contract, and operated to prevent a sale:

"This agreement made this 1 November, 1917, between F. R. Nunn and Charity Nunn, his wife, of the county of Lenoir and State of North Carolina, of the first part, to F. F. Loftin, of the county of Lenoir and State of North Carolina, of the second part, witnesseth:

"That, whereas, J. F. Edwards holds a note and mortgage, upon which the sum of $884 is now due, and the said Edwards is threatening foreclosure, and the first parties being desirous that the said mortgage be not foreclosed, but that they be loaned an additional sum of $191, and that the total, one thousand and seventy-five dollars ($1,075), be divided in a series of four notes, due one, two, three, and four years from date, and the second party being desirous of buying the said property from the said first parties, has offered them $200 per acre, according to the results of any reputable surveyor, the said lands being estimated as containing about seven (7) acres, and the first parties having agreed to sell at that price, actual measurement.

"Now, therefore, in consideration of the premises and the payment by the second party to the first parties of the sum of five dollars ($5), receipt of which is hereby acknowledged, the first parties do hereby agree to sell to the second party and his heirs and assigns, and do agree to convey to him and his heirs and assigns in fee simple, the following described lands, viz.: (Description omitted, but same as in trust deed.)

"And, whereas, the second party has agreed to advance the amount desired by the first parties, to be secured by a deed of trust and notes in the sum of $75, due 1 November, 1918; $200, due 1 November, 1919; $200, due 1 November, 1920; $600, due 1 November, 1921, with 6 per cent interest from date, interest payable annually; but the said notes and deed of trust have not yet been executed, all parties intending that this option shall first be executed; and it is further agreed that the second party shall exercise this option only upon the first parties' failure to pay the said notes, or any one, as they become due.

"It is the intent of the parties hereto that the second party shall furnish the funds with which to prevent the sale of the said lands at this time, and also furnish to said first parties $191 additional, the second party to benefit from this contract only to the extent that he shall receive 6 per cent interest on his money, and, in case the first parties again fail to make prompt payments on their indebtedness, that the second party shall be a preferred purchaser at the sum of $200 per acre, that sum being considered a fair, full, and reasonable value for said lands, especially considering the said lands subject to the life estate of Lucy Patterson. The life of this option shall be four years from this date, provided the deed of trust heretofore mentioned shall not have been canceled prior to said four years.

"And the second party, desiring that the first parties shall have no hardship thrust upon them, does hereby agree that at the time of the execution of the said deed from the first parties to the second party under this agreement, the first parties shall be given a contract by which they may be allowed to repurchase the said lands within three months of the date of the said deed upon the first parties paying to the second party and his heirs and assigns the sum paid to the first parties as the purchase price of said lands, plus the interest thereon, and the costs and expenses incident to the writing of the papers, said costs and expenses not to exceed $25."

This paper was duly registered. On the day of sale, and before the land was sold, it was announced that Loftin claimed no rights under this paper.

The following issue was submitted to the jury:

"1. Is the defendant, F. R. Nunn, entitled to redeem the lands in controversy in this action? Answer: 'Yes.'"

The court instructed the jury that if they believed the evidence they should answer the issue "Yes," and plaintiff excepted.

The jury answered the issue "Yes." Upon the coming in of the verdict, the plaintiff moved the court to set the verdict aside, and for a new trial. Motion denied, and the plaintiff excepted.

The court, upon the verdict and the admissions of plaintiff and defendants, rendered judgment in favor of the defendants, as set out in the record. To the judgment as rendered by the court the plaintiff excepted.

Moore & Croom and Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse for defendant.

ALLEN, J. The instruction to the jury, to which exception is taken, is predicated on the correctness of the two positions of the defendants, which it is therefore necessary to examine.

1. Accepting the evidence of the defendants as to the tender to be true, it shows that after the first note, secured in the deed in trust, became due, the creditor Loftin promised to extend the time of payment, and that before the sale tender was made of the amount of the first note, and interest on the whole debt, and, in our opinion, these facts do not impair the title of the plaintiff acquired at the sale.

The promise to extend the time of payment of the first note is without consideration, and therefore cannot be enforced (*Bank v. Sumner,* 119 N. C., 595; *Lumber Co. v. Christenbury,* 155 N. C., 260), and as by the terms of the trust deed the whole debt became due upon failure to pay either note, it was necessary, in the absence of an agreement supported by a consideration, to tender payment of all of the notes, which was not done.

Again the defendant was present at the sale, and saw the plaintiff buy without protest on his part, and, as said in *Burnett v. Supply Co.,* at this term, "There is a wholesome principle in our law to the effect that one who stands by and witnesses in silence a wrongful sale of his property, under circumstances that call on him to speak, will not afterwards be heard to impugn the validity of the sale in so far as the title of the purchaser is concerned."

The principle, while recognized, was not applied in that case, because the action was not against the purchaser to redeem, but against the mortgagee, who had wrongfully sold the land when there was nothing due.

One who stands by and sees his property bought by another, without protest and without notice of his claim, "Is not permitted to assert his interest afterwards as against the innocent buyer of the property, and to his prejudice, because he was silent when he should have spoken, and now the law will not hear him when he should be silent. He is equitably estopped from being heard and asserting his claim to the property." *Hardware Co. v. Lewis,* 173 N. C., 295.

If, however, the tender was good, and if the defendants are not estopped, the plaintiff is not affected, because he is a purchaser for value without notice of the tender.

The question was discussed in *Debnam v. Watkins,* 178 N. C., 240, and, after placing this Court among those holding that a mortgage passes the title, and is not a mere security, the Court said: "It seems, therefore, that in those States a *bona fide* purchaser for value and without notice of tender gets a good title. It is also held that a mortgagor who has notice of an intended sale and allows it to proceed without objection cannot afterwards show a tender, or even a payment in full, of the mortgage debt, and thereby defeat the title of a *bona fide* purchaser for value without notice. *Cranston v. Crane,* 97 Mass., 459; Jones on Mortgages, sec. 1788."

It is therefore apparent that the first position of the defendants cannot be sustained.

2. The second question depends on the construction of the paper-writing executed on the same day as the deed in trust.

Is it a contract, binding on the parties, which is to be construed with the deed, and which operates to modify its terms by postponing the time of sale, or is it an option or offer which would have no legal effect until accepted by the creditor?

It is called an option by the parties, and while this is not controlling, "There can be no doubt that in determining the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the Court. . . . In fact, where, from the terms of the contract or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights, and that whatever is done by the parties during the period of the performance of the contract, is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions." 6 R. C. L., 852 and 853.

It is not signed by the creditor, and ordinarily both parties sign a bilateral written contract.

The creditor does not agree to buy, and in fact there is no promise on his part contained in the writing except upon condition that he accepted the option and took a deed for the land.

The paper and the trust deed were executed on the same day as parts of the same transaction, and "The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance." 6 R. C. L., 851, and they should be held to make one harmonious whole, if practicable, and not destructive of each other.

Read in the light of these rules of construction, and considering the language used by the parties, the transaction appears to be this:

The defendants induced Loftin to pay off the Edwards mortgage, and executed the deed in trust to secure him, in which the debt was divided into four annual payments, differing in amount with provision that the whole debt should become due upon failure to pay either note, and with power to sell in that event.

They also gave Loftin the option to buy the land, seven acres, at $200 an acre, within the four years while the notes were maturing, but this option could not be exercised by Loftin except upon failure to pay one of the notes, and if exercised, and a deed made to Loftin, it was stipulated that the defendants should have three months from the date of the deed to redeem, and so understood, the option contract did not prevent the exercise of the power, because Loftin did not elect to buy, but preferred to rely on the trust deed, and on the day of sale renounced all claim under the option in the presence of the defendants, to which they made no objection.

If this is not the correct view, and the position of the defendants should be maintained, the power of sale in the trust deed is meaningless, and might as well be stricken out, because it could never be exercised. Certainly not before default, and not afterwards if Loftin in that event was obliged by contract to buy at private sale.

We are therefore of opinion that there is error in the instruction to the jury, and that on the facts as now presented the plaintiff is the owner of the land.

New trial.

J. F. HERRING ET AL. v. MARY C. HERRING ET AL.

(Filed 13 October, 1920.)

1. Controversy without Action—Statutes—Interrogatories.

The effect of a submission of a controversy without action on a case agreed, Rev., 803, to dispense with the formalities of a summons, complaint, and answer, and to submit the case to the court for decision; and no right is conferred on the parties to propound to the court interrogatories upon the matters in dispute between them.

2. Same—Wills—Courts—Equity—Widow's Dissent.

Courts of equity have no general jurisdiction of the constructions of wills, and will not entertain actions or proceedings merely for the purpose of settling disputes between legatees and devisees; and this is especially so when the widow's right to dissent is reserved, and the right thus reserved in her to destroy the effect of the judgment of the court. *Little v. Thorn*, 93 N. C., 71, cited as controlling.

APPEAL by both parties from *Allen, J.*, at chambers, 23 April, 1920, from LENOIR.

This purports to be a controversy without action to determine the rights of the legatees and devisees under the will of N. J. Herring, who died 1 January, 1920.

The will, consisting of eleven items, is made a part of the agreed facts, and the following questions are propounded to the court:

"1. Does the word 'stock,' as used in item 2 of said will, refer to and mean stocks of incorporated companies, or does it refer to and mean livestock? And if the said word 'stock' does refer to and mean shares of stock of incorporated companies, does the term also refer to and include Liberty Bonds?

"2. Are the plaintiffs, J. F. Herring, A. D. Herring, J. T. Herring, and Egbert Herring seized of an indefeasible estate in fee simple in the lands respectively devised to them by items 2, 3, 4, and 5 of said will? If not, what estate does each take?

"3. Is the defendant, Mary C. Herring, entitled to an estate for her own life in the lands devised to the plaintiff, J. F. Herring, in item 2 of said will?

"4. Is the defendant, Mary C. Herring, entitled to an estate for her own life from and after the death of Egbert Herring, if she shall survive him, in the lands devised to the said Egbert Herring in item 5 of said will?

"5. Does a valid charge of $500 in favor of the defendant, Nannie T. Herring, exist against each of the tracts of land devised to the plaintiffs, J. F. Herring, A. D. Herring, and J. T. Herring, and if so, are said charges claims against the said J. F. Herring, A. D. Herring, and J. T. Herring *in personam*, or do they attach to and run with the respective tracts of land?

"6. Is the defendant, Mary C. Herring, by virtue of items 2, 3, 4, and 5 of said will, entitled to annuities to be paid to her during her lifetime, as follows: By J. F. Herring, $75; by A. D. Herring, $100; by J. T. Herring, $100; and by Egbert Herring, $50? And if so, are the said annuities claims against the said J. F. Herring, A. D. Herring, J. T. Herring, and Egbert Herring *in personam*, or are they charges that attach to and run with the respective tracts of land?

"7. Is the defendant, Lorena Hoffman, entitled to have the sum of $2,500, bequeathed to her in item 6 of said will, invested in lands for her, to be held by her in fee simple?

"8. Is the defendant, Mary C. Herring, entitled to a general legacy of $7,000, or any other sum, by virtue of item 7 of said will?

"9. Is the defendant, Nannie T. Herring, entitled to have the sum of $1,500, bequeathed to her in item 7 of said will, invested in lands for her, to be held by her in fee simple?

"10. If the charges attempted to be imposed upon the plaintiffs, J. F. Herring, A. D. Herring, and J. T. Herring in favor of their sister, Nannie, be held to be valid and binding upon them, are the said charges payable at the time they come into possession of their respective tracts of land, whenever that may be, or do they have five years thereafter within which to pay the same?

"11. Is the defendant, Mary C. Herring, widow, entitled to the possession of all the lands of which her husband, the testator, died seized, until the first day of January, 1926, or until the birthday of her son Egbert in July, 1925?"

His Honor answered the questions, and all of the parties appealed.

Dawson & Greene for plaintiffs.
Dawson, Manning & Wallace for defendants.

ALLEN, J. The Revisal, sec. 803, "Does not confer upon certain parties who differ as to their rights to propound to the Court on a case agreed interrogatories in respect thereto; . . . the purpose is simply to dispense with the formalities of a summons, complaint, and answer, and upon an agreed state of facts to submit the case to the Court for decision." *McKethan v. Ray,* 71 N. C., 170.

"The law does not confer upon parties who differ as to the law of their case the right to propound interrogatories to the Court, on a case agreed, in respect thereto." *Rogerson v. Lumber Co.,* 136 N. C., 269.

Nor has a court of equity a general jurisdiction of the construction of wills, and it will not entertain actions or proceedings merely for the purpose of settling disputes between legatees and devisees.

The principle controlling the Courts is stated by *Ashe, J.,* in *Little v. Thorne,* 93 N. C., 71, as follows:

"The action seems to be predicated upon the general idea that a court of equity has a sweeping jurisdiction in reference to the construction of wills, which *Chief Justice Pearson* said, in the case of *Tayloe v. Bond,* Busb. Eq., 5, was an erroneous idea. In that case the learned judge, in his well considered opinion, has given a very clear exposition of the jurisdiction of a court of equity, in the construction of wills, and from it we deduct the following rule as established: That the jurisdiction in matters of construction is limited to such as are necessary for the present action of the court, and upon which it may enter a decree or direction in the nature of a decree. It will never give an abstract opinion upon the construction of a will, nor give advice, except when its present action is involved in respect to something to be done under its decree. That it will not entertain an action for the construction of a devise, for the rights of devisees are purely legal, and must be adjudged by the

courts of law. The only exception to this is where a case is properly in a court of equity, under some of the known and the accustomed heads of jurisdiction, and a question of construction incidentally arises, the Court will determine it, it being necessary to do so in order to decide the cause—as, for instance, in actions for partition, or for the recovery of legacies where devises and legacies are so blended and dependent on each other as to make it necessary to construe the whole, in order to ascertain the legacies; because the Court having jurisdiction over legacies must take jurisdiction over all matters necessary to its exercise.

"The advisory jurisdiction of the Court is primarily confined to trusts and trustees, *Alsbrook v. Reid,* 89 N. C., 151, and cases there cited. Hence, the Court will advise executors who are regarded as trustees, as to the discharge of the trusts with which they are clothed, and as incident thereto, the construction and legal effect of the instrument by which they are created, when a case is presented where the action of the court is invoked as distinguished from an *abstract opinion. Simpson v. Wallace,* 83 N. C., 477; *Tayloe v. Bond, supra.* But in the latter case it is said there is no ground upon which to base a jurisdiction, to give advice to an executor in regard to his future conduct or future rights, or to allow him to 'ask the opinion of the Court as to the future rights of a legatee,' as, for instance, 'Who will be entitled when a life estate expires?' But the advice is only given upon an existing state of facts, upon which a decree or some direction of the Court in nature of a decree is solicited."

This doctrine, in its entirety, is approved in *Reid v. Alexander,* 170 N. C., 303, and in both cases the actions were dismissed, and following these and other precedents the same course must be taken with this proceeding.

There is one feature of the present proceeding particularly objectionable, and that as it appears in the agreed statement that "It is expressly stipulated by the said Mary C. Herring, widow, that her joinder herein shall in no manner affect or prejudice her right to dissent from said will as provided by law, or be construed as an election on her part to take under said will, which stipulation is hereby expressly ratified and assented to by all the other parties hereto."

In other words, the widow, who is interested in six of the questions propounded, says to the Court that she will abide the result if the decision accords with her contentions, but if not, she will dissent and destroy the effect of the judgment of the Court.

Proceeding dismissed.

J. J. JENKINS v. THE STATE BOARD OF ELECTIONS OF NORTH CAROLINA, THE STATE AUDITOR, AND THE STATE TREASURER.

(Filed 13 October, 1920.)

1. Constitutional Law—Courts—Void Statutes.

Legislative enactments are presumed to be constitutional, and for the courts to declare them otherwise the statutes should plainly conflict with same constitutional provision; and the court should exercise its power to declare a statute unconstitutional with extreme caution, resolving every doubt in favor of the statute.

2. Constitutional Law—Statutes—Absentee Voters Law.

There being no provision in the Federal Constitution restricting the power of the State Legislature to enact statutes on the subject, our absentee voters law, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, known as the absentee voters law, are valid unless in contravention of the Constitution of our State.

3. Same—Elections—Secret Ballots—Choice of Elector.

The provisions of our State Constitution, Art. VI, sec. 6, making the distinction that the elector shall vote by ballot, and an election by the General Assembly shall be *viva voce*, gives, under our statute, the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. Consolidated Statutes, 5979.

4. Same—Fraud.

Our statutes, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, give ample protection against fraud, by requiring that the absent voter must have been lawfully registered and entitled to vote, and supplying him when physically unable to attend, etc., with a blank to be sealed in an envelope, to be sent to and held by the registrar until three o'clock of the day of election, and cast for the absent voter by the registrar, subject to the usual challenge, as if the voter himself had been present; and the statutes are not void as being in contravention of our State Constitution, Art. VI, secs. 2, 3, and 6.

5. Constitutional Law—Absentee Voters Law—Offer to Vote—Statutes.

The provisions of Art. VI, sec. 2, of our State Constitution, requiring that the voters at an election shall have resided in the State for two years, in the county 6 months, and in the precinct, ward, or other election district, in which he offers to vote, 4 months next preceding the election; and of sec. 3 of the same article, that every person offering to vote shall be at the time a legally registered voter, does not require that the elector shall cast his vote in person, and under our absentee voters law, he complies with the constitutional provisions that he shall offer to vote, when he transmits his vote to the registrar to be cast for him in accordance with the methods prescribed by the statutes. Consolidated Statutes, Art. 8, ch. 95, as amended by ch. 322, Public Laws of 1919.

CLARK, C. J., concurs with opinion.

CIVIL ACTION heard by *Kerr, J.*, on 16 September, 1920, from WAKE, upon a demurrer to the complaint, and upon a motion for injunction. The court sustained the demurrer, and denied the motion. Plaintiff appealed.

W. P. Bynum, R. C. Strudwick, and S. S. Alderman for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendants.

BROWN, J. The prayer of the complaint is that the defendants be enjoined from printing and distributing the forms required by the provisions of the acts of 1917 and 1919, and from carrying out any of the provisions of said acts upon the ground that they are unconstitutional and void. This legislation is known as the absentee voters law, being ch. 23, Public Laws 1917, reënacted and brought forward in Art. 8, ch. 95, of the Consolidated Statutes of North Carolina, as amended by ch. 322, Public Laws 1919. It is claimed that the law is unconstitutional because it is repugnant to Art. VI, sec. 2, and Art. VI, sec. 6, of the State Constitution.

Sec. 2 provides that the voters shall have resided in the State for 2 years, in the county 6 months, and in the precinct, ward, or other election district, *in which he offers to vote,* 4 months next preceding the election. Sec. 3 declares that every person *offering to vote* shall be at the time a legally *registered* voter.

Sec. 6 declares that all elections by the people shall be *by ballot,* and all elections by the General Assembly shall be *viva voce.*

The question presented and ably argued by the learned counsel on both sides is one of grave importance to the consideration of which we have given the most careful study. It is never wise for the judiciary to disregard the organic law which the people in their sovereign capacity have seen fit to adopt for the security of public and private rights. No rule of construction is better settled, both upon principle and authority, than that legislative enactments are presumed to be constitutional until the contrary is shown. It is only when they plainly conflict with some provision of the Constitution that they should be declared void. The power of declaring laws unconstitutional should always be exercised with extreme caution, and every doubt resolved in favor of the statute. As has been well said, these rules are founded on the best of reasons, because, while the supreme judicial power may interfere to prevent a legislative, and other departments, from exceeding their powers, no tribunal has yet been devised to check the encroachments of the judicial power itself. *Twitchell v. Blodgett,* 13 Mich., 151; *Sharpless v. Mayor of Philadelphia,* 21 Pa., 162.

It is not contended that there is any provision of the Federal Constitution which in any way interferes with the power of the Legislature of this State to enact the laws which are attacked by the plaintiff. Therefore, it is properly conceded that the acts in question constitute a valid exercise of legislative power unless they contravene our State Constitution.

Somewhat similar statutes, known as absent voters acts, have been enacted in some thirty-odd States of this Union. In some of the States the law applies only to those absent from their county or precinct, but still within the State. The laws of 21 States allow voting blanks to be filled out and mailed to the proper State officers from anywhere in the United States. It is needless to refer to the varying provisions of these statutes. They vary in the procedure prescribed, but in the main they provide for the casting and reception of ballots at the places where the absent electors are, and for the return of the ballots to, and the counting and canvassing by the proper election officials of the respective counties of which they are residents. Some of these statutes refer exclusively to voters who are absent in the military or naval service of the United States. Some statutes have been held unconstitutional on the ground that they violate constitutional provisions designating the place of holding elections and requiring an elector to vote in the district or precinct in which he resides. These statutes have been decided constitutional by the House of Representatives of the Congress of the United States so far as they affect the election of members of that body. *Baldwin v. Trobridge,* 2 Bartl. Cont. Election Cases, 46.

It is held that it is clearly within the province of a State Legislature to enact statutes of this description if the State Constitution is silent on the place of voting. *Morrison v. Springer,* 15 Iowa, 304; *Lehman v. McBride,* 15 Ohio State, 573; *State v. Main,* 16 Wis., 398.

The plaintiff contends that the statute violates the provision of our Constitution which provides that elections by the people shall be by ballot, arguing that this means a secret ballot in all elections. We admit that voting by ballot, as distinguished from *viva voce* voting, means a secret voting, and that the elector in casting his ballot has the right to put it in the box and to refuse to disclose for whom he voted, and that he cannot be compelled to do so. But this privilege of voting a secret ballot has been held to be entirely a personal one. The provision has been generally adopted in this country for the protection of the voter, and for the preservation of his independence, in the exercise of this most important franchise. But he has the right to waive his privilege and testify to the contents of his ballot. The voter has the right at the time of voting voluntarily to make public his ballot, and its contents in such case may be proven by the testimony of those who are

present. Public policy requires that the veil of secrecy shall be impenetrable *unless the voter himself voluntarily determines to lift it. Boyer v. Teague,* 106 N. C., 625; McRary on Elections (3 ed.), 305-306; Crolly Con. Lim. (7 ed.), 912.

A secret ballot is not compulsory so far as the voter is concerned, for our statute provides that the ballot may be deposited for the voter by the registrar, or by one of the judges of election, or by the voter himself if he so chooses. Con. Stat., 5979.

We think the position that the statute conflicts with sec. 6, Art. VI, is untenable.

We will consider the other contention of the plaintiff that the statute is repugnant to sec. 2 of the said article. The statute provides that in all primaries and elections that any elector who may be absent from the county in which he is entitled to vote, or physically unable to attend for the purpose of voting in person, etc., shall be allowed to vote as hereinafter provided. The statute then provides that no one shall vote who is not duly registered and qualified to vote under the laws of the State. It provides for sending out blank certificates and envelopes for absent voters. It also provides that the registrar shall hold the said letters unopened until 3 p. m. on the day of election, and that he shall then open the envelopes received from such absent voters, and that such votes, if found to be regular, shall be deposited and counted in the same manner as if the voter had been present in person. Sec. 5 of the act provides that:

"The right to vote of any absent voter shall be subject to challenge in the same manner as if the elector proposing to vote were present in person, and if found entitled to vote under the provisions of this act, and the laws of the State, every such vote so received shall be deposited and counted in the same manner as if the voter had been present and cast his vote in person."

It is contended that the words, "in which he offers to vote," in sec. 2, and the words, "every person offering to vote," in sec. 3, necessarily implies that the voter must be present in person at the polls and tender his ballot. This position was maintained by counsel for plaintiff with much force, and we must admit that the question is perplexing and involved in doubt. But we think the language of the Constitution is susceptible of a fair interpretation which will sustain the statute, in which case it is our duty to uphold it and give to the law the benefit of the doubt. The party who undertakes to pronounce a law unconstitutional takes upon himself the burden of proving beyond any reasonable doubt that it is so. Nothing should have the effect of avoiding a statute duly enacted but a *direct* collision between its provisions and the Constitution. That collision is not so clear as to justify us in setting aside a statute, which

is the law in a majority of the States of the Union, and, so far as we can find, has not been contested in recent years.

The statute was enacted in 1917, and its primary purpose was to enable our soldiers to cast their votes by mailing them to the proper officials.

The soldiers and sailors, who are absent from home in the country's cause are not disfranchised citizens, and their right to exercise the elective franchise should be preserved and the ways and means provided.

We admit this question has been decided against our view in the case of *Twitchell v. Blodgett,* 13 Mich., 127, and upon language similar to that used in our Constitution. But in that case there is a very powerful dissenting opinion by *Chief Justice Martin,* in which he holds that the words used do not require the personal presence of the elector at the polls. In that opinion the learned judge forcibly says: "Can we, upon any sound judicial opinion, hold that an election in the army is any the less a legal one, or the soldiers less entitled to the privilege of electors than persons remaining at their homes, if the Legislature is endowed with the power to fix the place and prescribe the manner of balloting and of canvassing votes—I think not."

The judge again says: "If a *viva voce* vote were required, it would be impossible to avoid the conclusion that the framers of the Constitution intended that votes be cast personally, and not otherwise; but a ballot may be deposited as the Legislature sees fit to authorize."

The fact that this law originated from extraordinary emergency, and was not contemplated by the framers of the Constitution, can make no difference. If the power resides in the legislators, they may exercise it and apply it to all voters, whether soldiers or not. A power not limited or withheld abides in the people, and in such case the Legislature, like Parliament, is omnipotent.

The case of *Bourland v. Hildreth,* 26 California, 162, cited by plaintiff, is not a direct authority against our views. The Constitution of California, as held in that case, not only prescribes the qualifications of electors, but also the *place* within which the act of voting shall be performed, and it cannot be performed elsewhere. But the value of that case as an authority is greatly weakened by the strong dissenting opinion of *Chief Justice Sanderson,* generally acknowledged to be a very great judge.

The case of *Chase v. Miller,* 41 Pa. State, 404, differs very materially from the one under consideration. The substance of that decision, as we read it, was that under the Constitution of Pennsylvania the right of a soldier to vote is confined to, and must be exercised, in the election district where he resided when he entered the military service, and that

the Legislature could not authorize a military commander to form an election district and hold an election therein.

The election laws, which attempted to confer the right of suffrage upon Federal soldiers absent on military service, and which were passed upon in some of cases cited, are wholly unlike, in principle as well as in detail, the North Carolina absent voters act. *Judge Woodard* thus describes these laws in above cited case: "They permit the ballot box, according to the court below, to be opened anywhere, within or without our State, with no other guards than such as commanding officers, who may not themselves be voters nor subject to our jurisdiction, may choose to throw around it; and it invites soldiers to vote where the evidence of their qualifications is not at hand; and where our civil police cannot attend to protect the legal voter, to repel the rioter, and to guard the ballots after they have been cast."

The Connecticut and New Hampshire cases, cited by plaintiff, plainly have no bearing on this controversy. Their Constitutions recognized, and we believe still recognize, the old New England electors' meeting. The right of suffrage was conferred upon those present and voting at the meeting.

This meeting is commonly called a town meeting, and is a very ancient institution in some of the New England States.

The history of these meetings is given in the Connecticut case. Opinion of Judges, 30 Conn., 591, and 44 N. H., 633.

These cases all dealt with statutes of certain States of the United States engaged in the Civil War conferring the privilege of voting upon their soldiers then absent in the army.

The votes were to be cast without any registration at the camps in which they were located; they were collected by certain designated officers to be sent to a State officer, and by him distributed among the various localities of the State.

Our absentee voters act is a very different enactment. No one can vote under it unless he is registered, and is otherwise a qualified voter. The elector must select his ballots and fill up and sign the form sent him, and seal them up in an envelope sent for the purpose. It must be addressed to proper official, and opened by him at 3 p. m. of election day. Every safeguard is provided to prevent fraud or mistake.

These laws are a very great public convenience, and serve a very useful purpose or they would not have been adopted in 33 States of the Union.

They have been sustained by the highest Courts of Iowa, 15 Iowa, 304; Ohio, 15 Ohio State, 573; and Wisconsin, 16 Wis., 398.

Passing to a consideration of the text of our Constitution, we think the context of Art. VI indicates that the personal presence of the voter is not required in order to cast his ballot.

An offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form, and mails the sealed envelope to proper official. The section requires only that he must make that offer in the precinct where he has resided, etc. We see no reason why an offer to vote may not be made in writing as well as by word of mouth. An offer to buy or sell may be made in writing, and why not an offer to vote? There is nothing immoral in such transaction, and it violates no principle of public policy.

That the Constitution makers did not mean that the words "offer to vote" should necessarily imply the personal presence of the voter is indicated by sec. 4. In that section the language is *"every person presenting himself* for registration." Those words plainly require the personal presence of the voter. If the personal presence of the voter had been required by sec. 2, those who framed the article could easily have used the words, "in which he presents himself to vote." Such language would have put the meaning beyond doubt. At the time that section of the Constitution was adopted, in 1900, absentee voting laws had been passed in many States, and in a few cases they had been before the Courts for construction. The convention doubtless had knowledge of them, and did not deem it advisable to preclude the General Assembly in its discretion from enacting such statute whenever it was deemed wise to do so.

An act of the General Assembly should not be set aside by implication. A constitution should not receive a technical construction as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the Government, and not defeat them.

In the language of *Chief Justice Gibson,* cited in *Twitchell v. Blodgett, supra,* "When we construe a constitution by implication of such rigor and inflexibility as to defeat the legislative regulations, we not only violate accepted principles of interpretation, but we destroy the rights which the Constitution intended to guard."

Affirmed.

CLARK, C. J., concurring: The plaintiffs contend: 1. That the statute violates the Constitution, which contemplates a secret ballot. The Constitution, Art. VI, sec. 6, in providing that all elections by the General Assembly shall be *viva voce,* and that all elections by the people shall be *by ballot,* intended that voting in the Legislature should be open and known to all men that the people might have a check upon the actions of their servants, and that voting by the people should be in secret, to the end that the humblest voter shall express his will uninfluenced and unintimidated, for he is responsible only to himself, while

the members of the Legislature are the agents of, and accountable to the people for the discharge of their duty in voting. The secrecy of the ballot, however, is a privilege that is entirely personal to the voter, which he can waive. *Boyer v. Teague,* 106 N. C., 625; McCrary on Elections (3 ed.), pp. 305, 306. The voter himself can voluntarily waive this privilege. Cooley Cons. Lim. (7 ed.), p. 912.

Sending the ballot by mail is a waiver of this privilege. This is a matter for the voter, and the officer is authorized to receive it for the Rev., 4343, C. S., 5979, expressly provides, "The ballot may be deposited for the voter by the registrar, or one of the judges of election, or the voter may deposit it himself if he chooses."

2. The plaintiffs also contend that the Constitution requires that the voter must be present in person when he "offers to vote." The Legislature provides that this can be done by mail, and this is not forbidden by the Constitution, which requires that the voter must "present" himself, that is, his personal attendance for registration, but does not require this for voting.

3. It was denied by President Jefferson, President Jackson, and those who have followed their views, that the Courts have the power to declare legislation invalid in any case except when, as is provided in the U. S. Constitution, Art. VI, ch. 12, State legislation conflicts with the supremacy of some provision of the Federal Constitution, or statutes enacted under the authority of the same. But even those who hold that there is an implied power of the Courts to hold any legislation unconstitutional, have always conceded that this power could not be exercised except where the unconstitutionality is "clear beyond a reasonable doubt." *Ogden v. Sanders,* 12 Wheaton, 213; Cooley Cons. Lim. (7 ed.), 254.

This presumption of the constitutionality of this act cannot be overcome in view of the fact that in 43 of the States out of the 48 there are statutes which in some form confer the right on absentees to vote.

In our own State, and in probably all the States, North and South, such right was conferred upon our soldiers during the Civil War, and it is a historical fact that by virtue of the vote thus cast by the soldiers, Zebulon B. Vance was elected Governor of this State in 1862, and Abraham Lincoln was reëlected President in 1864.

The method of absentee voting enacted at that time by this State, and by most others, authorized the soldiers to cast their ballots out of the State, in elections to be held by officials who may or may not have been citizens of the State, and without the safeguards of registration or challenge, and the votes were sent usually to some State officer for distribution to the various precincts where the voters were entitled to vote. This gave wide latitude for abuse and irregularity, and as pointed out in the

opinion of the Court in this case, the few opinions which held such absentee voting invalid, were based upon such reasons.

The statute of this State now in question, and probably all those in force in other States have avoided these objections by various requirements, such as the due registration of the voter and the authentication of his ballot by a notary public, postmaster, or other officer, and the sending of his ballot himself in a sealed envelope direct to the registrar and the judges of election of the precinct where he is entitled to vote, to be opened by them at a given hour on the day of election (in this State at 3 p. m.), and to be placed by them in the ballot box as requested, which last was authorized as long ago as Laws 1901, ch. 89, sec. 24; Rev., 4343, now C. S., 5979.

The real gravamen and basis of this proceeding is the statement in the plaintiff's brief admitting that "The absentee voters' law was undoubtedly passed for the meritorious purpose of allowing our soldiers absent in the great war to vote. The soldiers are at home, and the meritorious purpose is past. The statute remains, shorn of its meritorious features, and divested of every safeguard which might prevent it from becoming an instrument in aid of fraud and illegal voting."

In a country like ours, whose government is based avowedly upon the "consent of the governed," a full and free declaration of that will, and its return as cast is of the utmost importance. Any tampering therewith by any method whatever, whether by bribery, intimidation, voting illegally, making fraudulent returns, or any other misconduct on the part of election officials, voters, or any others, is made punishable severely by our statutes, C. S., 4185-4199, some of these offenses being made felonies, and others misdemeanors, and the same is true in other States, some of which have the further safeguards of voting machines and the Australian ballot.

Our statute, empowering absentees to vote, was first enacted, Laws 1917, ch. 23, to authorize "any elector who may be absent from the county in which he is entitled to vote" to fill in his ballot on blank certificates, and return in envelopes, furnished by the State Board of Elections to the county boards, and by the latter sent to the absent voter. The statute was extended, Laws 1919, ch. 322, to include any elector who is "physically unable, for the purpose of voting in person, to attend, which fact should be made to appear by certificate of a physician or by affidavit."

All the provisions in regard to the voting of absent electors will be found in C. S., 5960-5969, which throws around the exercise of the privilege every safeguard against fraudulent abuse by impersonation of voters or in any other manner. Even if the act gave additional opportunity for fraud, this would not make it unconstitutional, but would

address itself to the Legislature, either to make the legislations more strict, or to repeal the statute; but it is not to be presumed that the General Assembly of this State would enact a statute calculated to increase the opportunities of fraud at elections, nor that such measure would so commend itself to the general intelligence that 43 States should have enacted similar legislation. In truth, it diminishes the opportunities for fraud, as the ballots are sent in by the absent voters and are subject to challenge, and are kept on file for six months. They are authenticated by the signatures of the voters, thus giving the fullest opportunity of indictment for any fraud.

While there are a few decisions against the legality of the acts passed during the Civil War, which restricted the voting of absentees to soldiers, and permitted polls to be opened in camp, the decisions as to the present method have been in favor of its constitutionality. *Morrison v. Springer,* 15 Iowa, 304; *Lehman v. McBride,* 15 Ohio State, 573; *S. v. Main,* 16 Wis., 398. Probably the only decision to the contrary has been in California, to cure which the Legislature has submitted an amendment to the Constitution, which will be voted on at the general election next month. The Federal House of Representatives has held these statutes constitutional so far as they affect the election of members of that body. *Baldwin v. Trobridge,* 2 Bartl. Cont. Election Cases, 46.

The ordinance allowing the North Carolina soldiers to vote in camp (which is a type of acts passed by the Southern States generally) was enacted in June, 1861, by the State Convention, which was admittedly one of the ablest bodies ever assembled in the State, and contained many of the foremost lawyers of North Carolina. Its constitutionality was never questioned by any one, though the Constitution then in force required the elector "To vote in the county where he resides."

The "absentee voters" statutes have been passed in this State (and in nearly all others), not for the purpose of giving opportunity for fraud in elections, which would be inconceivable, and to assert the contrary would be a libel on public opinion throughout the country, which demands fair elections and an honest return of the votes as cast. These statutes have been enacted for the purpose of procuring a fuller expression of the public will at the ballot box. In North Carolina we rarely have secured a vote cast of more than 70 per cent of the eligible white voters in the State, the other 30 out of every 100 eligible white voters being absent by reason of indifference, or detained by work, or business, or illness, or physical disability.

In Philadelphia 60 per cent of the possible vote is the average vote cast, which is about the average throughout the country. In Virginia 40 per cent of the possible total is the average vote cast, and in Mississippi (where the primary is the real election), only 10 per cent of the

full vote is cast. The system of absentee voting which originated in behalf of the soldiers, who, it was felt, should not be disfranchised by reason of their absence in the discharge of duty, received a strong impulse from the action of the Travelers' Protective Association, who urged that they should not be deprived of the franchise while traveling as commercial agents. Nor should any one be deprived of the franchise by reason of temporary or permanent physical disability.

This legislation, intended for fuller expression of public opinion at the ballot box, and carefully guarded in its exercise by statutes in all the States, should not be misconceived as an invitation to fraud.

As a proof of the widespread demand and need for such legislation, the following memorandum of the statutes in the different states is appended.

STATES HAVING ABSENTEE VOTING LAWS.

Alabama, 1919. Act 620.
Arkansas, 1917, Act 175; 1919, Act 403.
Arizona, 1918, Special Sess., ch. II.
California, 1917, 710; Res. 64.
Colorado, 1915, ch. 76.
Connecticut, 1918, Special Sess., ch. 1 (Military).
Delaware, Special Sess., ch. 4 (Registration).
Florida, 1917, ch. 7380.
Georgia, 1918, No. 335 (Military).
Idaho, 1917, ch. 142.
Illinois, 1917, p. 434; 1917, p. 440 (Military).
Indiana, 1917, ch. 100; 1919, chs. 156-170 (counting ballots).
Iowa, 1915, Code Supp., ch. 3-b, tit. VI; Am. 1917, ch. 419.
Kansas, 1919, ch. 189; 1913, ch. 194 (Military).
Kentucky, 1915, Carroll's Stat., 1456, etc.; 1918, ch. 37.
Louisiana, 1917, Act 34 (Military); 1918, 272, *id.*, 264 (Registration).
Maryland, 1918, ch. 20 (Const. Am.); *id.*, ch. 78 (Military).
Massachusetts, 1918, ch. 293, 295 (Military).
Michigan, 1915, Act 270; 1917, 203, ch. 12, p. 427; 1919, 45.
Minnesota, 1916, Special Sess., ch. 2 (Military); 1917, chs. 68, 120.
Mississippi, 1917, Ex. Chap. 35, Am; 1918, ch. 184.
Missouri, 1917, pp. 274, 276 (Military); 1917, p. 287; 1919, p. 763.
Montana, 1917, ch. 155; 1918, ch. 18 (Military).
Nebraska, 1913, ch. 200; 1917, ch. 177; 1918, ch. 1; 1919, ch. 7.
North Carolina, 1917, ch. 23; 1919, ch. 322.
North Dakota, 1913, ch. 155; 1918, ch. 6 (Military).
New Hampshire, 1917, ch. 95 (Military).
New Jersey, 1918, ch. 150.

New York, 1918, ch. 298; 1919, Con. Res., p. 1791 (Cons. Am.).
Ohio, 1917, p. 52.
Oklahoma, 1916, ch. 25; Am. 1919, ch. 88; 1917, ch. 157; Am. 1919, ch. 65 (Military).
Oregon, 1919, ch. 361; *id.* S. J. R., No. 23, p. 835 (Cons. Am.).
Rhode Island, 1918, ch. 1610 (Registration), ch. 1657 (Military); Res. No. 1, p. 278 (Const. Am.).
South Carolina, 1918, No. 574 (Military).
South Dakota, 1913, ch. 200; 1917, ch. 233; 1918, Sp., chs. 45, 46; 1919, ch. 189.
Tennessee, 1917, ch. 104; 1919, ch. 71 (Registration).
Utah, 1919, ch. 42, p. 102.
Vermont, 1919, No. 7 (Military).
Virginia, 1916, ch. 369.
Washington, 1917, ch. 159.
West Virginia, 1917, 2d Extra Sess., ch. 13 (Military); 1919, ch. 100.
Wisconsin, 1915, ch. 461; Am. 1915, ch. 604; 1916, Special Sess., ch. 1; 1918, Special Sess., ch. 16 (Military); 1917, ch. 570.
Wyoming, 1915, ch. 102.

In several of these States the electors can also register by mail.

EMMA K. HARDY v. PHOENIX MUTUAL LIFE INSURANCE COMPANY.

(Filed 13 October, 1920.)

1. Insurance, Life—Policies—Noncontestable Clause—Actions.

Under a clause in a life insurance policy making it incontestable after a year from its date, except for nonpayment of premiums, the insured has a right of action against the designated beneficiary after the death of the insured within that period, and living, to declare the policy void for fraud or material representations as to the health of the insured in his application, and being concluded by the express terms of the policy, the company may not thereafter maintain his action, except for the nonpayment of premiums due it thereunder. *Trust Co. v. Ins. Co.*, 173 N. C., 558, cited and applied.

2. Insurance, Life—Noncontestable Clause—Conditions—Pleadings.

The provisions of a life insurance policy that it is incontestable after a stated time, etc., are conditions upon which the contracts are made, and not a waiver, and not being in strictness "a short period statute of limitation," it is sufficiently pleaded when the policy sued on containing them is set out in the complaint as a part thereof.

3. Insurance, Life—Policies—Noncontestable Clause—Contracts—Interpretation—Ambiguity.

A clause in a life insurance policy making it incontestable after one year from its date, except for the nonpayment of premiums, is for the benefit of the insured in the acquisition of business, and being unambiguous, the courts will not interpolate additional words to the effect that it was necessary for the policy to have been in force for a year before the death of the insured.

4. Insurance, Life—Policies— Noncontestable Clause— Actions— Limitations of Actions—Statutes.

Where, under a clause in a policy of life insurance, it is uncontestable after a year from its date, with certain exceptions, and the insured has died within the period, leaving the designated beneficiary alive, the insured is not relieved of his obligations to bring its action to declare the policy void for matters falling without the exceptions, within the year from the date of the policy, either against the insured in his lifetime, or the beneficiary thereafter; and there having always been a party against whom the insurer could have brought its action, the provisions of Rev., 367, extending the time in certain instances, have no application.

APPEAL by defendant from *Connor, J.*, at the March Term, 1920, of PITT.

This is an action on an insurance policy issued by the defendant upon the life of Isaac Carson Hardy for the benefit of the plaintiff. The policy was attached to and made a part of the complaint, and contained an incontestable clause which is hereafter set out in the judgment rendered.

The defendant filed answer in which the issuing of the policy was admitted, but the defendant alleged that the insured was suffering from an incurable disease at the time of its issuance; that the statements in the application for the policy were false; that the agent who issued the policy committed a fraud upon the company, and that the policy was procured by fraud.

The action was tried two or three times in the Superior Court without final determination, and at the last trial the plaintiff moved for judgment upon the pleadings, contending that the incontestable clause shut off the defenses alleged in the answer, and his Honor rendered the following judgment upon said motion:

"This cause coming on to be heard before his Honor, George W. Connor, judge, and a jury, at the March Term, 1920, of the Superior Court of Pitt County, and being heard upon motion of plaintiff, as set out in the record made at the close of all the evidence, that the plaintiff have judgment upon the pleadings and admissions, and it appearing to

the court that the plaintiff is entitled to judgment upon the pleadings, and the following admissions made by the parties hereto, as follows, to wit:

"1. That the policy in suit, a copy of which is attached to both complaint and answer, was issued on 7 November, 1910, by the defendant upon the life of Isaac Carson Hardy, and that the plaintiff, his daughter, is the beneficiary named therein, and that she paid the first premium thereon; that said policy was delivered to the plaintiff upon the payment of said premium.

"2. That Isaac Carson Hardy died on 27 October, 1911, and before the expiration of one year from the date of said policy.

"3. That the said policy provided that the defendant company would pay the sum of one thousand dollars ($1,000) to the plaintiff upon the death of Isaac Carson Hardy, and that said policy contained a clause as a part thereof in the following words: 'Incontestibility: This policy shall constitute the entire contract between the parties hereto, and shall be incontestable after one year from its date except for nonpayment of premium as stipulated, subject, however, in case of understatement of age, to an adjustment of the insurance proportionate to premium at true age; in case of overstatement of age overpayments of premiums will be returned to the owner of this policy.'

"4. That no action of law or suit in equity was brought by defendant to cancel or annul said policy within one year from its date; the defendant, in the spring of 1911, and before the expiration of one year from the date of said policy, did request plaintiff to surrender said policy that it might be canceled, which offer and request was refused by the beneficiary; that defendant was able, willing, and ready to return the premium paid by plaintiff, and did pay same into clerk's office upon filing answer herein.

"5. That after the death of Isaac Carson Hardy, the defendant denied liability to the plaintiff on account of the said policy, and this action was begun by the plaintiff on 10 April, 1912, and the answer thereto having been filed on 24 May, 1912; that the defense relied upon by the defendant appears in its answer, it being admitted that there was no premium due to the defendant on account of said policy at the time of the death of Isaac Carson Hardy.

"The court being of the opinion that by reason of the incontestable clause contained in the policy, and the facts admitted in the pleadings and in the record, the defense set up by the defendant in its answer is not available to the defendant.

"It is now, therefore, upon motion of W. F. Evans and Julius Brown, attorneys for the plaintiff, ordered, considered, and adjudged that the

plaintiff recover of the defendant the sum of one thousand dollars ($1,000), with interest from 10 April, 1912, and the cost of this action to be taxed by the clerk."

The defendant excepted, and appealed, assigning the following errors:

"First. The first and only assignment of error, embracing the first and second exceptions, is to the action of his Honor in granting plaintiff's motion for a judgment upon the pleadings and the admissions, and to the judgment rendered, and that same is contrary to law, and for that defendant was entitled to have the defense set up in its answer submitted to the jury for the reason that:

"1. That insured died within one year from the date of the policy, and the true construction that the court ought to put upon the incontestable clause in the policy is 'That if the policy has been in force one year, or if the insured should survive one year after the death of the policy, it should be incontestable.'

"2. That in any event the clause in question is in the nature of a statute of limitations, and, therefore, ought to have been pleaded to have been available.

"3. For that the plaintiff having failed to plead the clause in question, and having met the issue of fraud upon its merits, and the case having been tried before two juries, and no such motion ever having been made before, the plaintiff, after nine years, by her laches, has waived her right to interpose any such defense at this late date."

Evans & Eason and Julius Brown for plaintiff.
Albion Dunn for defendant.

ALLEN, J. The incontestable clause in a policy of life insurance was very fully considered in *Trust Co. v. Ins. Co.*, 173 N. C., 558, and it was then held:

"1. A clause in a policy of life insurance, making it incontestable at the end of a year, covers the defense of the alleged bad health of the insured at the time of its delivery, and also that of false and fraudulent statements alleged to have been made by the insured in his application.

"2. Where a policy of life insurance has been issued containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premiums, after that period no defense is available to the insurer, in an action upon the policy, excepting the nonpayment of the premium, as therein stated.

"3. The noncontestable clause in a life insurance policy is for the benefit of the insurer in increasing its business by assurance that after the maturity of the policy, usually upon the death of the insured, its

collection will not be subject to the uncertainty and delay of litigation, or questioned except as to matters therein stated—in this case, the nonpayment of the premiums.

"4. Where a policy of life insurance containing a clause making it noncontestable after the expiration of a year, except for nonpayment of premium, has been delivered and the premium paid therefor, an attempt by the insurer within that time, upon notification to the insured, to cancel the policy with tender of repayment of the premium upon a different ground than that stated in the clause, but not consented to or accepted by the latter, is a breach of the contract by the former; and it is necessary for the insurer, within the stated time, to bring suit in equity for the cancellation of the policy, or it will remain binding and enforcible upon the insurer's death."

It is also said in that case, and in others, that the effect of the clause is to create a short statute of limitations in favor of the insured, but speaking more accurately, it is contractual (*Dibbrell v. Ins. Co.,* 110 N. C., 193), and is sufficiently pleaded when the policy containing the clause is made a part of the complaint, as in this case.

The point is decided in *Mutual Life Insurance Company v. Buford et al.,* 160 Pacific, 928 (Okla.), and the Court says: "Where a policy of life insurance contains a provision that after two years from date of its issue, said policy is incontestable, such provision is not a waiver, but a condition; and where such condition is not specifically pleaded in the petition, but a copy of such policy of insurance is attached as an exhibit to and made a part of the petition, such condition as to incontestability of such policy of insurance is sufficiently pleaded."

Nor does section 367 of the Revisal, which extends the time for the commencement of an action under certain conditions upon the death of a party, enlarge the time within which the defendant could bring an action to cancel the policy, because the beneficiary in the policy, against whom the action could be brought, is still alive, and we find nothing in the record to prevent the plaintiff from taking full benefit of the incontestable clause in the contract of insurance.

The remaining question, and one not heretofore decided in this Court, is as to the effect on the incontestable clause of the death of the insured within one year from the date of the policy, and this depends largely upon the language used, and the purpose for which the clause was inserted in policies.

It says it "shall be incontestable after one year from its date, except for nonpayment of premium," and if we adopt the view of the defendant that this means, "That if the policy had been in force one year, or if the insured should survive one year after the date of the policy, it should be incontestable," we must insert in the contract, expressed in simple,

unambiguous language, stipulations which do not appear there, and which materially affect the contract of the parties, which we are not at liberty to do.

Again, "This clause, which has been generally adopted by the insurance companies, is not primarily for the benefit of the insured, but for the benefit of the insurance company itself.

"It was adopted because, in many instances, insurance is taken out for the benefit of the wife and children, and frequently the hope of a reasonable income after death to those dependent upon him was defeated by defense which could not have been sustained if the insured had been alive.

"This deterred many from taking out insurance, and the companies adopted the incontestable clause for the purpose of increasing their business. . . . No reasonable construction can be placed upon such provision other than that the company reserves to itself the right to ascertain all the facts and matters material to its risk, and the validity of their contract for one year, and if within that time it does not ascertain all the facts, and does not cancel and rescind the contract, it may not do so afterwards upon any ground then in existence." *Trust Co. v. Ins. Co., supra.*

If, therefore, there is nothing in the clause itself changing its terms or effect upon death of the insured within one year, if the clause was inserted for the benefit of the insurance company, to enable it to increase its business, if the period of one year after which the policy was to become incontestable, was to afford opportunity to the company to make its investigations and to commence an action for the cancellation of the policy, and if during the whole of the year some one has been in existence, the beneficiary, against whom an action could be brought, we see no reason for refusing to give the plaintiff the full benefit of the clause as it is written.

The death of the insured did not place the defendant at any disadvantage under the policy, nor stop its investigations, nor did it affect its right to commence an action, and in most cases death would inure to the benefit of the company, if it contemplated an action to cancel the policy by removing a hostile witness.

Our investigations, and those of counsel, indicate that the question has arisen very few times, and that the question, then, has been decided in accordance with this opinion. *Ebner v. Insurance Co.,* 121 N. E. (Ind.), 315, and *Manahan v. Insurance Company* (Ill.), L. R. A., 1918, D 1196, are directly in point.

In the *Ebner case* the insurance company brought an action for the cancellation of the policy two days before the expiration of the incontestable period, and after the death of the insured; and the appellate

court held that the proceeding was proper and legal, and said: "That if, as a result of such investigation, or of knowledge otherwise obtained, the insurer desires to contest the policy, appropriate steps to that end, either by a defense to an action brought on the policy in case of death of the insured, or by proper affirmative action, must be taken within the year; otherwise that the policy becomes incontestable, save as to conditions excepted from the noncontestable clause."

And in the *Manahan case:* "Incontestable provisions of insurance policies have been held valid as creating a short statute of limitations in favor of the insured, the purpose of such provisions being to fix a limited time within which the insurer must ascertain the truth of the representations made. *Royal Circle v. Achterrath,* 204 Ill., 549; 63 L. R. A., 452; *Flanigan v. Federal L. Ins. Co.,* 231 Ill., 399; 83 N. E., 178; *Weil v. Federal Life Insurance Co.,* 264 Ill., 425; 106 N. E., 246; Ann. Cas., 1915 D, 974. This being the purpose for fixing a specified time after which the policy shall be incontestable, it is not apparent, as plaintiff in error suggests, that the meaning of the clause here involved is that the policy shall not become incontestable until it has been in force for two years. There is nothing in this clause to indicate that the parties were contracting that plaintiff in error should have two years during the lifetime of Fay in which to investigate and determine whether false statements had been made in the application of the insurance. Plaintiff in error reserves two years time in which to make such investigation, and to determine whether there has been such a breach of warranty as would authorize it to rescind its contract.

"This clause can be construed as insisted upon by plaintiff in error only by reading into it that which is not there. This provision of the policy is in the language chosen by plaintiff in error, and constitutes a part of the contract which it entered into with Fay. . . . Some of the rights and obligations of the parties to a contract of insurance necessarily becomes fixed upon the death of the insured. The beneficiary has an interest in the contract, and as between the insurer and the beneficiary all the rights and obligations of the parties are not determined as of the date of the death of the insured. The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured, as much as it inures to the benefit of the insured himself during his lifetime."

We are therefore of opinion the plaintiff was entitled to judgment on the pleadings.

Affirmed.

J. W. ALEXANDER v. J. N. VANN.

(Filed 13 October, 1920.)

1. Libel and Slander—Privilege Communications.

An absolute privileged communication rests in public policy, and is one which, under ordinary circumstances, would be defamatory, made to another in pursuit of a duty, political, judicial, social, or personal, and an action for libel or slander will not lie, though the statement was false, unless actuated by actual malice.

2. Libel and Slander—Qualified Communications.

A qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating, acting without malice, has an interest, or in reference to which he has a moral or a legal duty to perform; and the inference of malice may be rebutted by the occasion of the communication, or such occasion may tend to prove it, or tend to prove that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

3. Libel and Slander—Privilege—Actionable Per Se.

The sheriff of a county in returning a prisoner charged with wife murder, to another county, put the prisoner in charge of his deputy sheriff, and deputized a negro ex-convict, who had, single-handed, made the arrest, to assist his deputy. The subdeputy rode in the car for colored people, but at the request of a third person, with the acquiescence of the deputy, went into the white people's car and rode with them for a while, to give some personal information as to the arrest: *Held*, a letter written to the deputy by a defeated candidate for sheriff, of the county to which the prisoner was being carried, in effect, that the writer was surprised and disgusted that the deputy permitted the negro subdeputy to ride on equality in the coach with himself, and that the negro subdeputy, a wife murderer, except in incident of birth, was a better man, lacks the elements of a privileged communication, in that it was addressed personally to an official of an adjoining county, and not to any one who could have remedied the wrong, if any had been committed; and considered with the further facts of the case, showed personal spite and malice, and was actionable *per se*.

CIVIL ACTION for damages for libel, tried before *Devin, J.*, at April Term, 1920, of HERTFORD.

The action was submitted to the jury upon the following issues:

"1. Did the defendant publish of and concerning the plaintiff the letter set out in paragraph three of the complaint? Answer: 'Yes.'

"2. Were the matters and things published of and concerning plaintiff in said letter true? Answer: 'No.'

"3. What damage, if any, is plaintiff entitled to recover therefor? Answer: '$500.' "

From the judgment rendered the defendant appealed.

Rogers & Williams, Stanley Winborne, and W. H. S. Burgwyn for plaintiff.

D. C. Barnes, W. R. Johnson, Winston & Matthews, and W. D. Boone for defendant.

BROWN, J. We are of opinion that Judge Devin was correct in holding that the words of the letter are libelous of themselves, and actionable because the doctrine of qualified privilege does not apply. The undisputed facts are that the plaintiff was a deputy sheriff of Hertford County under Sheriff Garrett at the time the said libelous letter was written and mailed to the sheriff of Pitt County. On 5 May, 1917, Sheriff Garrett received a telegram from sheriff McLawhorn of Pitt County requesting him to arrest one Zemas, a Hungarian of desperate character, a fugitive from justice, who had murdered his wife, for whose capture a reward of $200 had been offered. Eley Reid, a colored man, captured Zemas in the swamps of Chowan River, and, single-handed, delivered him to the sheriff of Hertford County at Winton. Sheriff Garrett had been requested to have the prisoner well guarded by two men at the expense of Pitt County. He deputized the plaintiff, a regular deputy, to take the prisoner to Pitt County, and appointed said Reid, a very powerful man, to act as guard. The plaintiff took the prisoner and placed him with himself and Reid in the smoker of a white coach, and delivered him safely to Sheriff McLawhorn at Greenville, Pitt County, N. C. The plaintiff, with Reid, then returned to Hertford County. The evidence shows that the plaintiff rode in the white coach, and Reid was in the colored coach except for a short distance, when he first got on the train he was called into the smoker of the white coach by one Mr. Ames, a railroad detective who knew him, and having heard of the capture of Zemas, the Hungarian wife-murderer, asked of Reid the details of the capture. When Reid had related the story to Mr. Ames, he returned to the colored coach and remained there until he reached Ahoskie, his destination.

In the fall, just prior to the publication of the letter in question, J. N. Vann, the defendant in this action, was for the third time defeated by A. E. Garrett in the election for sheriff of Hertford County, and at the time of the publication of the said libelous letter, J. N. Vann was a private citizen of Hertford County, and was unfriendly toward Sheriff Garrett.

Eley Reid was at the time the said letter was written an exconvict, and he is a negro.

The alleged libel is contained in the following letter received by Sheriff McLawhorn from the defendant:

AHOSKIE, N. C., March 9, 1917.

SHERIFF MCLAWHORN, Greenville, N. C.

DEAR SIR:—I read with surprise, and disgust to a certain degree, that account of the capture of the criminal from your section by Eley Reid of this county.

Judging from the report that Deputy Alexander brought back here, you gentlemen evidently did not recognize Reid as being a negro, nor did Alexander have self-respect to inform you of this fact, judging from the entertainment he reports you gentlemen have accorded Reid. A friend of mine says that Alexander actually had Reid in the white coach on the seats with gentlemen on his return trip here.

Reid is a negro, and an exconvict, and Alexander is a very little better, and I should say, except by birthright, Reid is a superior man.

Regretful to say the high office of sheriff of Hertford County has reached a very undignified state to which the better element of people here do not approve.

I am not giving you this information in confidence by any means, but I do think it the duty of all respectful whites who are proud of their Caucasian blood from which they sprang, to state these facts.

I am yours very truly,

J. E. VANN.

As we understand it, a privileged communication is one which, under ordinary circumstances, would be defamatory made to another in pursuance of a duty, political, judicial, social, or personal, so that an action for libel or slander will not lie though the statement be false unless actual malice be proved in addition. The great underlying principle of the doctrine of privileged communications rests in public policy. Qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has some moral or legal duty to perform. The occasion on which the communication was made may rebut the inference of malice or it may tend to prove malice, and that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made. Mr. Newell says, sec. 497, that a communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or proper cause. The learned author further says, sec. 501, that if the communication, whether written or oral, be of such a character that the expressions in it are beyond what common sense indicates to be justifiable, it cannot be held as privileged. In regard to communications containing charges against public officers, Mr. Newell says: "It is the

duty of all who witness any misconduct on the part of a magistrate or any public officer to bring such misconduct to the notice of those whose duty it is to inquire into and punish it; and, therefore, all petitions and memorials complaining of such misconduct, if prepared in good faith and forwarded to the proper authorities, are privileged."

This Court has recognized and acted upon these just principles of the common law. This Court held unanimously, in *Logan v. Hodges,* 146 N. C., 38, that: "A postal card containing a libelous communication concerning a public official of a county, though written in the public interest, is not absolutely or qualifiedly privileged when not addressed to some person having jurisdiction to entertain the complaint, or power to redress the grievance, or some duty to perform, or interest in connection with it." In *Fields v. Bynum,* 156 N. C., 413, this Court said: "To justify words alleged to have been slanderously spoken, and to bring himself within the protection which attaches to communications made in the fulfillment of a duty, the defendant must show something more than an honest belief in the truth of his utterances, for he must show that the communication was made in good faith on an occasion which justified his making it; and the manner in which it is uttered may take them out of the privilege." We also said in the same case that where the expressions are allowable, the manner in which they are made public may take them out of the privilege. *Dawkins v. Lord Paulet,* L. R., 5 Q. B., p. 102; Newell on Slander, p. 477.

We fully concur in what is said by *Mr. Justice Hoke* in *S. v. Publishing Co.,* 179 N. C., 720, as follows: "It is to the public interest that the conduct and qualifications of officials and candidates for public office be subjected to free and fair criticisms and discussion by their constituents, and such presents a case of qualified privilege, and to convict of libel for defamatory publication of this character by a newspaper and its editor, it must be shown that it is both false and malicious, its falsity not of itself sufficient to establish malice, there being a presumption that the publication was made in good faith."

Under all these authorities we think the defendant has failed to bring himself within the doctrine of qualified privilege. There is nothing in the letter which even charges the plaintiff with any dereliction in his official duty. The face of the letter shows to our minds conclusively that no good purpose could be accomplished, or was intended to be accomplished, by its publication. The plaintiff was the deputy sheriff engaged in carrying out the instructions of the sheriff of Hertford County. The sheriff appointed Reid to assist in guarding the prisoner. We see nothing improper whatever in appointing the negro, who had single-handed captured the murderer, to guard him to the place of destination. The person to whom the letter was addressed had no

jurisdiction whatever to entertain the complaint, or to redress the grievance if there had been any. McLawhorn, to whom the letter was addressed, was the sheriff of Pitt County. If Alexander had been guilty of anything that public policy required should be known and corrected, it was the defendant's duty to address his communication to the sheriff of Hertford County, who appointed Alexander. There is nothing to justify the defendant in charging the plaintiff with being very little better than a negro or a convict. There is nothing to justify the assertion that the exconvict Reid is a superior man to the plaintiff. The entire communication shows on its face that it was not written for the *bona fide* purpose of redressing or calling attention of the public to any misconduct in office of a public official. On the contrary, it appears to us very strongly that the letter was written solely in spite and malice for the purpose of injuring the plaintiff, who was a deputy of Sheriff Garrett of Hertford County, who had defeated the defendant in a recent election. The communication was not addressed to any person who had power to redress any grievance, but was addressed to the sheriff of another county. In *Logan v. Hodges, supra,* the defendant addressed a postal card to A. J. Martin, and sent it through the mails, reading as follows: "Dear Sir:—From conversation I have had with a gentleman from Davie County who was in Yadkinville the day after the robbery, I believe the guilty men live in Yadkinville. Turn your searchlights on your treasurer and the man that boards with him and the postmaster, and you will find where the money went. Yours truly, J. D. Hodges, Augusta, N. C., 9 September, 1904." This Court held the communication was libelous *per se,* and was not a case of qualified privilege, because not addressed to some person having jurisdiction to entertain the complaint or power to redress the grievance or some duty to perform or interest in connection with it.

If the *Logan case* was not one of qualified privilege, it is impossible for us to see how the present case can be. There is nothing in *S. v. Publishing Co.* which at all militates against our opinion in this case. That case was one against a newspaper on account of the editorial comment upon the conduct of sheriff McLawhorn, the sheriff of Pitt County, and a candidate for renomination, charging that he had been unfaithful and criminally negligent in respect to enforcing the statutory provision applicable to deserters and slackers under the Federal Draft Acts. It is manifest that the publication was in the public interests; that it was made against a public officer, a candidate for reëlection, and *prima facie* made in good faith in order to defeat the reëlection of the unworthy public officer.

In this case the motives of the defendant in writing the letter were evidently personal. His feelings were hostile, and, however strong may

have been his convictions, there is nothing on the face of the letter, or in evidence, which can justify putting plaintiff on par with an exconvict.

We think the verdict of the jury, under proper instructions by the judge below, must be sustained.

Affirmed.

JENNIE LEE REES ET AL., EX PARTE.

(Filed 13 October, 1920.)

1. **Estates — Contingent Interests — Sales — Statutes — Private Sales — Courts.**

   Lands affected with a contingent interest may be sold under the provisions of Rev., 1590, when it is made to appear that the income from it is a little more than sufficient to pay taxes and keep the premises in repair; that it is not well located, and not likely to rise in value; and a judgment of the Superior Court that they be privately sold to a designated person, at a price ascertained to be a fair and reasonable one, will be sustained on appeal.

2. **Estates—Contingent Interests—Sales—Statutes—Proceeds, How Held —Life Tenant—Payment.**

   When lands affected with contingent interests are sold for reinvestment under the provisions of Rev., 1590, the life tenant is only entitled to receive the net income from the proceeds of the sale pending reinvestment in lands, or from the lands thereafter reinvested in, during her life; and there is no authority of law to arrive at the value of the life estate and pay the *corpus* of it to the life tenant, in money.

3. **Estates—Contingent Interests—Sales—Proceeds—Reinvestment—Statutes—Liberty Bonds.**

   The proceeds of the sale of lands affected with contingent interests under Rev., 1590, should be paid into the clerk's office, to be loaned on real estate security on approval of the judge, or, under ch. 17, Laws 1919, temporarily invested in Liberty Bonds, until such time as it can be reinvested in the purchase of other real estate, to be held upon the same contingencies and in like manner as was the property ordered to be sold.

APPEAL by all parties from *Kerr, J.*, at September Term, 1920, of WAKE.

Controversy without action under Rev., 1590, for sale of contingent remainder. The object of the controversy is to sell the house and lot in Raleigh devised to Mrs. Jennie Lee Rees, with remainder over, and reinvest the proceeds to meet the contingencies stated in the said will. From the judgment all the parties appealed.

Robert W. Winston for Jennie Lee Rees and husband.
J. C. Little for next friend.

CLARK, C. J. Jennie L. Lee devised the property in question to her daughter Jennie (now Mrs. Rees), with limitation that if she should "die leaving issue surviving her, then to such issue and their heirs forever," but if she "shall die without issue surviving her, then the property to return to my eldest daughter." In *Rees v. Williams*, 164 N. C., 128, the Court construing this devise, held that the vesting of the estate in remainder depended upon the contingency of the death of the devisee without leaving issue surviving her, and hence during her lifetime she could not convey an indefeasible title, for should she die, leaving issue, the title would vest in them. This case was before us on rehearing (*Rees v. Williams*, 165 N. C., 201), and was reaffirmed. It has been cited and approved in the cases cited to *Rees v. Williams*, 165 N. C., 201, in Anno. Ed., and more recently in *Jenkins v. Lambeth*, 172 N. C., 470; *Whitfield v. Douglass*, 175 N. C., 48, and cases there cited; *Kirkman v. Smith, ib.*, 582; *Patterson v. McCormick*, 177 N. C., 455, and at last term in *Thompson v. Humphrey*, 179 N. C., 51, 53; *Love v. Love, ib.*, 117, and *Jarman v. Day, ib.*, 319. Mrs. Rees has since obtained from her sister, Mrs. Schlesinger and husband, and from her brother, Harry Rees and wife, conveyances of their interests.

Harry Lee, the brother of Mrs. Rees, and his two infant children; also the two infant children of Mrs. Schlesinger, and the infant child of Mrs. Rees, are made parties, the infants appearing by next friend, duly appointed. Thus all the classes who could participate as heirs at law of Mrs. Rees are represented. She resides in Annapolis, Md., and her only brother, Harry Lee, in Raleigh, N. C. The petition concurred in by all parties represents that W. H. Pitman has offered $8,500 for the property; that the house is dilapidated; that the necessary repairs, taxes, and insurance nearly absorb the entire rental; that the property is located in an undesirable locality, where it is not likely to advance in value; that $8,500 is a fair and full price, and that the best interests of all parties, including the infants, demand a sale of the property and the acceptance of the offer of W. H. Pitman. The Court found all the above allegations to be true, and approved the sale to W. H. Pitman at the price named, who has declined to pay his bid upon the ground that the commissioner cannot make a good and indefeasible title. The Court held that the commissioner could convey a good and indefeasible title to the property, and adjudged that the purchaser pay the sum bid by him.

This Court approves the order of the court below directing the sale and the acceptance of the bid of W. H. Pitman and the execution of the

deed to him upon the payment of the purchase-money, which he is adjudged to make, and approves the judgment that the commissioner's deed will convey an indefeasible title, and the judgment directing the proceeds less $25 allowed the next friend for his services as such, and for executing the deed to Pitman as commissioner, to wit: the sum of $8,475 shall be paid into the office of the clerk of the Superior Court, subject to the further orders of the court.

The decree, however, further finds that "the present worth of the life estate of the said Mrs. Rees is $7,300," and directs this sum to be "paid over to her as her share of said fund, the remainder being $1,175, to be paid to the clerk of the court, to be held by him to await the death of said Jennie Rees, and then be distributed as her will shall direct, including accumulated interest." This latter part of the decree adjudging the value of Mrs. Rees's interest, and directing it to be paid over to her, we cannot approve. We find no authority for it in Rev., 1590, which, on the contrary, provides that in sales under this section the proceeds "shall be reinvested in purchasing or improving real estate, to be held upon the same contingency and in like manner as was the property ordered to be sold"; and authorizes the loaning of such money, subject to the approval of the court, until such time that it can be reinvested in real estate. Nor, even if the statute permitted, the valuation and payment to Mrs. Rees of her expectancy would we be disposed to validate the calculation in this case, whereby she was allowed $7,300 in cash, and the parties in remainder only $1,175, subject to all risks of investment. She is stated to be 30 years of age. Upon this basis of calculation, had she been much younger, her expectancy would have more than absorbed the entire fund, leaving the remaindermen nothing, instead of the *corpus* of the entire fund, at its enhanced value if reinvested in real estate on same contingencies and in like manner as the statute directs. Mrs. Rees is not entitled to the valuation of her expectancy, and payment thereof to her. This is not authorized by the terms of the will, nor by any statute. She is entitled only to the net interest, or rents after payment of the incidental expenses of the administration of the fund. The amendment to Rev., 1590, by Laws 1919, ch. 17, authorizes a temporary investment of such fund in "Liberty Bonds," and the statute thus amended is now C. S., 1744. The $8,475 should be paid into the clerk's office to be loaned on real estate security, on approval of the judge, or invested in "Liberty Bonds" until such time as it can be reinvested in the purchase of new real estate, to be held upon the same contingencies and in like manner as was the property ordered to be sold; and the annual interest, or rents, shall be paid over to Mrs. Rees, less the necessary costs of administering the property, and at her death the *corpus* shall be conveyed to the parties entitled.

Modified and affirmed.

MRS. ALICE A. TILLETT, MALVERN H. TILLETT, AND AMY TILLETT v. FRANK H. NIXON AND WIFE, ANNIE NIXON.

(Filed 13 October, 1920.)

1. Estates—Remainders—Contingencies— Children— Possibility of Issue Extinct—Fee Simple—Deeds and Conveyances.

An estate for life, and also upon contingency in fee should the tenant for life die without children, vests the estate immediately upon the death of the testator in the first taker upon the contingency stated; and where she has only one child the possibility of her bearing others being waived, a deed made by both will convey the fee-simple title to the purchaser. The effect of a general power of disposition given by will to the first taker, and the difference between the expressions "devise" and "bestow," discussed by WALKER, J.

2. Wills—Power of Disposition.

Where a devisee of a life estate, who also was given a general power in the will to dispose of it, has become, then, by descent, the owner of the reversionary interest, her right to alienate the property is an ordinary incident of her ownership, and is not restricted by the terms of the power, as the life estate and the reversion have become merged in her, thereby vesting in her the absolute ownership regardless of the power.

3. Same—Waiver.

The devisee of a life estate in lands with a general power of disposition to take effect after the termination thereof, waives the right to exercise such power by her deed conveying her title thereto when it appears that she had acquired the reversion by descent.

HOKE, J., concurs in result.

APPEAL from *Bond, J.*, at chambers, 30 July, 1920; from PASQUOTANK.

This is a controversy without action submitted under the statute (Rev., 803) for the decision of the court, upon the following facts agreed:

"Mrs. Alice A. Tillett, Malvern H. Tillett and wife, Amy Tillett, plaintiffs above named, and Frank Nixon and wife, Annie Nixon, defendants above named, parties to a question in difference, which might be the subject of a civil action, hereby agree upon the following case containing the facts upon which the controversy depends, and respectfully present a submission of the same to the Superior Court of Pasquotank County, and to you as judge of the First Judicial District, for decision, said facts being as follows, viz.:

"1. That on 17 December, 1878, Nathan Overman, a resident and citizen of Pasquotank County, died, leaving a last will and testament, duly attested, probated, and recorded in said county of Pasquotank, copy of which is hereto attached, marked 'Exhibit A,' and made a part of this case, containing the facts agreed.

"2. That Margaret Overman, wife of the testator, Nathan Overman, and being the same referred to in the will of Nathan Overman, hereto attached, died on 30 April, 1879.

"3. That the plaintiff, Mrs. Alice A. Tillett, is, and was at the time of the death of the said Nathan Overman, the only child and heir at law of the said Nathan Overman, deceased, and is the daughter, 'Alice A.,' referred to in the will of Nathan Overman hereto attached.

"4. That the plaintiff, Malvern H. Tillett, is the only child born to the plaintiff, Mrs. Alice A. Tillett, and that the plaintiff, Amy Tillett, is his wife.

"5. That at the time of his death the said Nathan Overman was seized and possessed in fee of a certain lot of real estate in Pasquotank County, North Carolina, and more particularly described as follows, to wit:

" 'Situated on the north side of Church Street in Elizabeth City, N. C., being the main residence of Mrs. Alice A. Tillett, and bounded on the north by the lands of G. W. Palmer and Chas. Sawyer; east by the lands of John L. Hinton heirs; south by Church Street; and west by other lands of Mrs. Alice A. Tillett, which she inherited from her father, Nathan Overman, deceased; same fronting eighty-three feet on Church Street and running back between parallel lines to the northern boundary of said property as heretofore given.'

"6. That the plaintiffs and defendants have heretofore entered into a certain contract, under the terms of which the defendants have agreed to purchase from the plaintiffs, at the price of $8,000 cash, and the plaintiffs have agreed to sell to the defendants at said price, and to convey to the defendants a good and indefeasible title to the lands described in the preceding section.

"7. That the plaintiffs have heretofore tendered to the defendants a proper deed, sufficient in form, purporting on its face to convey title to said lands in fee to the defendants, executed by plaintiffs in their own right, and by virtue of said power, with full covenants of warranty, seizin, and right to convey, and that the defendants have refused to accept said deed and to pay the purchase price for said lands, claiming that the plaintiffs are not seized of said lands in fee, and cannot convey a good and indefeasible title in fee simple.

"8. That Mrs. Alice A. Tillett is now a widow, seventy-two years of age, and that there is no human probability of her remarriage, followed by the birth of issue; and that the legal possibility of such an issue has been, and is hereby, expressly waived by the defendants, as a ground of objection to said deed.

"9. Upon the foregoing facts the plaintiffs contend that they are seized of said premises in fee, or have a right by virtue of the power in

the will, and otherwise, to convey the same in fee simple, subject only to the legal possibility of lawful issue hereafter born to the plaintiff, Mrs. Alice A Tillett; and the defendants contend that the plaintiffs are not seized of said premises in fee, and have not a right, by reference to said power, or otherwise, to convey the same in fee simple, subject only to the legal possibility of issue born hereafter to the plaintiff, Mrs. Alice A. Tillett; it being hereby expressly agreed between the plaintiffs and the defendants that if the court shall be of the opinion with the plaintiffs upon the foregoing contention, judgment shall be rendered for the plaintiffs, decreeing that the defendants accept said deed and pay said purchase price, and if the court shall be of opinion with the defendants upon the foregoing contention, then judgment shall be rendered for the defendants accordingly.

"Wherefore, the said parties to this controversy, desiring to expedite the determination of the aforesaid matters in controversy between them, submit the foregoing facts to this honorable court, and respectfully request its decision upon said question in difference. (Signatures of parties, with verification.)

" 'EXHIBIT A.'

"Be it remembered, that I, Nathan Overman, of sound and disposing mind and memory, of the town of Elizabeth City, N. C., do make, publish, and declare this paper-writing to be and to contain my last will and testament, as follows, to wit:

"1. I appoint my beloved wife, Margaret, executrix of this my last will and testament, directing her first to select from my household and kitchen furniture such articles for her own use and comfort as she may think proper and necessary, sell the residue thereof, if any, and also all my wares, goods, merchandise, and every of my personal property; collect all notes and sums of money due me by account, or otherwise, and rent due from year to year during her natural life, my store, house, and all other of my town lots and buildings (except the dwelling-house and lot where I now live), and from the sale, collections, and rents as aforesaid, pay all my debts and the balance thereof, including rents of my said house, even unto the death of my wife, I give and bequeath unto my wife Margaret, and my daughter Alice A. Overman, jointly and equally, share and share alike.

"2. I give and bequeath unto my wife, Margaret, and my daughter, Alice A. Overman, and their heirs forever, jointly and equally, share and share alike, my farm in this county, near Salem, known as the Thomas Harvey farm, including all the lands I own in Bluff Point.

"3. I leave to the use and enjoyment of my wife during her natural life the lot of land and building thereon where I now live; also such of

my household and kitchen furniture as she may find necessary for her convenience and comfort. Should my wife survive my daughter Alice, and also all children of my daughter, in such event I give to my wife and her heirs all my town property of every class. But should my daughter Alice survive my wife, Margaret, and die without leaving issue of her body begotten, in such event my said daughter shall have power to devise and bestow after her death unto or upon whomsoever she will all my estate not hereinbefore devised, if any; nevertheless, should my daughter Alice have children of her body begotten, any or any one of which survive both my wife, Margaret, and my daughter, Alice, I give and bequeath to them, or that one, as the case may be, after the death of both my wife and my daughter, all my town property of every kind, to them, him, or her, as may be, and their, his, or her heirs forever. In witness, etc. (Signed) NATHAN OVERMAN."

Judgment was rendered dismissing the proceeding, and taxing the plaintiffs with the cost. Exception and appeal by plaintiffs.

Meekins & McMullan for plaintiffs.
W. A. Worth for defendants.

WALKER, J., after stating the case: We are compelled to differ from the learned judge, upon the admitted facts, as to the ability of plaintiffs to make a good and indefeasible title to the land described in the contract of sale, and in the deed tendered by them to the defendants therefor.

Without deciding the first important, and very interesting question, raised by the plaintiffs (for a reason hereafter given), it is proper, we think, and fair to them, that we should, though in our own language, state the substance of their claim, and the reasoning by which it is supported, as the question may be presented again, and it may aid the court in coming to a correct conclusion, whether it be one way or the other. We do so more especially in this case, as there are strong and safe reasons upon which we may base our conclusion, without deciding the one as to the right of the donee of the power to convey by deed, as well as by will. Plaintiffs' contention:

First. The daughter could, by deed, pass a good title as owner of the life estate and donee of the power.

The testator's wife, Margaret, being dead, the contingencies under which she might take, in item 3, are eliminated from consideration. It then appears that by item 3 of the will the testator devised the property in controversy to his daughter, the plaintiff, Mrs. Alice A. Tillett, in the event of a failure of children surviving her, "to devise *or bestow* after her death unto or upon whomsoever she will all my estate hereinbefore devised." It is, therefore, manifest that if the plaintiff, Malvern Tillett,

shall survive his mother, Mrs. Alice A. Tillett, then the deed and title tendered by the plaintiffs to the defendants are good, since in that event the absolute fee simple is vested in him under the provisions of the will. The question, however, is presented as to the validity of the title and deed if the plaintiff, Malvern Tillett, should predecease his mother. And it is submitted for the plaintiffs that in that event the title and deed would be good. Upon the contingency that no child of hers survives her, Mrs. Alice A. Tillett, under the power of the will, can convey the fee simple. It is not contended that the power given to Mrs. Alice A. Tillett in the will has the effect of enlarging her life estate into a fee simple. The contrary seems now to be well settled in this State. It is equally well settled, however, that upon the devise of a life estate, coupled with an absolute power of disposition, the devisee of the life estate, Mrs. Alice A. Tillett, who is also the donee of the power, is enabled to convey the property in fee. *Mabrey v. Brown,* 162 N. C., 217; *Herring v. Williams,* 153 N. C., 231; *Herring v. Williams,* 158 N. C., 1; *Long v. Waldraven,* 113 N. C., 337; *Stroud v. Morrow,* 52 N. C., 463.

This principle is settled. A devise of an estate, generally or indefinitely, with a power of disposition over it, carries a fee. But where the estate is given for life only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed, unless there be some manifest and general intent of the testator which would be defeated by adhering to the particular intent. Words of implication do not merge or destroy an express estate for life, unless it becomes absolutely necessary to uphold some manifest general intent. The *Church v. Disbrow,* 52 Penn. St., 219, which has been approved and adopted by this Court in *Bass v. Bass,* 78 N. C., 374; *Patrick v. Morehead,* 85 N. C., 62, and in *Long v. Waldraven, supra.* Hence, it was said, in the case last cited, that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee. It was further said that the testator did not direct that one-third of his estate should, upon the death of his wife, go to whomsoever she should think proper to make her heir or heirs, in which event it might be said, perhaps, as in *Sherer v. Sherer,* 1 Wash., 266 (1 Am. Dec., 460), that the wife, by suffering her legal representatives to succeed her, actually made them her heir or heirs as much so as if she had pointed them out by an express devise.

The compass of this inquiry is narrowed, then, to the question as to what is the nature of the power given to Mrs. Alice A. Tillett under the will in conjunction with the life estate devised. In this connection, it appears that at the time of the execution of this will the plaintiff, Mrs. Alice A. Tillett, and the wife, Margaret, now deceased, were not

only the sole natural objects of the testator's bounty, but, as shown by the provisions of the will itself, the sole primary objects of his consideration, affection, and regard. *Hauser v. Craft,* 134 N. C., 326. The power in the will itself is a power appurtenant, as distinguished from a power collateral—a power coupled with a duty or trust. It is a power, the exercise of which is voluntary, and must, therefore, be considered as having been given in the will of the testator for the benefit of the plaintiff, donee of the power, and the benefit of the ultimate appointee. These being the circumstances surrounding the execution of the will, it is difficult to imagine any reason why, in view of the contingency upon which alone the power is given, the exercise of the power should have been confined by the testator to any particular manner. It is easy to conceive why the estate devised to Mrs. Alice A. Tillett should be restricted to a life estate, and the power of disposition altogether withheld in the event she had children surviving her, but failing this contingency, no reason appears why the testator, having devised to his daughter a life estate, and having then the intention to give her the power of disposition for her own benefit exclusively, should have limited the exercise of this power to an appointment by will, which could not benefit the donee, thus nullifying his very purpose in creating the power.

The contention of the defendants that the power can only be exercised through the form of a will by Mrs. Alice A. Tillett is further negatived, as plaintiffs contend, by the language of the power itself. Attention is again called to the language in which this power is created, as follows: "My said daughter shall have the power to devise, or bestow, after her death, unto or upon whomsoever she will, all my estate not hereinbefore devised."

One of the primary rules in the construction of wills is to give significance and effect to every word, where possible, without contravening the clear intention of the testator elsewhere expressed, or some positive rule of law or public policy. The fallacy in the defendant's contention, therefore, is that it not only overlooks the circumstances surrounding the execution of the will, but also the use of the word "bestow" in the creation of the power. This word was not used synonymously with the word "devise." To hold that it was would be to say that the testator having already used the word "devise," had without reason interpolated another word having exactly the same meaning—that is to say, would be to deny to the word "bestow" its ordinary meaning. There exists, furthermore, no authority or reason for construing this word as synonymous with "bequeath." Both the lexicographers and popular use deny the word such narrow signification. And it is, furthermore, to be remembered that in the use of this word the testator was referring to

lands. This appears conclusively from consideration of the estate, subject to the power, to wit: "all my estate not hereinbefore *devised.*" In "Words and Phrases" the word "bestow" is defined to mean "to give, to confer, to impart." The meanings of the word given above are accepted by high authority. Thus, in Corinthians 1:12:3, we find this language: "Though I bestow all my goods to feed the poor"—it being apparent that the word "goods" in the quoted sentence is used to designate property generally, real and personal, rather than any particular kind. And so, in Deut., ch. 14:26: "Thou shall bestow that money for whatsoever thy soul . . . desireth." The word has various other meanings, and some of them curious, as, for instance, "to expend," as money, this being obsolete; to give in marriage, "I could have bestowed her on a fine gentleman," as it was used in "The Tattler." "To demean, or to conduct oneself, to behave." "How might we see Falstiff *bestow* himself tonight in his true colors, and not ourselves be seen," as used by Shakespeare. "To lay up in store, or for safe-keeping, to store or place somewhere." "He bestowed it in a pouch," as said by Sir Walter Scott. But lexicographers are apparently in accord that "bestow" is synonymous with the words, "to give, grant, or confer," and this seems to be its common and prevalent meaning. In popular usage, too, the word signifies a transfer by one of something of value to another, without regard to the form of transfer. By the use of the word "bestow" the testator meant more than the mere use of a word synonymous with that of "devise," and as it has a meaning different from that of "devise," and includes the idea of parting with property whether by will or deed, it should have that meaning, as there is no reason why the testator should have restricted the exercise of the power to any particular method of passing the estate or transferring the land. In the light of the circumstances surrounding the execution of the will, therefore, and the plain meaning of the word "bestow" itself, the intention of the testator becomes clear, to devise to his daughter a life estate with a remainder to her children, if any, surviving her, coupled with a power to dispose of the property generally failing that contingency. This construction in no wise conflicts with his use of the words "after her death," in the language creating the power—these words referring manifestly to the estate to be appointed to the use, or the time when it shall vest. Not even a power to devise can be executed after the death of the donee. This would, of course, be a physical impossibility. It meant, therefore, that she should have the power to appoint the remainder, or reversion, after her life estate, and that the estate thus appointed under the power should not commence or take effect until after her death. It follows, therefore, that, if the plaintiff, Malvern Tillett, should predecease his

mother, her deed, executed by virtue of the power, would convey the fee simple. This is one of the plaintiffs' arguments, with their conclusion therefrom.

We are not all well agreed as to this proposition, but are as to the second one, and therefore prefer to rest our decision upon the latter, which we will now proceed to consider and decide.

Second. Plaintiffs have the right to convey a fee simple without reference to the power.

While it is true that a devise of an estate for life, coupled with the power of general disposition, does not enlarge the life estate into a fee, it is yet equally true that where there is a devise in fee, coupled with a voluntary power to appoint in fee, the devisee takes the absolute fee simple in the property, irrespective of whether the power of appointment is or is not restricted as to the manner of execution. The reason of this rule is that the right to dispose of property, whether by will, deed, or otherwise, is an ordinary incident of absolute ownership, which cannot be restricted, as to the manner of its exercise, by the power—the creation of the power in such cases being regarded as merely declaratory of a right already existent by virtue of the unqualified ownership of the property. This being the reason of the rule, it follows that wherever the donee of a voluntary power to appoint, either generally or in some particular manner, becomes vested with the absolute ownership in the property, subject to the power, such donee takes the property, together with the ordinary right of alienation unqualified in any degree by the existence of the power.

Applying these well settled principles to the case before us, it will be seen from the will in controversy that in the event the plaintiff, Mrs. Alice A. Tillett, should die without children surviving her, and in the further event that she should fail to exercise the power in the will, she will acquire the fee by descent from her father, there being no ulterior limitation of the property devised to her for life. Assuming that she outlives the plaintiff, Malvern Tillett, and also fails to exercise the power, then it appears that the only devise of this property made by the testator was of a life estate to her, Mrs. Alice A. Tillett, and that he died intestate as to the remainder or reversion. This being true, the remainder or reversion, that is to say, the fee simple in the property, subject to the life estate devised, immediately vested in his heirs at law. As to who were his heirs at law there can be no question. It is elementary that the descent is cast immediately upon the death of the ancestor, and it appears from the case agreed that at the time of the testator's death in this case, the plaintiff, Mrs. Alice A. Tillett, was his only child and heir at law. The descent was, therefore, immediately cast upon her, and by virtue thereof, and by virtue further of the devise

to her of a life estate, she became, immediately upon the death of the testator, the owner of the property in fee, subject only to the contingency that she should have children surviving her at her death. Assuming this contingency to happen (which is waived), it is plain, for reasons set out hereinbefore, that the deed tendered to the defendants, being executed by M. H. Tillett, her son, would pass the fee simple. Assuming this contingency not to happen, then Mrs. Alice A. Tillett is the absolute owner of the property in fee by devise of the life estate, and by descent of the reversion, coupled with the power to dispose of the property, either generally or by will. This being true, then, by virtue of the foregoing principles, her right to alienate the property as an ordinary incident of her ownership cannot be restricted by the terms of the power.

It furthermore seems to be well settled that a power coupled with an interest may be released. 21 R. C. L., 808; *Haslen v. Kean*, 4 N. C., 700. In 21 R. C. L., 808, where it is further said: "It is only consonant with the principles of fair dealing and common sense that any conduct of the donee of a (voluntary) power which in good faith precludes him from making an appointment, should have the effect of an estoppel. Any dealing with the estate by the donee of the power inconsistent with its exercise by which the rights of others are affected puts an end to the power." It would uphold a fraud if it did not. *Langley v. Conlan*, 212 Mass., 135; also reported in Ann. Cases, 1913 C, p. 421. In the case of *Langley v. Conlan, supra,* and the cases cited in the text, and the notes in Annotated Cases, will be found the fullest exposition of the law, the facts being practically on all fours with the facts in this case. In the cited case there had been a devise of lands for life to the daughter, coupled with a power to appoint by will. The devisee was one of two daughters of the testator, who died intestate as to the reversion. The daughter thereupon mortgaged the premises, and subsequently exercised the power of appointment, naming the defendants, Conlan and Abler. The Court held that the daughter, having taken a life estate by devise, and one-half of the reversion by descent, and having subsequently acquired the other half by purchase, the power was extinguished; and second, that the daughter, having, by mortgaging the property, dealt with it in a manner inconsistent with the subsequent exercise of the power, an estoppel was thereby raised which precluded her appointee under the power. But whether, under the foregoing principle, the power be extinguished or the donee estopped from exercising it, by reason of her inconsistent prior conduct in respect to its subject, it cannot be doubted, as we think, that such a power was destroyed under the doctrine of merger, when the descent was cast upon her and she thereby acquired the fee, not by purchase, or anything equivalent to it, but by inheritance, which blended the two estates.

The question now presented is clearly stated, and thoroughly discussed by *Chief Justice Rugg* in *Langley v. Conlan,* 212 Mass., 135, and we may be excused for quoting somewhat extensively from his opinion, as it seems to cover the precise matter completely and in all its bearings. He says, at page 137: "The question has never arisen in this commonwealth whether the donee of a power can be estopped from a voluntary exercise of the power. But it seems to follow from the decisions in *Clapp v. Ingraham,* 126 Mass., 200, and *Tuell v. Hurley,* 206 Mass., 65, 67. It is only consonant with principles of fair dealing and common sense that any conduct of the donee of a power which in good faith precludes him from making an appointment should have the effect of an estoppel. Any dealing with the estate by the donee of the power inconsistent with its exercise by which the rights of others are affected puts an end to the power. It has been so held in other jurisdictions. *In re Hancock* (1896), 2 ch., 173; *Foakes v. Jackson* (1900), 1 ch., 807; *Leggett v. Doremus,* 10 C. E. Green, 122, 127; *Brown v. Renshaw,* 57 Md., 67, 79; *Grosvenor v. Bowen,* 15 R. I., 549." It is further said on the same page: "This principle prevails notwithstanding the general rule that appointees by exercise of a power take, not through the person making the appointment, but through the donor of the power. Where the execution of the power is voluntary on the part of the donee, his conduct may be such as to prevent the exercise of the power. This is such a case. Eliza J. Langley made conveyance in mortgage with full covenants of warranty to the demandant. She received for her own use the consideration of the mortgage. It is hard to conceive of conduct more decisely indicating in good faith a promise not to exercise the appointment to the prejudice of the mortgagee. It follows that the appointees under the will of Eliza J. Langley have no title in the demanded premises." In still further elucidation of the principle, while dealing with facts very much like those in our record, he shows by unanswerable reasoning that the life tenant and donee of the power could by deed pass a valid and unassailable title. We are not speaking here of the right to convey by deed under the power, but of a very different question. The Chief Justice, in this connection, said: "The will of John O. Langley created a life estate for the benefit of his daughter Eliza. As he (the testator) made no disposition of the property in the event of her failure to exercise the power of appointment, he was intestate to that extent. Hence the remainder vested in his heirs at law, subject to the daughter Eliza's life estate, and subject to be divested by the exercise of the power of appointment by her. At the time of the conveyance by Eliza to the demandant, she was therefore life tenant and owner in fee of one-half the remainder, subject to her own power of appointment, and shortly after this mortgage she acquired the entire

interest in remainder, and was appointed trustee under the will of her father, being the first to qualify as such trustee. The inquiry is whether the conveyance to the demandant passed title so as to render ineffective the deed of Barlow, subsequently appointed trustee. Under these circumstances there was a merger of the life interest and the ownership of the remainder, so as to vest an absolute title in Eliza. It is a general principle that where property is given for the benefit of certain persons in such a way that no one else has or can have a possible interest in it, they are, in effect, absolute owners, and should have the control and disposition. In such a case equity will decree a dissolution of the trust. *Sears v. Choate,* 146 Mass., 395. It is also held generally that where the legal and equitable title of real estate both vest in the same person, the equitable title will merge in the legal estate, and absolute ownership will ensue divested of the trust. 1 Perry on Trusts (6 ed.), 347, and cases there cited. The present case calls for the application of this principle, and it works an equitable result." He speaks of "an equity," because there was a trustee in that case, and the estate was therefore of an equitable nature, but this made no difference in the result, and does not at all distinguish the cases from each other. We especially refer here to the case of *Parks v. Robinson, supra,* in which is cited with approval *Cummings v. Shaw,* 108 Mass., 159; *Troy v. Troy,* 60 N. C., 623; *White v. White,* 21 Vt., 250; *Wright v. Eastbrook,* 121 N. C., 156. The Court said in the *Cummings case:* "This clause gives to the plaintiff either an estate in fee, on the ground that power to convey (or will) an absolute estate is an attribute of ownership, and carries with it a fee, or it gives an estate for life, with power to convey or will an absolute estate; and upon either construction the plaintiff is able to convey to the defendant a fee simple, and thus perform his contract. If a question had arisen as to the validity of a devise over, it might be important to determine whether the plaintiff took an estate for life or in fee, but it cannot be so in this case." It was said in the *Troy case, supra:* "This is a power appurtenant to her life estate; and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder. A power of this description is construed more favorably than a naked power given to a stranger, or a power appendant, because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger, or one which does not affect the estate of the person to whom it is given." And practically the same was said in *Wright v. Westbrook, supra,* where the language is: "Where property was given to one during her natural life, 'with full power to dispose of the same,' with the permission of her husband, a deed executed by husband and wife conveyed a good and indefeasible title."

Mr. Fearne says, in his great treatise on Contingent Remainders and Executory Devises, 4 Am. Ed., secs. 778, 779, that merger of estates take place, as follows: "By act of the tenant for life, or in tail; by acceptance of the reversion; by surrender, bargain, and sale, or lease and release to the remainderman or reversioner; by bargain and sale, or lease and release, where the tenant for life has also the immediate remainder or reversion; by joining the remainderman or reversioner in a conveyance; by descent of the inheritance on the particular tenant, subsequently to the taking effect of the particular estate." This will gives a life estate to the widow of the testator, Margaret Overman, with a contingent fee provided she survives her daughter Alice Tillett, and all of Alice's children, with contingent remainder in fee to Alice, provided she survives the widow and dies without leaving issue of her body begotten; with general power of appointing the estate to such uses as she may designate, with limitation over to her child or children surviving her. We think that the doctrine of merger applies, and that, because of Alice's act in conveying the land, her power of appointment is defeated. In any view presented (not including the right to convey under the power), the title transferred to the purchaser of the land by the deed is a valid and indefeasible one, any defect inhering in it, by reason of the possibility that Mrs. Alice Tillett may again marry and have children, one or more of whom may survive her, being waived. We considered this feature of waiver very recently in *Malloy v. Acheson,* 179 N. C., pp. 90, 92, and 95, and refer to that case for the discussion of it, and for its effect upon this case.

Our conclusion is that the court erred, and that the judgment should have been for the plaintiffs. It will, therefore, be reversed, and judgment entered according.

Reversed.

HOKE, J., concurs in result.

IN RE WILL OF JOHN L. HINTON.

(Filed 13 October, 1920.)

1. Wills—Caveat—Devisavit Vel Non—Evidence—Competent in Part—Instructions.

Evidence competent on the issue of the mental capacity of the testator to make the will in question will not be excluded because incompetent upon the issue of undue influence, when not asked to be confined by the propounders to its proper purposes.

2. Wills—Caveat—Devisavit Vel Non—Mental Capacity—Undue Influence—Evidence.

Evidence is sufficient to take the cases of *devisavit vel non* to the jury upon the issues of mental capacity and undue influence upon the testator, in favor of the caveators, who are the daughter-in-law and her children, the grandchildren of the testator; that they were destitute at the death of their father, and one of the grandsons had appealed to the testator in his lifetime for help, who promised help in the future, but said he was then too poor and unable when he was a man of comparative wealth; that he had canceled a devise to them upon the face of the will, leaving them nothing, but all to the propounders, in good financial circumstances, and who were present at the trial and did not go upon the witness stand and deny the charge of the caveators of fraud and undue influence in procuring the will, etc.

3. Courts—Conduct of Witness—Trials—Appeal and Error.

The emotional conduct of a witness on the stand interested in the result of a trial of *devisavit vel non*, is a matter within the discretionary control of the trial judge, who should see that no undue prejudice is thereby caused, and will not ordinarily be considered in the Supreme Court on appeal.

4. Wills—Caveat—Instructions—Mental Capacity.

On the trial of the issues of *devisavit vel non* it is not reversible error for the judge to charge the jury, upon the evidence, that the testator must have had testamentary judgment, when considered with the charge as a whole, it appears by necessary implications he had instructed them accurately upon the question of "testamentary capacity" required by the principles of law applicable, and explained what he meant by the expression.

5. Pleadings—Amendments—Courts—Wills—Caveat—Devisavit Vel Non—Limitation of Actions.

It is within the sound discretion of the trial judge to permit amendments to the pleadings so as to set up the plea of the statute of limitations to the caveat of a will.

6. Limitation of Actions—Wills—Caveat—Coverture—Married Women—Statutes.

Our statute, Rev., 3135, in express terms, repels the bar of the statute of limitations when the caveators to the will are *feme coverts*, for the duration of their coverture; and where the jury have found that the caveat had been filed more than seven years after the will had been probated, but during the full time the caveators were and still are under coverture, the statute may not be successfully pleaded.

7. Wills—Caveat—Devisavit Vel Non—Nonsuit—Trials.

The proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for the direction of a verdict on the issues will be disallowed.

8. Instructions—Prayers for Instruction—Substantial Compliance.

It is sufficient if an instruction to the jury substantially covers the prayers therefor tendered, as the court is not required to use the language of the prayers.

9. Wills—Caveat—Devisavit Vel Non—Cancellation of Item—Issues—Waiver.

The caveators of the will waive their rights in an item thereof devising certain lands to them by submitting to its cancellation, and this renders the submission of an issue as to the cancellation unnecessary.

10. Wills—Caveat—Issues—Devisavit Vel Non—Verdict.

A will should be set aside when either the issue of mental capacity or of undue influence has been answered in favor of the caveators in proceedings of *devisavit vel non.*

APPEAL by propounders from *Stacy, J.,* at January Term, 1920, of PASQUOTANK.

John L. Hinton, whose will is attacked, and by the judgment declared not to be his will, died in January, 1910, leaving surviving him his widow, Sophie (since deceased), and six children, viz.: Mary F. Hinton, Sophie Ida Sawyer, Charles L. Hinton, E. V. Hinton, W. E. Hinton, and R. L. Hinton. There also survived him the children of another son, John C. Hinton, who died 4 September, 1902, before the will was probated.

After the death of John L. Hinton, the devisee, Mary F. Hinton, died, unmarried and intestate. After the caveat was filed and one hearing was had, Charles L. Hinton, another devisee, and one of the executors, died. The will was admitted to probate on 29 January, 1910. On 30 September, 1918, a caveat was filed by the daughters of John C. Hinton, the son of testator who had died before the will was made, viz.: Ada Whitehurst (with her husband), Flossie Nosay (with her husband), and Sophie Morgan (with her husband). The attack on the will is based upon the usual grounds—want of mental capacity and undue influence.

The will, if valid, devises a life estate to the widow in all lands of testator in North Carolina, except the Gordon farm in Camden County, with remainder to his six children named. All property in other states is devised to his four sons, and the property in this State is devised to his four sons, and the Gordon farm is devised to his daughter-in-law, the widow of John C. Hinton, deceased, for life, then to her four children, the caveators, and another child, John, who later died. C. L. Hinton and R. L. Hinton, testator's sons, were named as executors. The will, as stated, was dated 4 September, 1902, and was witnessed by George B. Pendleton, connected with the First National Bank of Elizabeth City, and W. T. Old, cashier of said bank. Thereafter, on 18 May, 1906, testator wrote on the face of the will and across the devise of the Gordon farm as follows: "I revoke the gift of the Gordon farm, 18 May, 1906." Signed John L. Hinton.

The caveators aver that at the time of the execution of the paper-writing (4 September, 1902), "and continuously thereafter, until his death," John L. Hinton was without mental capacity to make a will. They further aver that his signature thereto was obtained by undue influence and improper influence.

For their verdict the jury found:

That more than seven years elapsed between the probate of the will and the filing of the caveat, and that more than three years elapsed after Mrs. Whitehurst and Mrs. Nosay came of age before caveat was filed.

That Mrs. Whitehurst and Mrs. Nosay both married during minority, and have since been at all times under coverture.

That the execution of the paper-writing was procured by undue influence.

That at the time of execution of the paper-writing, on 4 September, 1902, John L. Hinton did not have mental capacity sufficient to make and execute a valid will.

That the paper-writing is not the last will and testament of John L. Hinton, deceased.

During the progress of the trial, and near its conclusion, the court permitted Mrs. John C. Hinton, mother of original caveators, to come in as a party, and adopt the caveat as her pleading, over propounders' objection. And the court permitted Mrs. John C. Hinton to then renounce her claim to the Gordon farm, and to waive objection to the revocation of that devise. After these preliminaries, Mrs. John C. Hinton testified as appears in the record.

Propounders, in apt time and by proper request, sought to have stricken out by the court the charge of undue influence, upon the ground that it consisted solely of allegation and suggestion, wholly unsupported by evidence fit to be submitted to the jury, and propounders insist that the record sustains their contention in this respect. They further contend that there was error very prejudicial to propounders in many instances, in the admission of testimony and evidence designed to bear upon both the question of mental incapacity and the suggestion of undue influence, so prejudicial, in fact, that if error there is, it should be held for reversible error.

The court entered judgment upon the verdict, and propounders appealed.

R. C. Dozier, Meekins & McMullan and Ehringhaus & Small for caveators.

Aydlette & Sawyer, Thompson & Wilson, Ward & Grimes, W. F. Halstead, and Small, MacLean, Bragaw & Rodman for propounders.

WALKER, J., after stating the case: We will first consider the case so far as it relates to the mental capacity of the testator to make a will at the time he executed the one in question.

The principle complaint of the propounders, on this branch of the case, is that the judge admitted the testimony of Mrs. John C. Hinton, the daughter-in-law of the testator, having married his son, John C. Hinton, who died before the will was made. She was made a party to the proceeding, why, we cannot see, as she did not caveat the revocation of the clause of the will by which the testator had devised to her for life the Gordon farm. But, assuming that having her made a party was legal, and both wise and expedient, we do not see how it can affect the competency of her testimony. We do not agree with learned counsel (who have filed a most excellent and ingenious brief, reinforced by an able oral argument by Judge Bragaw), that she was permitted to testify as to conversations with the testator bearing solely, or even partially, on the other issue as to undue influence, and if her testimony did include it, it did so incidentally, and bore directly on the issue as to his mental capacity. This being so, the remedy of propounders was to request the judge to caution the jury not to use it for any such purpose. It frequently happens that testimony may tend to prove matters not strictly within its competency, or, as we sometimes say, competent for one purpose and not for another, and it therefore becomes the duty of the presiding judge, by proper and careful instructions, to caution the jury as to how it should be restricted, for instance, where an expert is testifying as to the mental capacity of a person, where that issue is involved in the case, he may relate any conversation or communication with that person, or detail his conduct in the expert's presence, even though it may, in form and substance, be proof of relevant facts, in which case it would be admissible with proper caution to the jury from the judge as to how it should be considered by them, and a further warning that they should not use it at all, directly or indirectly, as proof of the facts the statement or conversation contained, but solely as evidence bearing upon the question of his mental capacity to make a deed, contract, or will, or to commit a crime, if he is being then prosecuted for one. The authorities are full, clear, and even positive to this effect. *McLeary v. Norment*, 84 N. C., 235, is a sufficient authority for this proposition, and the language of *Chief Justice Smith*, in referring to the Code of Civil Procedure, sec. 343 (The Code, sec. 590; Rev., 1631), is so much to the point, and presents a case so clearly analogous to this, that we leave all the exceptions based upon evidence of this kind to what he says at p. 237: "The proviso proceeds upon the idea that, unless both can be heard, it is best to hear neither. But the conversations offered are not to prove any fact stated or implied, but the mental condition of the plaintiff, as

declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body and mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must any conclusion of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. Would it not be competent to show an attempt at self-destruction? And do not foolish and irrational utterances equally tend to show the loss of reason, when proceeding from the same person? In either case the conduct and the language may be feigned and insincere, but this will only require a more careful scrutiny of the evidence, and does not require its total rejection. The admissibility of the witness's opinion, resting, as it necessarily must, upon past opportunities of observing one's conduct, requires, in order to a correct estimate of the value of the opinion, an inquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded. As an irrational mind manifests itself in irrational and foolish acts and expressions (and in this view the words are of equivalent import), so proof of the latter point to the insane source of which they are the offspring." It seems to us that *McLeary's case* answers many of the sixty-five exceptions we find in the record. See, also, *Rakestraw v. Pratt,* 160 N. C., 437; *In re Chisman's Will,* 175 N. C., 420; 22 Corpus Juris, pp. 599-609; *Linebarger v. Linebarger,* 143 N. C., 229; *In re Stock's Will,* 175 N. C., 224; *Bissett v. Bailey,* 176 N. C., 44. This rule does not apply where the exercise of undue influence is the question. *Hathaway v. Hathaway,* 91 N. C., 139; *Linebarger v. Linebarger, supra; Bunn v. Todd,* 107 N. C., 266. It would be a work of supererogation to consider so many exceptions in detail, and, therefore, we will confine ourselves to the salient and decisive ones. A full and minute discussion of this kind of testimony, and the reasons for admitting it, will be found in the following authorities. 17 Cyc., pp. 136-152, and particularly the footnotes; *Clary v. Clary,* 24 N. C., 78; *McRae v. Malloy,* 93 N. C., 160; *Whitaker v. Hamilton,* 126 N. C., 465; 1 Greenleaf on Ev., sec. 441.

If the evidence offered to prove insanity, or mental incapacity, was relevant also on the first issue, as to undue influence, that did not authorize the exclusion of it upon a general objection, because that goes to the entire evidence or implies that all of it is incompetent, and if any part of it is admissible, the objection, in general form, must fail. The propounders should have asked (under Rule 27 of this Court, 174 N. C., at p. 834) that the evidence be restricted "to the purpose" for

which it is competent. The testimony admitted here was certainly competent on the second issue, as to mental capacity, and we do not think it was allowed to apply to the other issue as to undue influence.

Disinheritance of children, or those who, under the particular facts of this case appears to have had a strong claim on the testator's bounty, such, for example, as his grandchildren, is competent evidence to show his mental incapacity to execute a will, and generally to show the state of his mind in respect to the transaction. *In re Burn's Will,* 121 N. C., 336; *Bost v. Bost,* 87 N. C., 477; *Reel v. Reel,* 8 N. C., 248; *Howell v. Barden,* 14 N. C., 442.

The evidence tends to show that the caveators were the widow of his son, who bore his name, and his children, and therefore grandchildren of the testator, who had peculiar claims to his affection and generosity, because they were destitute when the husband and father died. One of the grandchildren, a little boy, appealed for help to him, because, as he pathetically said, "I have no father now, and want you to help us," which the testator promised to do, but did not do, as normal men would have done. He devised them the Gordon farm, but canceled the clause afterwards. His children were in good financial circumstances, and they received from him, in his lifetime, deeds for very valuable property, besides all they got under the will. There was great disproportion between what they received from him by deeds and will, and the caveators, of course, as these destitute grandchildren got nothing. The propounders got it all. When his son's widow told him "the pitiable story of her plight, and that of her children, he replied that he was too poor to help, as poor as she; that it required all his money to keep up his policies, and by these expressions and his subsequent conduct showed he had completely forgotten them and the promise made to them and their little brother at the time of their father's death." He was not poor at all, but wealthy, as wealth was considered at that time. There was not only some evidence of his mental incapacity, but very strong and convincing evidence of it, the details of which it is not necessary to set forth. There was also plenary evidence of undue influence. None of the beneficiaries under the will went to the stand, although they were present at the trial, and faced in silence the accusation against them of exercising undue and fraudulent influence under the distressing circumstances of the case, depriving the grandchildren, who were their nieces and nephews, of their just share in their grandfathers' estate. A clearer and stronger case of insanity and undue influence could hardly be made out. We are at a loss to conceive why propounders did not take the witness stand to refute the personal charges made against them, unless they knew them to be true and unanswerable, or felt that they could not overcome the evidence of their truth offered by the caveators,

or did not wish to undergo the ordeal of a severe cross-examination, which might disclose to the jury how unfeelingly they had treated the caveators, who, because of their helpless and hopeless condition, were entitled to their care and protection, instead of being the victims of their cupidity. There can be no wonder that the verdict was against them. Evidence of this kind was competent for the jury to consider, for when one can easily disprove a charge by testimony within his control, and which he can then produce, and fails to do it, it is some proof that he cannot refute the charge. *Goodman v. Sapp,* 102 N. C., 477; *Powell v. Strickland,* 163 N. C., 393; *Bank v. McArthur,* 168 N. C., at p. 54; *Trust Co. v. Bank,* 166 N. C., at 122.

There is some objection made to the manner in which Mrs. John C. Hinton delivered her testimony, as to her alleged conduct when on the stand as a witness, and especially to her constant display of deep emotion, even being driven to tears by the sad story she was relating. These are matters for the control of the court in its discretion, which should be exercised at all times to prevent prejudice and unfairness to either party, and we have no doubt that the able and just judge who presided at the trial did all that the law required of him in the circumstances. We see nothing to the contrary. *S. v. Tyson,* 133 N. C., 692; citing *Knight v. Houghtalling,* 85 N. C., 17; *Horah v. Knox,* 87 N. C., 487. It was said in *S. v. Tyson, supra:* "We conclude, therefore, that the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice, and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objection must be entered, at least before the verdict."

The exception that the judge, in defining mental capacity, said, in one part of his charge, that the testator must have had "testamentary judgment" is untenable, as he immediately explained to the jury, by manifest implication, what he meant, by telling them that he must have "testamentary capacity," and again, that he must have a "testamentary mind," and the jury could not have inferred that he must be able to

dispose of his estate wisely, justly, and discreetly. We must consider the whole charge, its full context, to ascertain its real meaning, and not merely excerpts from it. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389.

The amendment of the pleadings to raise the question of the statute of limitations was a matter of discretion not reviewable here. But if the statute had been pleaded in due time, we are of the opinion that it would not be available to the propounders under the facts and circumstances of this case. The Laws of 1907, ch. 862 (Rev., 3135), has this proviso: "If any person entitled to file a caveat be within the age of twenty-one years, or a married woman, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability." The court submitted these two issues: "(4) Was the caveat filed more than seven years after the original probate of the will in controversy, and more than three years after Mrs. Ada Whitehurst and Mrs. Florence Nosay each had attained the age of twenty-one years? (5) Were the caveators, Mrs. Whitehurst, Mrs. Nosay, and Mrs. Morgan, each married to their present husbands during her minority, and have they since their marriage been at all times under coverture?" Both of which were answered "Yes." So that it can make no difference if the court refused to submit the other one requested by the propounders, as the findings upon the fourth and fifth issues prevent the bar of the statute, as will appear from its own language.

The motions for nonsuit, and to dismiss the proceedings, and the request for instructions to find for propounders on the issue as to undue influence, were properly disallowed. One who propounds a will for probate cannot suffer a nonsuit nor withdraw the paper propounded. The proceeding in the court is one *in rem,* and it is bound to give its sentence on the paper itself—*the res*—without regard to particular persons, but always endeavoring to give proper notice to all parties interested. *St. John's Lodge v. Callender,* 26 N. C., 334. "When a will is offered for probate, the proceeding is not a civil action, nor is it a special proceeding, but is *in rem,* to which there are, strictly speaking, no parties. When an issue *devisavit vel non* is raised, the court will require all persons interested in the matter to be brought before it. Any of them may withdraw if they see proper, but none of them have a right to take or suffer a judgment of nonsuit, or dismiss the proceeding." *Hutson v. Sawyer,* 104 N. C., 1. Besides, there was ample evidence to justify the verdict on both issues, as we have shown. *In re Worth's Will,* 129 N. C., 223; *Bost v. Bost, supra; Ross v. Christmas,* 23 N. C., 209. The testator was devoid of testamentary capacity, and his will (or volition), if he had any left, was completely dethroned or overmastered. The treatment of the widow of testator's son and namesake

by the beneficiaries named in the will was peculiarly heartless under the circumstances. How they could resist the cry of the little orphans for their protection and care, almost an appeal for bread, we are unable to understand.

We have discussed the exception as to the modification of prayers for instruction submitted by propounders. The judge fully explained his meaning of the first, and the other additions to the prayers were entirely proper to make his meaning and the law clear to the jury. Instructions are not bound to be in the language of the prayers, but it is sufficient to give them substantially. *Graves v. Jackson,* 150 N. C., 383; *Marcom v. Durham,* 165 N. C., 259.

We may add that caveators waived all rights under the clause of the will devising the "Gordon farm," and submitted to its cancellation, so that there was no special issue as to that matter.

The prayers of propounders, so far as they were proper, were substantially given in the charge, which was a full, fair, and able presentation of the facts and the law, and, in strict accordance with the precedents of this Court.

The other exceptions are either covered by what we have said, or are untenable in themselves. The propounders had a fair opportunity to meet and answer the allegations of caveators, and to show their right to have the will sustained, if such they had.

There was abundant testimony in this case to support the finding on the first and second issues, and if the rulings on either of them were correct, the will must be set aside. There surely was no error as to the second issue, as to mental capacity, and we are satisfied that there was none upon the first, as to undue influence. The evidence was sufficient to support the verdict even under the case of *In re Craven's Will,* 169 N. C., 567. It is not necessary to show that actual violence or physical force was employed in procuring the will. Coercion amounting to undue influence may exist where the only pressure felt is that which is upon the mind of the testator. Terrors afflicting and affecting the powers of the imagination will frequently deprive a man of his free agency. It is a well known fact that the strength and vigor of the will and the condition of the mental powers are largely dependent upon the physical condition of the individual. If a man's physical frame is weakened by old age and debilitated by a long and lingering illness, or racked by excruciating pain, it is in vain to expect from him that mental vigor and attention to his affairs, or that independent spirit in managing and arranging them, that we find present in one who is physically strong and vigorous. Hence, the physical condition of the deceased is always relevant. It may be shown that he was in feeble health when he executed the will, and that he had been suffering from illness for some time prior

thereto. For it is well established that the conduct of a person, himself in vigorous bodily strength, towards another who is ill, though mentally sound, may so intimidate the latter and fill his mind with fear that he passes under the complete control of the former. But physical weakness alone, whether the result of old age or produced by illness, is never conclusive on the question of undue influence. But evidence of the fact that when he executed the will the testator was seriously ill, and that he was very feeble physically as the result of old age or disease, in connection with other facts and circumstances tending to show that he was unable to exercise his will freely and intelligently, so that it was not in fact his will, but the product of some coercive influence, which he was unable to resist, may justify a finding that it was procured by undue influence. 1 Underhill on Wills, sec. 139.

We have examined the case closely and with care, giving strict attention to each and all of propounders' exceptions, and after our review of the case we can find no error committed at the trial, and none in the record.

No error.

M. C. BUFFALOE v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 13 October, 1920.)

Issues—Trials—Negligence—Contributory Negligence—Last Clear Chance—Instructions—Appeal and Error.

In an action against a street car company for its negligence in injuring the plaintiff's vehicle by a collision while crossing the track, and the evidence is conflicting upon the issues of negligence, contributory negligence, and the last clear chance, it is not reversible error for the trial judge to refuse to submit an issue upon the last clear chance, when he properly charges the law thereon under the issue of negligence. The charge in this case is adjudged sufficient, but the submission of the issue as to the last clear chance is commended. *Semble*, the evidence in this case may present the principle of concurring negligence.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1920, of WAKE.

This action is for damages to plaintiff and his automobile caused by a collision with one of defendant's street cars on New Bern Avenue, just beyond Bloodworth Street, in the city of Raleigh, on 7 March, 1918.

The court submitted only two issues, one as to the negligence of the defendant, answered "Yes" by the jury; and the other as to the contributory negligence of the plaintiff, also answered "Yes." Judgment for defendant, and plaintiff appealed.

Walter L. Watson and S. Brown Shepherd for plaintiff.
James H. Pou, Murray Allen, and W. L. Currie for defendant.

WALKER, J. There was some evidence to support the finding upon the first issue, apart from the evidence as to the last clear chance, and also conflicting evidence as to whether defendant, after its motorman saw the plaintiff, in the act of crossing its track, had sufficient time to prevent the collision by the exercise of ordinary care, and this conflict in the evidence carried the case to the jury.

The evidence more nearly presents a case of concurring negligence (*Lea v. Utilities Co.*, 176 N. C., 513), the defendant running its car at an excessive speed, and the plaintiff crossing the track too near the approaching car for the motorman to stop the street car and prevent the disaster. But treating the case as one raising, upon the evidence, the question of the last clear chance, the judge sufficiently charged the jury as to that feature of the case, for he told them if they found the facts to be that the motorman discovered, or by the exercise of ordinary care could have discovered, that the plaintiff was in a position of peril in time to have prevented the collision, and he failed to use all available means to stop his car, or to do what ordinary prudence required of him in that respect, and this failure in the performance of the duty he owed the plaintiff was the real and proximate cause of the injury, they should answer the first issue "Yes." The jury evidently accepted the defendant's theory that the plaintiff crossed the track so near the front of the rapidly moving car that the motorman had no sufficient time, by the exercise of due care under the circumstances, to stop his car and prevent the injury. The question as to the last clear chance was properly covered by the judge's charge. *McCall v. R. R.*, 129 N. C., 303. The plaintiff, it is true, was negligent in attempting to cross the track when so near it. The law does not require engineers to anticipate that a man so placed will do the foolish instead of the sensible thing, and if by his own conduct he places it beyond the power of the motorman to save him from his rashness or temerity, he must take the consequences, as he cannot complain of the motorman or impute the wrong to him.

The judge is not bound to submit the third issue, as to the last clear chance, in the sense that it is always reversible error not to do so. *Scott v. R. R.*, 96 N. C., 429. In that case there was only the one issue submitted, as to defendant's negligence, though two were involved, but the charge of the court (Judge H. G. Connor presiding) presented the two phases of negligence and contributory negligence, and this Court affirmed the judgment, where exception had been duly taken by the appellant, that the other issue as to contributory negligence should have been submitted by the court. But where the case is tried upon one issue as to

negligence, or upon that and the issue as to contributory negligence, the court should be careful to explain every view of the case, as to negligence, contributory negligence, and the last clear chance, where all of these matters arise. It is better to submit the question of the last clear chance, where it is presented, by a separate issue, but it is not always imperative to do so if proper instructions are given, so that plaintiff may have the full benefit of it. If we can see clearly that the plaintiff has been prejudiced by a failure to submit the issue, we may correct the error by awarding a new trial. And, in this connection, it may be well to add that the judge should make it plain to the jury what the last clear chance means, which is, as generally defined, that notwithstanding the plaintiff's negligence, if the defendant's motorman saw his peril, or that he had, even negligently, exposed himself to injury by a collision with the approaching car, and was liable to be hurt, or by the exercise of ordinary care he, the motorman, could have seen his danger, as for example, by keeping a proper lookout, and he failed, nevertheless, to exercise such ordinary care, either to discover the peril, or after discovering it, he failed to take proper measures to prevent the injury, the company would be liable. *Norman v. R. R.*, 167 N. C., 535. We think his Honor substantially complied with this rule and gave a proper charge.

It might enable the jury to more clearly understand the case, or, at least, in many instances prevent confusion, if what is called the third issue is submitted. Our conclusion is supported, as we think, by what is held in *McCall v. R. R.*, 129 N. C., 298. The Court said of the question now under discussion: "This apparent conflict grew out of the fact that no issue was submitted as to whose negligence was the proximate cause of the injury. And while it is thought best not to have too many issues, yet, as contributory negligence was to be pleaded and a separate issue submitted as to that, it seems that it would be entirely proper, if not best, to submit a direct issue to the jury that they may say by a direct finding whose negligence caused the injury. But we do not think this charge, properly understood, is contradictory. Nor do we see that the defendant has been prejudiced by the manner in which it is stated."

We conclude that plaintiff was not prejudiced by the failure to submit the issue he requested, but that he got the full benefit of it in the charge which was given.

No error.

McGOVERN & COMPANY, INC., v. ATLANTIC COAST LINE RAILROAD COMPANY AND WALKER D. HINES, DIRECTOR GENERAL.

(Filed 20 October, 1920.)

Courts—Jurisdiction—Transitory Actions—Actions—Railroads— Statutes —General Orders.

The courts of our State have jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina, to recover an injury to, or loss of goods, caused by an initial and connecting carrier, a foreign corporation, in another State (Rev., 1500; C. S., 1436), the cause of action being transitory; and Rev., 423, 424; C. S., 468, 469, and General Orders of Director General of Railroads, Nos. 18 and 18-a, relate solely to venue and have no application to taking jurisdiction of an action.

APPEAL by defendant from *Stacy, J.*, at February Term, 1920, of NEW HANOVER, for refusal to sustain the demurrer of the defendants to the jurisdiction, and to dismiss the action.

Carr, Poisson & Dickson for plaintiffs.
Rountree & Daris for defendants.

CLARK, C. J. The cause of action arose in Massachusetts by the wrongful act of the Boston & Albany Railroad Company, the initial carrier, connecting with the Atlantic Coast Line Railroad Company. The plaintiffs are residents of New York, and the defendant, the Atlantic Coast Line Railroad Company, is a North Carolina corporation for the purposes of jurisdiction. *Staton v. R. R.*, 144 N. C., 135; *R. R. v. Spencer*, reviewed and reaffirmed; *Brown v. Jackson*, 179 N. C., 363.

Certainly the Superior Court has jurisdiction of an action brought by a nonresident against a domestic corporation in the State of its domicile. The defendant, in his demurrer to the jurisdiction, relies upon the Rev., 424; C. S., 468, 469. But these sections, as well as Rev., 423; C. S., 467, are in the subchapter, "Venue," and have no application to jurisdiction which is governed by Rev., 1500; C. S., 1436; which provides that "The Superior Court has original jurisdiction of all civil action where exclusive original jurisdiction is not given to some other court."

Rev., 423, was fully considered in *Ledford v. Tel. Co.*, 179 N. C., 63, in a well reasoned opinion by *Allen, J.*, which held that "an action to recover damages for an injury negligently inflicted is transitory, and the party injured may maintain such action in our State, though he may be a nonresident and the cause of action arose in another State, regardless of the defendant's nonresidence here, or whether it be a corporation, if valid service of summons can be made here. The same ruling applies

to Rev., 424. The decisions cited in *Ledford v. Tel. Co., supra,* are numerous and are selected from many States, and are conclusive.

If the defendant's reasoning was correct, action could not be brought in New York, where the plaintiffs reside, nor in Massachusetts, where the cause of action arose, because the defendant railroad company cannot be served in either of those States.

The defendants also maintain that this action cannot be maintained at all against the railroad company, but we have held to the contrary in *Clements v. R. R.,* 179 N. C., 225; *Gilliam v. R. R., ib.,* 508; *Hill v. Director General,* 178 N. C., 609, which have been reaffirmed at this term in *Vann v. R. R.,* 180 N. C., ...

General Orders Nos. 18 and 18-a, relied upon by the defendants, pertain, like Rev., 423 and 424, only to *venue,* and do not deprive our courts of jurisdiction.

The demurrer to the jurisdiction was therefore properly overruled.

Affirmed.

G. A. DENNISON v. FRANK SPIVEY ET AL.

(Filed 20 October, 1920.)

1. Bills and Notes—Notes—Negotiable Instruments—Fraud—Burden of Proof—Evidence.

Evidence that a note sued on was not to be delivered until certain other signatures were placed thereon, which were not obtained, and the property for which the note was given had never been delivered to the signers, and that the person thus negotiating for the sale had left the State, and the plaintiffs claimed to be innocent purchasers for value, in due course, etc., is sufficient to sustain an affirmative finding upon the issue of fraud, and to put upon the plaintiff the burden of proving that he had purchased in due course without notice of the defect in the title of the notes.

2. Same—Infirmity of Instrument—Notice—Rule of the Prudent Man.

When the plaintiff claims to be an innocent purchaser for value of the note sued on, by endorsement, before maturity, and without notice of fraud between the original parties, evidence that he lived in another State, and asked no questions of the orginal payees, living near him, and had made no demands on them, is sufficient to sustain a verdict against him upon the question as to whether he was a purchaser without notice of the infirmity of the instrument, or purchased under circumstances so suspicious as to put a man of reasonable prudence upon inquiry, and affect him with notice.

APPEAL by defendant from *Allen, J.,* at November Term, 1919, of COLUMBUS.

This is an action on three notes, executed 28 April, 1913, for $800 each, due respectively 1 June, 1914; 1 June, 1915; and 1 June, 1916, in purchase of a stallion. Summons was served 6 July, 1917. These notes were executed to Crawford and Ceas, and the defendants pleaded and offered proof that the signatures of the notes were procured by fraud. The plaintiff alleged that he was a holder in due course, without notice, having purchased the notes soon after execution and before maturity, and for value. Verdict and judgment for defendants. Appeal by plaintiff.

I. B. Tucker and T. C. Bowie for plaintiff.
Schulken, Grady & Toon for defendants.

CLARK, C. J. In *Bank v. Exum,* 163 N. C., 199, this Court said: "When there is evidence tending to show fraud in the execution of a note, the burden is thrown on the plaintiff to show that it was a *bona fide* purchaser and not upon the defendants to show the negative of that proposition."

In this case the jury found the issues as follows:

"1. Were the signatures to the notes sued on procured by fraud? Answer: 'Yes.'

"2. Did the plaintiff purchase said notes in good faith and without notice of infirmity or any defect and before maturity and for value? Answer: 'No.' "

The case is resolved into the discussion whether there is any evidence that will support the findings of the jury. The defendants admit they signed their names to these notes, but alleged and put in proof that they did so under an agreement with one John Crawford that they were not to be delivered unless the signatures of W. M. Cox, C. C. Pridgen, and Auty Baldwin were obtained to the said notes. This was not done. And the defendants claim that these notes were never delivered to any one by the authority of any one of these defendants, and that John Crawford, having failed to secure these signatures aforesaid to said notes, refused to deliver, and did not deliver said stallion to these defendants, but afterwards sold him for $200, and failed and refused to return said notes to these defendants as he had agreed to do, but immediately left the State, carrying these notes with him, and has never been since seen by these defendants who have not received any value whatever for said notes. There was allegation and proof that the names of these defendants to said notes were obtained through false and fraudulent misrepresentations of John Crawford.

There was ample evidence to be submitted on the first issue, and the burden of proof on this second issue was therefore on the plaintiff. The

plaintiff was not at the trial, and the only evidence for him was his deposition, taken at Milan, Michigan, in which he states that he knew the signature of E. E. Ceas, of the firm of Crawford & Ceas, and purchased the notes in the early part of 1914 and asked no questions; that he purchased them before maturity and paid the face value, less 10 per cent discount. The price of the stallion was $2,400, for which the three notes for $800 each were given, which were to be signed by twelve men, but as three failed to sign, $200 has since been credited on each note, which was more than the 10 per cent which the plaintiff alleges was the inducement to buy, and which credits were entered without the consent of the defendants.

The defendants also rely on the fact that the plaintiff, who lived 1,000 miles away, testified that he bought these notes and "asked no questions"; that he had never called upon Crawford and Ceas, the indorsers, who lived near him, for payment, nor has brought any action against them.

In *Bank v. Branson,* 165 N. C., 354, the Court said: "Where a party is about to receive a bill or note, if there are any suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder or the consideration of the paper, he shall be held bound to make such inquiry; or if he neglects to do so, he shall hold the paper subject to all equities. In other words, he shall act in good faith and not willfully remain ignorant when it was his duty to inquire into the circumstances and know the facts."

Upon all the evidence, the jury might well consider that the transaction was an unusual one, and not likely to be engaged in by prudent business men, and the circumstances in evidence were calculated to create a well grounded suspicion as to the dealings between the parties with reference to said notes.

The court, therefore, did not err in refusing all the prayers of the plaintiff to instruct the jury:

1. To answer the issue of indebtedness in favor of the plaintiff.

2. If they believe the evidence for the defendants to answer the first issue "No"—in favor of the plaintiff.

3. Upon the plaintiff's uncontradicted testimony the jury should answer the second issue "Yes."

4. That the defendants failed to offer evidence sufficient to establish fraud, and therefore the jury should answer that issue against the defendant.

Besides the circumstances in evidence, this Court, in *Trust Co. v. Ellen,* 163 N. C., 45, and *Bank v. Exum, ib.,* 201, quoted *Winter v. Nobs,* 19 Idaho, 28, where the Court calls attention to numerous cases in the

reports of many States of actions upon notes for stallions obtained under circumstances similar to these, the plaintiffs always alleging that they were purchased for value and before maturity and without notice.

No error.

M. F. McRAE v. MAXTON, ALMA AND SOUTHBOUND RAILROAD COMPANY.

(Filed 20 October, 1920.)

1. **Evidence—Hearsay—Fires—Damages.**

A map made by a surveyor showing the number of acres as "claimed" by the plaintiff to have been burnt over and damaged by fire from defendant railroad company's locomotive in an action to recover damages for the negligence of the defendant therein, is hearsay and incompetent as substantive evidence, and a judgment based thereon and calculated by the judge on a verdict of so much damage per acre, the acreage not being found by the verdict, is reversible error.

2. **Appeal and Error—Judgments—Fires—Damages—Evidence.**

When the trial judge has erroneously calculated the fire damage to plaintiff's land by multiplying the damage per acre, found by the verdict, the number of acres not being admitted nor found by the verdict, the question as to whether the judgment should have been based upon other evidence of a different acreage, without motion therefor, is not presented on appeal.

3. **Negligence—Issues—Pleadings—Evidence—Fires—Damages.**

An answer to an issue, was "the plaintiff's land burned over by the negligence of the defendant, as alleged in the complaint?" refers to the negligence alleged and not to the number of acres of the plaintiff that were damaged.

APPEAL by the defendant from *Guion, J.*, at September Term, 1920, of ROBESON.

Action to recover damages for burning over plaintiff's land from a fire set out by sparks and cinders escaping from a defective engine, catching on a foul and inflammable right of way, and spreading thence to the plaintiff's land. Verdict and judgment for the plaintiff, and appeal by the defendant.

McNeil & Hackett and Junius J. Goodwin for plaintiff.

Henry A. McKinnon and McLean, Varser, McLean & Stacy for defendant.

CLARK, C. J. The complaint averred that "about 50 acres" of plaintiff's land was burnt over as the consequence of sparks negligently

emitted from the defendant's engines. This was squarely denied by the answer. The only evidence as to the acreage burnt over is that of the court surveyor, who testified that he "surveyed burnt lands for plaintiff about the middle of March and made this map introduced as exhibit 'A,' showing plaintiff's *claim* for 42.2 acres burned, . . . went over burnt area as indicated on map, pointed out by M. F. McRae." The only other testimony as to the acreage burnt is that of A. D. McRae, brother of the plaintiff, who testified "about 40 acres burnt over."

There was no issue submitted as to the acreage burnt over. To the issue, "What damage, if any, is the plaintiff entitled to recover from the defendant?" the jury responded, "$12.50 per acre."

Had the jury responded in a lump sum, it would have been conclusively presumed that they ascertained the number of acres in fixing the damage. The number of acres was not admitted, nor was it found by the jury, and it was error to enter judgment upon the indefinite verdict.

The surveyor, whose survey was made several months after the fire, testified that his map, which was introduced in evidence, showed "plaintiff's *claim* 42.2 acres burned," and added, "that the burnt area was pointed out to him by M. F. McRae" (the plaintiff). This was incompetent because M. F. McRae had not testified as to the area burnt over, and was not even corroborative evidence. It was merely the hearsay statement of the plaintiff and the map was simply a statement of the plaintiff's claim as to the acreage. It was error for the judge to take that unproven acreage and multiply it by the jury's finding of $12.50 per acre and enter a verdict for $527.50. The jury did not even find the "about 40 acres" estimate of A. D. McRae to be correct, and whether the judge could have given judgment for the recovery of $500 is not before us, for he did not enter such judgment, and there was no motion by the plaintiff that he should do so.

The plaintiff insists that the second issue finds that "the plaintiff's property was burned by the negligence of the defendant, as alleged in the complaint." But that issue is only as to the negligent burning; as the first issue is to the ownership of the property. Neither of them throw any light upon the acreage burnt over, which was not a fact that could be found by the judge.

There are several other exceptions, in view of which, without discussing them (as they may not arise again), the case should be sent back without being restricted to the issue of damages, for a

New trial.

ROSA S. KENNEDY v. ATLANTIC TRUST AND BANKING COMPANY.

(Filed 20 October, 1920.)

1. Principal and Surety—Payment—Bills and Notes—Notes—Mortgages—Evidence—Husband and Wife.

When money is loaned to the husband for the prosecution of his business, secured by a chattel mortgage on his own property, and the wife appears on the note as a joint maker, and the note is further secured by a mortgage on their lands held in entireties: *Held*, a payment of the note by the proceeds of an agreed sale of the personal property of the husband, also discharges the mortgage on the realty, and the liability of the wife as surety on the note; and as between the original parties it may be shown that the wife signed as surety and not as a joint maker thereof.

2. Equity—Subrogation—Mortgages.

The attorney of a mortgagee had charge of an arrangement whereby a private sale was effected under agreement that the proceeds, sufficient for the purpose, were to discharge the mortgage debt, and the mortgagee gave a third person authority to collect the money and pay it accordingly. The attorney voluntarily guaranteed the payment of the money, and, *Held*, the equitable right of subrogation to the mortgagee's right, if any, was not available to him, he not having an interest to protect, or being in any manner liable for the debt.

3. Principal and Surety—Bills and Notes—Notes—Evidence.

A wife signing a note with her husband for a loan made to him personally by a bank may show, as between the original parties, that she signed as surety, and this principle applies to an attorney or agent of the payee, who, fully aware of the transaction, voluntarily paid the note and claims the equity of subrogation to the rights of the payee.

4. Principal and Surety—Equity—Exoneration—Bills and Notes.

Where the wife is surety on her husband's note, secured by a chattel mortgage on his property, and also by mortgage on lands held by them both in entireties, evidence of the value of the chattels covered by the mortgage, privately sold, under an agreement with the mortgagee that the proceeds should satisfy his debt, is admissible upon the question of exoneration of the surety, and the mortgagee having received the proceeds of the sale or the benefit thereof.

5. New Trials—Appeal and Error—Substantial Injustice.

Mere errors on the trial that have not worked substantial injustice to the appellant will not entitle him to a new trial.

APPEAL by defendant from *Allen, J.*, at October Term, 1919, of NEW HANOVER.

This is an action brought by plaintiff to restrain defendant from foreclosing a mortgage made by her to defendant. The mortgage was made on 31 October, 1911, to secure two notes, under seal, of $750 each, one payable one year after date, and the other two years after date, both

signed by plaintiff and her husband on 31 October, 1911. After the maturity of the two notes, the defendant, on 29 October, 1915, under the power in the mortgage, advertised the property for sale on 29 November, 1915, when the plaintiffs sued out an injunction, which was continued to the hearing.

The plaintiffs claimed in their complaint:

1. That the plaintiff mortgaged her interest in the land with her husband, which was an estate by entirety, with the understanding and agreement between her and defendant that defendant would exhaust the mortgage on the personalty before selling the realty; and,

2. That there was an agreement between plaintiff's husband and the defendant bank that $1,500 of the purchase-money of the restaurant, which was sold, should be applied to the discharge of the indebtedness of plaintiff to the bank.

This was denied in the answer, and thereon issues of fact and law arose.

Defendant's second assignment of error is the failure of the court to nonsuit the plaintiff at the close of plaintiff's testimony, the motion having been renewed at the close of all the testimony.

The following facts appear to be practically undisputed, though they may not be admitted by the pleadings. On 31 October, 1911, J. R. Kennedy, the husband of the plaintiff, owned and was conducting a restaurant in the city of Wilmington, and for reasons satisfactory to Kennedy, he applied to the defendant for a loan, offering the restaurant business and its fixtures as security therefor by way of mortgage on the restaurant furniture and fixtures, and certain real property described in the mortgage. At that time J. R. Kennedy and his wife owned, as tenants by entireties, the real estate covered by the mortgage afterwards executed and attempted to be foreclosed under the power of sale, which foreclosure was restrained by the court.

At the time of J. R. Kennedy's application for the loan from the bank, the real estate owned by him and his wife was mortgaged to the Peoples Savings Bank for $500, as Kennedy wanted money to purchase improvements and equipment for his restaurant. The result was that the bank required the payment of the People Bank's prior mortgage for $500, and loaned Kennedy $1,500; $500 was to pay the Peoples Bank's mortgage, and $1,000 was for the use of the restaurant. Kennedy desired only to mortgage the restaurant, but the bank insisted upon a mortgage on the restaurant and on the real estate, and the bank took the two mortgages to secure the loan. A chattel mortgage on the restaurant and a mortgage on the real estate, both securing the same two notes, which the bank required to be signed by both Kennedy and his wife, covering the $1,500 loaned, and with the money so loaned $500

was paid to the Peoples Bank in cancellation of its mortgage, and the residue was given to the borrower, J. R. Kennedy, to use in his restaurant.

While the notes were signed by both husband and wife, the wife did not borrow the money, nor ask for it, and the loan was in truth and in fact to J. R. Kennedy, and the bank knew this fact and dealt with J. R. Kennedy personally, and Kennedy personally for a while paid the interest on this debt.

Mr. Henry Heyer, an attorney of the Wilmington bar, was selected to draw, and did draw, the papers and examine the title to the real estate for the bank, and with part of the funds loaned by the bank paid the Peoples Bank mortgage, though he claimed he was J. R. Kennedy's attorney in the matter and was paid by Kennedy. Mr. Levi Carter, of the Hanover Realty Company, went with Kennedy to make arrangements with the bank for this loan.

Some time afterwards Carter, for himself, the Hanover Realty Company, and one Max Meyers, made a trade with Kennedy for the purchase of the restaurant mortgaged to the bank, whereby Kennedy claims they were to pay him for the restaurant $2,500, $1,500 of which was paid to the bank in satisfaction of the notes secured by the chattel mortgage and the real estate mortgage, and the residue, $1,000, was to go and be applied as a credit toward the payment for the Lloyd place that Kennedy was to buy from the purchasers of the restaurant, and Kennedy was to give a second mortgage to the purchasers of the restaurant on the Lloyd place for an additional $1,000 of the purchase price of the Lloyd place, Kennedy to take the Lloyd place subject to a mortgage which was then on it, and which had been given by Carter and Meyers and the Hanover Realty Company. The second mortgage was to be due seven years after its date.

The terms of the two trades being agreed upon, Mr. Henry Heyer was called in by the parties to prepare the papers for the consummation of them, and in preparing the papers he asked: "Who is to pay the mortgage on the restaurant?" and was informed that Carter was to pay it. Heyer went to the defendant bank and asked them if they would cancel the mortgage upon the restaurant (certainly informing them why he asked the question), and upon being informed by the bank that it would not cancel the mortgage on the restaurant, he informed the bank that the restaurant was being sold, and told the bank that he would collect the money for the bank. Thereupon the bank agreed to cancel the mortgage and let Heyer collect it.

The restaurant was sold in accordance with the agreement that Carter was to pay the mortgage and Heyer to collect it, and the bank gave to Heyer the mortgage marked canceled, and Kennedy signed the bill of

sale conveying the restaurant, and delivered it to the purchasers, but before that part of the trade could be completed, and the title to the Lloyd place examined, Kennedy was called from the city to the bedside of his sick father, and the mortgages to be given by Kennedy for the balance of the purchase price for the Lloyd place were never executed and delivered, Kennedy claiming that Carter, Meyers, and the Hanover Realty Company would not let him have the papers, and Carter and Meyers claiming that they could not find Kennedy to deliver him the papers for execution.

The purchasers of the restaurant took possession of it, ran it for a while, and then sold it to one Sheppard, when Mr. Henry Heyer was again called in and drew the papers for its sale to Sheppard, knowing that the bank had not been paid, and that Carter had agreed to pay the bank's mortgage, and knowing that he had the bank's mortgage, either canceled or for collection, and that he had voluntarily promised to pay the bank the amount due under the Kennedy mortgage, and participated in the transaction whereby the restaurant was sold to Sheppard with a guarantee against encumbrances. The restaurant was the individual property of J. R. Kennedy, the real estate to secure J. R. Kennedy's debt was the property of husband and wife as tenants by entireties, the wife borrowing nothing from the bank and requesting nothing of it, but assenting to sign with her husband the notes and the mortgage on the real estate, and being therefore merely a surety.

At the second sale of the restaurant, which Mr. Heyer aided in making, the restaurant was sold for $1,500, the amount of the bank debt against Kennedy, after removal of part of the fixtures.

In the meantime, Heyer not having collected from Carter, or any other person, the money on the bank's mortgage, and being in no way liable to the bank for its debt, not having assumed it, the bank said something to him about collecting the amount of the chattel mortgage. Whereupon Heyer voluntarily gave the bank his personal guarantee in writing, with one George H. Hutaff, for the payment of the Kennedy chattel mortgage.

The court decided with the plaintiff, and granted the injunction. Defendant appealed.

A. G. Ricaud and E. K. Bryan for plaintiff.
John D. Bellamy & Son for defendant.

WALKER, J., after stating the case: It appears that, pending this suit, and at the request of the defendant bank, Henry Heyer, in pursuance of his guarantee to do so, paid the chattel mortgage, which, of course, discharged the debt secured by the real estate mortgage given

by Kennedy and his wife to the bank. There is no question of an innocent holder in the case, as the bank was the original payee in the Kennedy notes, and it, its agent, or Heyer, participated in all the transactions mentioned, Heyer having actual knowledge and the bank perhaps imputed knowledge of the facts.

The assignments of error, as to the admission of evidence, are without merit.

As between the apparent makers and the original taker of the Kennedy notes, it was competent for the plaintiff to prove which of the two signing the notes to the bank was the principal debtor, and which was the surety. *Welfare v. Thompson,* 83 N. C., 276; *Lockhart v. Ballard,* 113 N. C., 292; *Foster v. Davis,* 175 N. C., 541; *Williams v. Lewis,* 158 N. C., 571. Henry Heyer, for whom this suit is defended, and who paid the notes signed by Kennedy and his wife, aided the transfer of the property to Sheppard, and they being parties to that transaction, the evidence objected to, which was the subject of the third assignment of error, was competent.

The testimony, under the fourth assignment of error, was competent as shedding light on the value of the personal property upon which the bank held a chattel mortgage, and on the sale to the Hanover Realty Company, to which the bank and Heyer both assented. Mrs. Kennedy, and her real estate, were sureties of her husband, and the bank and Heyer having appropriated the principal debtor's property, the surety, and her land, were thereby exonerated, as they (the bank and Heyer) virtually assented to the disposition of the principal's property securing the debt upon which the wife was surety, and received the proceeds of the sale, or the benefit thereof.

The evidence of the witness Ricaud, the subject of the fifth assignment of error, was competent as showing the bank had knowledge of the sale and transfer of the restaurant, and acquiesced in such sale, and, further, as showing the bank had released the property covered by the chattel mortgage.

While we have, in a summary way, considered defendant's exceptions to testimony, it was only perfunctory, on our part, as we are of the opinion that none of the exceptions were properly taken. It will be observed by referring to the record that each of those covered by the fifth assignment of error was entered to a mass of evidence, some of which was surely competent. The exception must be good as to all the evidence embraced by the objection. *S. v. Ledford,* 133 N. C., 714; *Nance v. Tel. Co.,* 177 N. C., 313, where the cases, up to that time, are collected; *Harris v. Harris,* 178 N. C., 7. The other exceptions are so immaterial and inconsequential as to be utterly insufficient to induce a reversal, if the questions were incompetent. We will repeat again that

verdicts and judgments should not be lightly set aside upon grounds, or for reasons, which show the alleged error to be harmless, or not injurious, in its results. There should be something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice; it should be meritorious and not frivolous. The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is no sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss, or the probability of loss, there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed, and then taken away. There must be, then, a probability of repairing the injury, otherwise the interference of the Court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right, and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly, and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. *S. v. Smith*, 164 N. C., 475, 480, 481, and cases approving it which will be found in the Anno. Edition of that report; Hilliard on New Trials (2 ed.), sections 1 to 7; Graham & Waterman on New Trials, 1235. Tested by this safe and sound rule of the law, there is no reversible error in the exceptions so far considered.

The real pivotal question in this appeal is, whether Henry Heyer was entitled to be subrogated to the rights of the bank, provided the bank had any right to which the doctrine of subrogation applied. We do not think it had any such right, nor do we assent to the proposition that Henry Heyer had acquired such an equitable right by anything that he did, even if he were a party to this suit, and had properly pleaded or set up the same. Granted that he secured the money for Carter to pay for the personal property he had bought at the sale, that was only a favor or accommodation to Carter, and in no possible aspect could raise an equity in Heyer's behalf. This seems to be perfectly plain. But there are none of the elements of a subrogation, if Heyer had come in and been made a party, and sufficiently pleaded the same equity. He was a mere volunteer in the transaction, and the written guaranty which he gave to the bank does not change the result. It was still a voluntary

and gratuitous payment by him. It was more than voluntary, it was officious, in a legal sense, and he cannot appeal to equity for relief. This doctrine is well settled. *Joyner v. Reflector Co.*, 176 N. C., 274; *Publishing Co. v. Barber*, 165 N. C., 478; *Liles v. Rogers*, 113 N. C., 197. Legal subrogation arises, where one has an interest to protect, or is secondarily liable, and makes a payment. *Jones v. Reflector Co., supra.*

But another conclusive answer is, that in the beginning there was a written agreement that the money arising from the sale of the restaurant property should be applied in payment of the debt secured by both the chattel and real estate mortgages, which was $1,500, and that is all that has been done. If Mrs. Kennedy, the surety of her husband, must pay over that amount to Heyer, through the bank itself, or the bank as trustee, they will have received nothing for the restaurant property in the end.

"Conventional subrogation, so named from the covenant or agreement of the civil law, is founded upon the agreement of the parties which really amounts to an equitable assignment." *Joyner v. Reflector Co., supra.* Heyer was under no legal liability, nor moral obligation, to pay the debt, and the agreement referred to in the last quotation means an agreement made at the time of contracting liability, or an agreement entered into afterwards at the instance of the party liable. "A volunteer cannot acquire an equitable lien or the right of subrogation." *Publishing Co. v. Barber*, 165 N. C., 478, p. 487. On page 484 of the case last cited, the Court states that one can be subrogated only upon some special circumstance (meaning having some interest or right to protect), or by a payment on request from the debtor, raising an implied contract.

Mr. Heyer, in his testimony, upon which the defendant relies, states positively that Kennedy and his wife were not to pay the indebtedness to the bank, but that Carter was to pay it, and he in effect means to say that he gave the bank his guarantee because Carter had assumed the Kennedy debt; and, certainly, there can be no implied contract between Kennedy and his wife and Heyer, for the latter to pay the debt, as there is no express contract, and Heyer at that time had no interest of his own to protect.

The facts of all the transactions show that the bank or its attorney, if he be the bank's attorney, had knowledge of these sales and aiding in consummating them, and Mrs. Kennedy being a surety, and the plaintiff having proved that the personal property which her husband, the principal debtor, put up as security for the debt, has been sold and brought enough to pay it, and the bank and its attorney or guarantor having assented to the sale of the principal debtor's property, the sureties' property must be exonerated to the extent of discharging it from any

further liability. *Carriage Co. v. Dowd,* 155 N. C., 308, as the proceeds of the sale were sufficient to pay the whole debt.

This case is even stronger than the statement above made, for here we have the guarantor to the bank, Heyer, aiding and actively participating in the sale of the property of the principal debtor, who was primarily liable for the payment of the debt, and also assisting in its conversion, or wrongful disposition, and he now asks a court of equity, and conscience, to help him in this questionable conduct, by fastening the resultant loss upon the surety, who is innocent of all wrong, and to decree to the wrong-doer the property of such surety. If there is a legal or equitable rule justifying such a claim, we have failed to discover that it has found its way into the books.

No error.

CHARLES ELLIOTT AND ANNIE T. ELLIOTT v. EULA MAY McMILLAN.

(Filed 20 October, 1920.)

Husband and Wife—Bills and Notes—Notes—Negotiable Instruments—Endorsement of Married Women—Common Law—Statutes.

An endorsement of a married woman of her husband's note in a State where the common law prevails, unaffected by statute, is void; and payment thereon made by her after her husband's death and her naked promise to pay the balance is without consideration, and not enforcible as her ratification of the transaction after discoverture.

CIVIL ACTION, tried before *Allen, J.,* at March Term, 1920, of CUMBERLAND, upon the following issue:

"In what amount, if any, is defendant, Mrs. Eula May McMillan, indebted to the *feme* plaintiff, Mrs. Annie Theresa McMillan Elliott? Answer: '$3,011.35, to be paid by Eula May McMillan to Mrs. Annie T. Elliott.'"

From the judgment rendered the defendant appealed.

Rose & Rose for plaintiffs.
Robinson & Robinson for defendant.

BROWN, J. The note sued on was executed in the State of Florida by W. A. McMillan, and endorsed there by the defendant, who was his wife. The husband is dead, and this action is brought in the State of North Carolina to recover from the defendant, his widow, as endorser of the note, she being now a resident of this State.

After the husband's death, the defendant made a payment of $1,500 on the note, and promised to pay the balance while in North Carolina. She wrote a letter in October, 1918, in which she stated, "I want to pay Annie in full right away."

The counsel for the defendant, Miss Robinson, in a very full and able argument, contends that the note, having been executed and endorsed in Florida, is a Florida contract, and controlled by the laws of that State, that the common-law rule prevails in Florida, and that under it the endorsement is void. She further contended that as the original note was void as to the married woman's endorsement, neither a new promise nor a part payment thereon, made without valuable consideration, by her after discoverture is binding.

The authorities cited by counsel for defendant appear to sustain her position. Sec. 59, Gen. Stat. of Florida of 1906. As early as 1877 the Supreme Court of Florida held, in the case of *Dolner v. Snow,* 16 Fla., 66, that the promissory note of a married woman is void, and that the Constitution and statutes of Florida make no change in the rule of common law, and that neither at law nor in equity can she bind herself so as to authorize a personal judgment against her. This was the law prevailing in this State up to recent years.

It is contended that the defendant ratified her contract and promised to pay the note after her husband's death. The promise to pay the note was not founded upon any new consideration. Since at common law all contracts of a married woman, with some exceptions (this not being one), were void *ab initio,* they could not be ratified either during coverture or after discoverture. Elliott on Contracts, vol. 1, p. 637. She is not bound by a new promise made after discoverture without additional consideration. As the wife was incapable of making such contract in the beginning, a new promise based upon the old consideration solely, is *nudum pactum.*

In *Long v. Rankin,* 108 N. C., 333, it is held that "The note of a married woman being void, a promise to pay the same, after discoverture, must be founded upon a new consideration, or the original transaction must have been of such a character as to have constituted an equitable charge upon her separate estate." See Mordecai's Law Lectures, vol. 1, ch. 6, p. 329; *Felton v. Reid,* 52 N. C., 271; *Wilcox v. Arnold,* 116 N. C., 708. In the latter case it is held that: "The bare promise of a widow to pay a note executed by her during her coverture, and therefore void, is not binding on her." This case is cited with approval in 119 N. C., 326, and 133 N. C., 360.

The prayer for instruction, that upon the entire evidence plaintiffs were not entitled to recover, should have been granted.

New trial.

CITY OF RALEIGH v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 27 October, 1920.)

1. **Railroads—Street Railways—Charters—Municipal Corporations—Cities and Towns—Enlarged Limits—Governmental Powers—Streets and Sidewalks.**

The provisions of a charter granted by a municipality to a street railway company that it pave along and between its rails and turnouts, etc., in the same manner and materials, etc., as the municipality should use when improving its streets where the tracks run, applies to improvements of streets in added territory by an extension of the city limits, not alone under the conditions imposed by the charter, but also under the general exercise of the governmental powers of the municipality.

2. **Same—Moving Track.**

Under a provision of a franchise given for a street railway by a municipal corporation that its tracks shall be located, wherever practicable, in the center of the street, and also under the general police or governmental powers generally exercised by the municipality, a city or incorporated town may lawfully require the railway company to remove a track it is operating on the side of a street near the sidewalk, to the center of the street.

CONTROVERSY without action, heard and determined by *Daniels, J.*, at June Term, 1920, of WAKE.

The proceeding is brought to recover $13,312.69, with interest from 15 October, 1914, money paid out by the plaintiff for removing car track, paving between tracks, etc., for defendant. It was agreed that this work should be done by the plaintiff, and if it should be decided that the defendant was liable therefor, then the plaintiff should recover the same. His Honor rendered judgment against the defendant, which appealed to the Supreme Court.

J. S. Manning and J. W. Hinsdale, Jr., for plaintiff.

J. H. Pou, W. L. Currie and Walter L. Watson for defendant.

BROWN, J. We gather the following facts from a voluminous case agreed: The defendant and its predecessors operated under a license granted by the city of Raleigh, double-track street car line up Hillsboro Street to the city limits at St. Mary's Street. Defendant operated the same line beyond St. Mary's Street on what was called Hillsboro Road, and on the north side thereof, for some distance beyond the city limits by virtue of authority granted by the board of county commissioners of Wake County to operate said road, they directing that the tracks shall be built on the north side of the said road. Defendant and its predecessors also secured permits from the property owners on the north side of said road which was given to defendant for a valuable consideration.

On 1 July, 1907, the western limits of the city of Raleigh were extended westwardly one-half mile to the intersection of Park Avenue and Hillsboro Street, and track in the defendant's road that far.

The city of Raleigh decided to improve and pave Hillsboro Street, and ordered the Carolina Power & Light Company, at its own expense, within the territory added to the city of Raleigh, on Hillsboro Street:

(a) To remove its car tracks from the north side of said street to the center of said street.

(b) To pave between the tracks and one foot on each side of the tracks.

(c) To pave the space between its double tracks in addition to the space of one foot on each side of the track.

The defendant denied the right of the city to compel it to do this work, and, under an agreement between plaintiff and defendant, plaintiff did the work and the liability of the defendant to pay for same was to be determined by the courts.

The franchise originally granted by the city contained the following clause: "*Provided, however,* that if the said city decides to put in or change its sewerage pipes on any of the streets of said city on which the track of said company may be laid, the said city may require the said company to remove and replace at its own expense the said track for said purposes. The space between the tracks shall be kept level with the rail, and shall be kept clean and in good order; and whenever the city shall pave or macadamize any street occupied by the tracks of said company it shall be the duty of said company, at its own expense, to pave or macadamize the space between the tracks and one foot on each side of the track with like material and in like manner as the city shall pave or macadamize said streets."

We think it is beyond controversy that the obligations and duties incumbent upon the defendant in respect to the streets embraced within the limits of the city before the extension of the corporate limits in 1907, attached at once to the defendant in respect to the streets embraced within the added territory.

In Dillon on Municipal Corporation (5 ed.), sec. 1304, it is said: "A grant of authority to use the streets of a municipality for the purpose of conducting water or gas, without express limitation, is not to be deemed restricted to existing streets and highways, but is to be construed as extending to streets and highways as subsequently enlarged, changed, or opened."

In *People v. Deehan,* 153 N. Y., 528, it was held: "If the company is authorized to use the streets of a municipality, the authority conferred extends to and includes streets in territory subsequently added to the

city by annexation." *Rogers Water Co. v. Fergus,* 178 Ill., 571; McQuillian on Municipal Corporation, vol. 4, sec. 1674; *Gas Light Co. v. St. Louis,* 46 Mo., 121; *People v. Deehan,* 153 N. Y., 528.

We think it equally clear that the plaintiff had the right to require the defendant to remove its tracks from the north side of Hillsboro Street to the center of the same. This is expressly provided in the franchise granted to the Raleigh Electric Company, the predecessor of the defendant, which contains the following provision: "The said tracks of the Raleigh Electric Company shall be located wherever practicable in the center of all of said streets, avenues, lanes, cartways, thoroughfares, and public highways."

In addition to the requirement contained in the franchise, the plaintiff, under the exercise of its police power, had the right to compel the defendant to remove its tracks to the center of the street. Dillon on Municipal Corporation, vol. 3 (5 ed.), sec. 1271. There it is said: "Pipes, conduits, rails, and structures erected or constructed in the city streets under a general grant of authority to use the streets therefor *are subject to the paramount power and duty of the city* to repair, alter, and improve the streets, as the city, in its discretion, may deem proper, and to construct therein sewers and other improvements for the public benefit. This paramount power and duty of the city is clearly *governmental* in its nature, and, in many cases at least, forms a part of the *police* powers of the municipality. The decisions hold that the grantee of the franchise has no cause of action for any damage which it may sustain by acts of the city in reasonably performing its duty in these respects." See, also, *Gas Light Co. v. New Orleans,* 197 U. S., 453; *People v. Geneva W. S. F. Co.,* 186 N. Y., 516.

It is manifestly true that in this day of multitudinous motor vehicles and other conveyances, the safety of the citizen requires that street car tracks shall be in the center of the street. This is a universal custom, we believe, in nearly all cities and towns where street cars are operated. We are also of opinion that the plaintiff had the right to compel the defendant to pave between the tracks and the one foot on each side, and also to pave the space between its double tracks. This comes within the letter as well as the spirit of the franchise which contains the following provision: "The space between the tracks shall be kept level with the rail, and shall be kept clean and in good order; and whenever the city shall pave or macadamize any street occupied by the tracks of said company, it shall be the duty of said company, at its own expense, to pave or macadamize the space between the tracks and one foot on each side of the tracks with like material and in like manner as the city shall pave or macadamize said streets."

For the safe and convenient use of the public street it is as much

necessary to pave the space between the double track as it is to pave the space between each individual track. This authority is not only given the plaintiff, we think, under the franchise, but it is a proper exercise of the police power.

In *Atlantic Coast Line v. The City of Goldsboro,* 155 N. C., 358, it is held that: "An ordinance of the town requiring the plaintiff to lower its tracks to a level with the street at the expense of the railroad company was a lawful exercise by the town of its police power." In the same case it is said: "A railroad company accepts a charter from the State in contemplation of and subject to the development of the country, and with the expectation that cities and towns would require new or improved streets across rights of way acquired, and, therefore, by prior occupancy a railroad company can obtain no rights which would impede or render dangerous streets of incorporated towns to whom the power had been granted, in the exercise of their police power for the benefit of the citizens."

This case was affirmed by the Supreme Court of the United States, *R. R. v. Goldsboro,* 232 U. S., 548.

The question was fully considered in the case of *New Bern v. Atlantic & N. C. R. R. Co.,* 159 N. C., 542. In that case the railroad company had a right of way through the streets of the city of New Bern at the time the street was a dirt street. Owing to the increased size of the city and travel on the street, the local authorities deemed it necessary that the street should be paved with permanent material to insure the public a reasonable use of it. It was held that it was the duty of the railroad company to meet the present requirement of paving for the use of the city. In that case it is said: "When the express consideration for a franchise given by a city to a railroad company for the latter to have a right of way for its railroad through a street is that the railroad shall keep and preserve the street in good order for the use of the citizens of the town, the railroad, by operating under its franchise, impliedly promises to perform the same obligations in respect to keeping up this street as the municipality should owe to its citizens, contemplating the growth of the city and such improvements as would be suitable and proper in the future."

We do not think it necessary to discuss this matter further. The overwhelming weight of authority seems to place the liability of the defendant beyond doubt.

Affirmed.

AMERICAN BANK AND TRUST COMPANY v. JOSEPH W. HARRIS ET AL.

(Filed 27 October, 1920.)

Bills and Notes—Negotiable Instruments—Actions—Defenses—Payment—Evidence—Judgments—Appeal and Error—Issues—Verdict.

There were allegations in the complaint, in an action upon a note, that the plaintiff was a holder for value by endorsement, before maturity; and the answer denied the execution of the note, and alleged that the defendant had executed a prior note to the same payee in a different amount which he had paid, on which defense the evidence was excluded. There were only two issues, submitted without exception, one as to the execution of the note and the other as to the validity of its endorsement to plaintiff, under agreement between the parties, that if the jury found the note sued on had been executed by defendant they should find for the plaintiff in that amount: *Held*, no error in the judgment accordingly rendered in plaintiff's favor upon an affirmative finding of the jury on the issue as to whether defendant had executed the note sued on.

APPEAL by defendant from *Guion, J.*, at the April Term, 1920, of NEW HANOVER.

This is an action on a note under seal for $297.27, of date 23 August, 1913, secured by a mortgage, which the plaintiff alleges was executed by the defendant to J. J. Darby, and that it was transferred by indorsement to the plaintiff bank for value before maturity.

The defendants denied the execution of the note and the transfer to the plaintiff, and alleged the execution of a note to said Darby on 28 September, 1912, for $315, as to which note they pleaded payment.

They further alleged that they have never executed any note or mortgage to Darby except the note of 28 September, 1912, and did not plead payment of the note sued on.

The jury returned the following verdict:

"1. Was the note and mortgage described in the complaint executed by defendants, Joseph W. Harriss and wife, as alleged? Answer: 'Yes.'

"2. Was said mortgage and note assigned to plaintiff for value and before maturity? Answer: 'Yes.'

"3. If not, what sum, if any, is defendant, Joseph W. Harriss, indebted to plaintiff? And it being agreed between counsel for plaintiff and defendant that if the first issues should be answered 'Yes,' that the amount due is $297.27, with interest from 23 August, 1913, until paid."

Judgment was rendered accordingly, and the defendant appealed.

Woodus Kellum for plaintiff.
Rodgers & Rodgers for defendant.

ALLEN, J. The pleadings raise two issues, one as to the execution of the note of $297.27, of date 23 August, 1913, by the defendants to

Darby, and the other its transfer to the plaintiff bank, and as no exception relates to either of these issues, the judgment must be affirmed.

The evidence of the defendant, excluded by the court, was an offer to prove that he had paid the note of September, 1912, and the receipts, which were not admitted in evidence, antedated the note sued on, all of the evidence tending to the conclusion that the defendant has settled the note of 1912, and has paid two other notes of $75 and $57.50 executed by them, and have paid nothing on the note in controversy.

They could not well claim payment of a note which they denied executing in the pleadings, and on the witness stand, and when, as stated in the judgment, it was "agreed between counsel for plaintiff and defendant that if the first issue should be answered 'Yes,' that the amount due is $297.27, with interest from 23 August, 1913, until paid."

No error.

LOUIS GOODMAN v. A. J. ROBBINS.

(Filed 27 October, 1920.)

1. **Pleadings—Contracts to Convey Lands—Mistake—Fraud—Equity.**

   The defense to an action to enforce specific performance of a contract to convey land, that there was a mistake made therein, or that the plaintiff had fraudulently and materially changed it, is an equitable one, and it is necessary to be pleaded in order to be shown by the evidence.

2. **Deeds and Conveyances—Contracts— Descriptions— Evidence— Parol Evidence—Maps—Plats.**

   A description in a contract to convey land, "Farm No. 19,020, in block No. ..... of the tract of land subdivided into tracts containing 55 and 56 acres belonging to Louis Goodman and known as the Swain land," is sufficiently definite to admit of parol evidence of identification, and the registration of the map thereof is immaterial.

CIVIL ACTION, tried before *Guion, J.*, at Special June Term, 1920, of BRUNSWICK.

From a verdict and judgment for the plaintiff the defendant appealed.

E. K. Bryant, George H. Howell, Joseph W. Ruark, and C. Ed. Taylor for plaintiff.

Robert W. Davis and Robert Ruark for defendant.

BROWN, J. This action is brought by the plaintiff to compel the defendant to specifically perform three contracts for the purchase of land. The plaintiff alleged that the defendant purchased at auction sale the

lands described in the complaint and after purchasing them he executed the contracts. To this the defendant made only a general denial, and did not allege the contracts were the result of a mutual mistake, or that they had been materially changed after he had signed them. The defendant admitted bidding in the land and signing the contracts, and his defense was a mistake, and that the plaintiff had fraudulently materially changed the contracts.

When evidence was offered of mistake and fraud, the plaintiff objected upon the ground that no such defense was set up in the defendant's answer, and such defenses must be pleaded before evidence of this character would be admissible. The court excluded the evidence, and the defendant excepted.

His Honor's ruling was correct; an equitable defense such as was offered in this case must be pleaded. *McLaurin v. Cronly,* 90 N. C., 50; *Locklear v. Bullard,* 133 N. C., 260; *Rountree v. Brinson,* 98 N. C., 107.

It is contended that the description in the three contracts is insufficient to warrant the admission of parol evidence. The descriptions are very similar. We will give only one: "Farm No. 19,020, in block No. ....., of the tract of land subdivided into tracts containing 55 and 56 acres belonging to Louis Goodman, and known as the Swain land." We are of opinion that this description is sufficiently definite to enable the land to be located. *Id certium est quod certium reddi potest. Simmons v. Spruill,* 56 N. C., 9; *Farmer v. Batts,* 83 N. C., 387; Rev., 948; *Holmes v. Sapphire Co.,* 121 N. C., 410; *Moore v. Fowle,* 139 N. C., 51; *Ward v. Gay,* 137 N. C., 397.

The fact that the map was not registered is immaterial. *Collins v. Land Co.,* 128 N. C., 565.

Affirmed.

M. C. RIVENBARK, ADMINISTRATOR, v. WALKER D. HINES, DIRECTOR GENERAL, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 October, 1920.)

Employer and Employee—Master and Servant—Dangerous Instrumentalities—Safe Place to Work—Scope of Employment—Negligence.

Where an employer at a machine shop, at the dinner hour, connects a hose for compressed air used in driving certain implements in the shop, to a valve several feet from the ground, on an iron supply pipe running down from the roof, that would otherwise have been harmless, and, as was frequently done, therewith dusts off his own clothes, and, at the request of another employee, a boy 15 or 16 years of age, both experienced,

also dusts off the latter's clothes, and then recklessly and wantonly places the nozzle so as to penetrate the boy's body with the compressed air, causing injury and death, the injurious act is not within the course of employment of the employee causing the injury, and the employer not being in default of any duty, is not responsible for the resulting damages. *Robinson v. Mfg. Co.*, 165 N. C., 495, cited and distinguished.

CIVIL ACTION, tried before *Guion, J.*, at March Term, 1920, of NEW HANOVER.

From a judgment of nonsuit, the plaintiff appeals.

McClammy & Burgwin for plaintiff.
George Rountree for defendant.

BROWN, J. This action is brought to recover for the negligent killing of the plaintiff's intestate, A. B. Rivenbark, on 29 October, 1918. The evidence, taken in its most favorable light for the plaintiff, tends to prove the following facts:

The defendant, Atlantic Coast Line Railroad Company, has a roundhouse and shops in Wilmington, and in the roundhouse there are tracks upon which engines may be overhauled. Near each of these tracks, upon pillars extending from the ground to the roof, there are iron pipes containing compressed air and operated by valves about four feet from the ground. There is an air hose to be used at each of these pillars so arranged that it may be attached by screw to the pipe on the pillar, with a nozzle at the end, to which may be connected hammers or riveters or ordinary nozzles for blowing air. These rubber hose are usually locked up during the night, but, in the morning, when the operatives are about to begin work, they are taken out and laid around near the pipes, *but disconnected.* When they are to be used, they are taken up and attached to the pipe at the pillar by screwing, and the valve is turned and they are ready for use; and the usual rule is that when an operative finishes a piece of work he turns the valve, shutting off the air, *disconnects the hose,* and drops it at a place where it can be conveniently gotten when it is necessary to use again. This hose is used by mechanics and their helpers for various purposes, such as driving hammers, boring holes, riveting, blowing dust out of engines, cleaning cars, and so forth, and it was a regular habit of the employees, who had been working in and around engines, tenders, tanks, etc., and became dusty, to clean themselves by blowing themselves off just after quitting work.

Plaintiff's intestate was a well grown and intelligent lad fifteen years of age, and had been at work at and around this roundhouse, where the workmen were constantly using this compressed air hose. John Walton, a full grown colored man, was a helper, assisting boiler makers in their

work. It was his duty to get out the hose and attach it to the pipe ready for use. It was the habit of the employees at noon to clean themselves up by the use of the air hose before going to dinner. On this occasion the colored man, Walton, who had frequently used the air hose for blowing himself off, came out of a tank, where he had been working with witness, Franks, Rivenbark, and others, and took the hose from the ground, where it had been in use a short while before, *and took it to the pipe and attached it*, and proceeded to blow the dust from his clothes. After Walton had finished blowing himself off, the boy, Rivenbark, stepped across the pit and said, "John, blow me off." John said, "All right," and proceeded to do it, and after he had finished blowing him off in the front, Rivenbark turned, and Walton blew him off in the back, and, just before he finished, he caught Rivenbark and held the nozzle between his legs, and the air entered his body. Rivenbark hollered, "John, you have killed me." He was taken to the hospital and died shortly thereafter.

We are of opinion that the motion for nonsuit was properly allowed. It is well settled that where a servant commits a wrongful act against a third person, the master is liable for the act if it is committed in the scope and course of the servant's employment, and in furtherance of the master's interests, not otherwise. This general principle has been fully discussed and applied in a number of cases by this Court. *Jackson v. Tel. Co.*, 139 N. C., 347; *Pearce v. R. R.*, 124 N. C., 83; *Sawyer v. R. R.*, 142 N. C., 7; *Roberts v. R. R.*, 143 N. C., 179, and many other cases cited in the notes to those cases. In the *Jackson case, Mr. Justice Walker* says: "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." In the *Roberts case, Mr. Justice Hoke* says: "The test is not whether the act was done while Bradley was on duty or engaged in his duties; but was it done within the scope of his employment, and in the prosecution and furtherance of the business which was given him to do?" In *Mott v. Ice Co.*, 73 N. Y., 543, cited in the *Roberts case*, it is said: "For the acts of a servant in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible, whether the act be done negligently, wantonly, or even willfully. The quality of the act does not excuse. But if the employee, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible."

Applying these principles to the admitted facts, it seems clear that the defendants are not liable for the acts of Walton. He was not acting

for defendants nor within the scope of his employment. He had quit work to go to dinner, and was blowing off the dust from his clothing as was usual among the employees. The boy, Rivenbark, was familiar with this process and asked Walton to blow the dust off his clothes. Walton did this, and when the boy turned his back Walton forcibly seized him and wantonly and recklessly blew the air through the boy's rectum into his body and killed him. Upon these facts Walton was guilty of manslaughter, and had he not died, doubtless he would have been punished for it. In no view can he be said to have been acting within the scope of his employment or in the service of the defendant. The case differs very materially from *Robinson v. Mfg. Co.*, 165 N. C., 495. In that case it is held that where the master negligently left a dangerous appliance under conditions likely to inflict an injury on his employee while engaged in the master's work, and consequently another employee is injured who has not been instructed as to its dangerous character, the master is responsible in damages. In that case a boy of 14 was employed as a "doffer" in the cotton mill at Cherryville, N. C. At night, on 8 May, 1913, while engaged in doffing, he stooped over to pick up empty bobbins, whereupon Tom Carpenter, a youth of 15 or 16 years, and a coemployee in the same mill, slipped up behind him as he was in a stooped position, and, placing the nozzle of a rubber hose carrying compressed air at a pressure of 120 pounds to the square inch near the rectum of the plaintiff, pressed the valve on the end of the nozzle, and thus released the compressed air, which entered the rectum with force sufficient to cause plaintiff to drop to the floor in great pain, with his intestines and lower extremities permanently torn, ruptured, and mangled. The said compressed air was generated in defendant's mill, and used by means of a rubber hose and nozzle to clean the machines in the mill.

It appeared in the evidence that the air hose, highly charged with compressed air, was used at certain intervals, but when not in use the hose was allowed to lie upon the floor, and no effort was made to guard or confine it. It was attached to a pipe in the wall, from which it could be readily unscrewed and reattached with ease.

The decision in that case is based upon the well known doctrine of leaving dangerous appliances unguarded and around loose where employees not acquainted with them may be injured. In that case the air hose was attached to the compressed air pipes and all that was necessary to release the air of great power was pressure at the nozzle. No precaution whatever had been taken to secure the proper use of the hose, and it was picked up and used disastrously by two boys. In that case *Chief Justice Clark* says: "In view of the terrible power of compressed air, and the *natural tendency of boys at the age of these* to use a dan-

gerous implement of this kind without taking thought of the damage which might be inflicted, the duty of the employer to give the plaintiff a safe place to work *required that the hose should be detached when not in use.*"

In the case at bar the air hose was disconnected when not in use, and it was disconnected at the time of this occurrence. Walton picked up the air hose and attached it by screwing it to the pipe, and then proceeded to use it in cleaning off himself and the other workmen. Before he picked it up, the air hose was in a place of safety and incapable of injuring any one. Then again, it appears that both Walton and young Rivenbark were familiar with the use of the air hose, and that it was used habitually by the workmen in cleaning their clothes when they "knocked off." This is not a case where a dangerous appliance is left in a dangerous condition and liable to injure some one. In the condition in which the hose was before Walton attached it to the air pipe, it was absolutely harmless. The cause of the boy's death was the wanton and reckless conduct of Walton, who forcibly injected the air into the boy's body. Walton was not acting in the scope of his employment or in the service of the defendant. A case very similar to this, and supporting these views, is *Kirby v. R. R.* (Ala.), 52 L. R. A. (N. S.), 386; *Standard Oil Co. v. Anderson,* 212 U. S., 215. The principle is very well expressed in the case of *Evers v. Krouse,* 66 L. R. S., 592, as follows:

"An act done by a servant while engaged in the work of his master, but entirely disconnected therefrom—done not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, or mischievous purpose of the servant—is not in any sense the act of the master, and for the injuries resulting to a third person from such an act the servant alone is responsible."

In *Tarppen v. Weston Co.,* L. R. A., 1918, E. 507, it is held: "Injury by the forcing of compressed air into the body of a workman engaged in the performance of his duties, by fellow-employees who use a hose upon him in a spirit of fun, does not arise out of his employment within the meaning of the Workmen's Compensation Act."

In *Franciska Tomkoska v. Pressed Steel Car Co.,* Workmen's Compensation Board of Pennsylvania, page 1708, in a case of the sportive or malicious use of compressed air, and one very like the case at bar, it is held: "When an employee, engaged in the course of his employment, temporarily suspends his work and engages in play or sport, and while so engaged suffers an injury, he or his dependents are not entitled to compensation for disability or death resulting from such an injury. Such an accidental injury is not 'in the course of employment.'"

In cases under the Workmen's Compensation Act, the English courts have uniformly held in the same way.

The following authorities sustain our position: *Fitzgerald v. Clark & Son* (1908), 11 K. B., 796; *Barnes v. Colliery Co., Ltd.* (1912), A. C.; *Herbert v. Foxe & Co.* (1916), A. C., 405 (this case is also reported Ann. Cases, 1916, D. 578); Labatt (2 ed.), sec. 924-a, note 9; *Gurley v. Power Co.*, 172 N. C., 690, and cases cited.

The judgment of the Superior Court is

Affirmed.

JOHN W. CRAWFORD, EXECUTOR, ET AL., v. R. R. ALLEN ET AL.

(Filed 27 October, 1920.)

Actions—Venue—Estates—Contingent Interests— Sales— Statutes— Dismissal.

Where lands affected with contingent interests are ordered sold by the court under the provisions of Rev., 1590, the court will afford a complete remedy in the proceeding against one buying under its decree, upon motion in the cause, and where the purchaser does not comply with the terms of sale upon the ground of defective title, an independent action, brought in a different county to compel him to do so, will be dismissed by the court *ex mero motu*, and the independent action, having been brought in another county, cannot be treated as a motion in the original cause. This is especially true in proceedings of this character, where the court, under the provisions of the statute, directs the investment of the funds. Ch. 259, Laws 1919. *Semble*, under the facts of this case the purchaser would acquire a good title to the *locus in quo* upon paying the purchase price as the law directs.

APPEAL by defendants from *Kerr, J.*, at chambers, 17 September, 1920, from WAKE.

This is a controversy without action to recover the purchase price of certain lots of land situate in Raleigh, bought by the defendant Allen at a judicial sale.

There was judgment in favor of the plaintiffs, and the defendants excepted and appealed.

Robert C. Strong for plaintiff.

J. S. Manning and Little & Barnes for defendant.

ALLEN, J. This is a controversy without action in the Superior Court of Wake County to recover the amount bid by the defendant Allen for two lots situate in the city of Raleigh.

The bid was made in a proceeding in Harnett County under section 1590 of the Revisal, which authorizes a sale of contingent interests in land, and the proceeding in which the sale was made is now pending

in the Superior Court of Harnett, the last clause in the decree accepting the bid being, "and this cause is retained for further order."

Under these conditions it is clear that the present proceeding cannot be maintained, if the same relief can be had in the proceeding in Harnett County as "Numerous adjudications have established the general proposition that where relief can be had in a pending cause, it must be there sought. *Murrill v. Murrill,* 84 N. C., 182, and many other cases." *Hudson v. Coble,* 97 N. C., 263.

The authorities are also uniform that a court of general jurisdiction, ordering a sale of land, can and will afford a complete remedy in the proceeding against one buying under its decree.

In *Marsh v. Nimocks,* 122 N. C., 478, in which an independent action was brought to recover the price bid at a judicial sale, the Court says: "The action must be dismissed. In a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be given in the pending action it must be done by a motion in the cause, and not by an independent action. The latter is allowed only where the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid the multiplicity of suits, avoid delay, and save costs. *Hudson v. Coble,* 97 N. C., 260; *Petillo ex parte,* 80 N. C., 50; *Mason v. Miles,* 63 N. C., 564, and numerous cases cited in them."

This case was approved in *Wooten v. Cunningham,* 171 N. C., 126, the Court declaring in the latter case that, "When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it."

It is of special importance that this principle be observed in the sale of contingent interests in land as the court approving the sale is, under certain conditions, required to compel the officer receiving the purchase-money to give bond (ch. 259, Laws 1919), and, "The decree must provide for the investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests" (*Smith v. Witter,* 174 N. C., 620), and these duties cannot be properly or orderly performed if the purchase-money is under the control of a court of another county.

This proceeding, "having been brought in another county, cannot be treated as a motion in the cause" (*Rosenthal v. Robertson,* 114 N. C., 597), and as it plainly appears that the plaintiffs have a complete remedy in the proceeding in Harnett County, it must be dismissed.

If the question was properly presented for decision, we would hold the title of the purchaser to be good upon the payment of the purchase

price into court, or to an officer authorized to receive it, as it appears that all persons having an interest in the land, vested or contingent, are parties to the proceeding in Harnett County, and are bound by the decree, and "So far as the purchaser is concerned, the statute having given the power of sale, and all the parties in interest being before the court, there is no reason why a good title cannot be conveyed to him and he is in no way charged with the duty of seeing that the purchase-money is properly distributed. When a purchaser has paid his bid into court, or to the officers duly authorized to receive it, he is quit of all further obligation concerning it." *Pendleton v. Williams,* 175 N. C., 254, approved in *Dawson v. Wood,* 177 N. C., 164.

It would have been advisable to institute the proceedings for sale of the contingent interests in Wake County, where the land is situate, but this does not affect the title, as jurisdiction is conferred by the statute upon the Superior Court for the sale of such interests and no objection has been made to the hearing in Harnett County.

This controversy without action is

Dismissed.

E. L. THOMPSON v. P. C. CLAPP ET AL.

(Filed 27 October, 1920.)

Contracts, Written—Evidence—Parol Evidence—Rebuttal— Equity— Estoppel in Pais.

Parol evidence is admissible, in defense to an action for specific performance of a written contract to convey land, that after the execution of the contract sued on, the parties had agreed that a survey of the lands should be made in two weeks, and the purchase-money then paid, and in default thereof the plaintiff should lose all his rights, under the principles that parties to a written contract may rescind it by parol or abandon it by matters *in pais;* and that, in equity, such testimony may rebut, but not raise a suit for specific performance.

APPEAL by defendant from *Calvert, J.,* at May Term, 1920, of ALAMANCE.

This is an action for specific performance of a contract to convey land made 13 April, 1915. The defendant admitted the execution of the contract sued upon, but alleged a parol agreement on 17 April, 1915, that the survey of the property required by the contract should be made within two weeks, and the purchase money was then to be paid, but that in default of the survey being made within two weeks the plaintiff was to forfeit all rights.

The agreement to convey within two weeks was not complied with by the plaintiff, and the defendant notified him that the contract was no longer binding on the defendant, and on 1 May, 1915, returned to the plaintiff the $25 which he had paid at the time the original contract was made.

The defendant excepted: (1) Because the court refused to let the defendant offer evidence to show the abandonment of the contract. (2) The refusal of the court to let the plaintiff answer the question, "Did you not agree that if the survey was not made within two weeks that the sale should be considered off?" (3) That the court refused to allow the defendant to prove by parol the abandonment of the contract. (4) For refusal of the court to instruct the jury that "Plaintiff had no right under the contract set out in the complaint to demand of the defendant the conveyance of the land until the survey had been made, and it being admitted by the plaintiff that no such survey of said land had ever been made, the jury should answer the first and second issues 'No.'"

Verdict and judgment for plaintiff; appeal by defendant.

Long & Long and Parker & Long for plaintiff.
W. H. Carroll and R. C. Strudwick for defendant.

CLARK, C. J. In *May v. Getty,* 140 N. C., 310, the Court held, citing many authorities, that parties to a written contract may by parol rescind, or by matters *in pais* abandon the same.

In *Rudisill v. Whitener,* 149 N. C., 439, the Court held that the enforcement of specific performance, being an equitable matter, it is always admissible to show any good reason why specific performance should not be decreed. The matters here offered were competent for that purpose, and could have been shown by parol.

It was also error to refuse to permit the plaintiff to answer the question: "Did you not agree that if the survey was not made within two weeks that the sale should be considered off?" In *Holden v. Purefoy,* 108 N. C., 167, the Court said: "It has long been settled that a parol waiver of a written contract under the statute of frauds, amounting to a complete abandonment, and clearly proved, will bar specific performance."

In *Herren v. Rich,* 95 N. C., 500, which was an action for specific performance on a contract very similar to this case, it was held that although the contract was under seal, parol evidence was permissible to show any good reason why the equitable relief prayed for should not be granted. There are many authorities to the same effect.

It is a principle of equity that parol testimony is permissible to rebut, but not to raise an action for specific performance. "While parol testi-

mony is not admissible for the party seeking specific performance to vary or add to the terms of a written contract, it is always admissible in behalf of a defendant resisting it." *Mayer v. Adrian,* 77 N. C., 91, and cases there cited, and citations thereto in the Anno. Ed. The authorities to this effect are numerous.

The evidence excluded should have been admitted. Its weight and the effect to be given to it was a matter for the jury. The motion of nonsuit was properly refused, but for the reasons above given there must be a

New trial.

TOWN OF LUMBERTON v. S. A. BRANCH AND WIFE.

(Filed 27 October, 1920.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Dedication—Burden of Proof.

Where the defendant is in possession of a strip of land, claimed by plaintiff to be a public street of the town, for the use of lots he owns therein, the burden of proof is on him to show his title to the *locus in quo*, otherwise he must fail in his action.

2. Municipal Corporations—Cities and Towns—Maps—Plats—Statutes—Dedication.

Where the original owner of lands plats them into streets and lots and conveys them to another to be sold by lottery, and lots are accordingly sold with reference to the plat, and under a private act of the Legislature a town was incorporated of the lands so sold, it is a dedication of the streets and public ways, appearing on the plat, to the use of the public.

3. Same—Evidence.

Where the plaintiff claims that the defendant is occupying lands in an incorporated town dedicated and accepted for the use of a public street, an old plat found by a clerk of the Superior Court of the county, among the records of his office, etc., is not sufficient evidence of title when it appears that the defendant had been from the first in adverse peaceful possession of the *locus in quo*, and that the street in question was only indicated as running in the direction of the plaintiff's land, and the plat was torn out so that it did not show thereon that it reached it, etc.

4. Municipal Corporations—Cities and Towns—Streets—Adverse Possession—Limitation of Actions.

Prior to the act of 1891 (Rev., 389), sufficient adverse possession would ripen the title to a street by its citizen against a municipal corporation.

APPEAL by plaintiff from *Allen, J.*, at the February Term, 1920, of ROBESON.

This is an action to recover a lot of land and to remove obstructions therefrom, which the plaintiff alleges is a public street in the town of Lumberton.

The defendant is in possession of the land and claims to be the owner thereof.

The plaintiff offered in evidence a grant to John Wilson, of date 29 April, 1768, covering the land in dispute.

John Wilson conceived the idea of giving a part of this land as a county-seat and town site and of selling lots by lottery. He thereupon had a survey made, and a plat on which there were certain blocks and lots and streets, the lots being numbered, and he then executed a deed to William Tatum and four others conveying the land covered by the plat, and authorizing the grantees to conduct the sale of the lots by lottery, which was done.

The deed to Tatum and others is dated 14 August, 1787, and thereafter by Private Act of 1798 the town of Lumberton was incorporated, the conveyance by Wilson, the platting and sale of the lands being recited in the act, and it was enacted that the said land so laid off be established a town and town common agreeable to the scheme and plan thereof by the name of Lumberton.

The plaintiff also introduced a plat which it claimed to be the original, accompanying the deed to Tatum and others under which the lottery was held.

There was very little if any evidence of possession or use of the street by the plaintiff, but the defendant introduced evidence showing that he, and those under whom he claimed, had been in the adverse possession of the land since 1867.

The following issue was submitted to the jury:

"1. Is the plaintiff the owner of the lands in controversy and entitled to the immediate possession of the same?"

This issue was answered in favor of the defendant, under the instruction of the Court, to which the plaintiff excepted.

There was a judgment for the defendant, and the plaintiff appealed.

Woodberry Lennon for plaintiff.

McLean, Varser, McLean & Stacy and McIntyre, Lawrence & Proctor for defendant.

ALLEN, J. The burden was on the plaintiff to show that the land in controversy, and now in possession of the defendant, is a public street of Lumberton, and if it has failed to do so the action must fail.

The introduction of the grant to Wilson, and of the deed from Wilson to Tatum and others for sale by lottery, with evidence that the two

papers covered the *locus in quo*, carried the legal title to Tatum and others, and as lots were sold with reference to a plat this would be a dedication of the streets and public ways, appearing on the plat, to the use of the public.

It was therefore necessary for the plaintiff to identify the plat under which lots were sold, and to show that the land in controversy was represented thereon as a street.

The evidence of identification of the plat relied on as the original may be sufficient to be submitted to a jury, but it is largely conjectural.

C. B. Townsend testified: "I went in as clerk of the court of Robeson County in 1879, and served about sixteen years. In going through some old dilapidated records and straightening up things after I got in, I found something that I suppose was this map you hand me, only it was folded and wrapped up in newspapers, and it had the original lottery tickets. It was a map just like this here with these names on it, and I concluded this is the same thing. Of course it has been smoothed out since then. It was similar to this, and folded up in a dilapidated condition in faded piece of newspaper and in a cupboard arrangement in there, and had the original lottery tickets. It attracted my attention because it was unique for me to see something of that sort wrapped up in a little package, and had something about drawing lots in the town of Lumberton, and something similar to that, which I take to be the same thing. That was some time in 1879. They were supposed to be lottery tickets; they had names of lottery tickets and said 'drawing of town lots in the town of Lumberton,' and they were pinned together and kind o' tied up, little bits of paper, numbers on them. And the map was similar to this one, and I take it to be the same. Looks very much like the map I found; I concluded it was. It was folded up and in a dilapidated condition, wrapped up in old faded newspaper."

It will be noted that the original plat was folded, wrapped in newspapers, and had lottery tickets with it, while the one offered in evidence was "smoothed out," had no newspaper or lottery tickets with it, and the most the witness can say of it is he supposes it is the original.

Assuming, however, that it has been identified, what does it show?

It is divided into blocks, consisting of four lots each, except a few irregular blocks, and the lots are numbered from 1 to 131. The outer boundary of these blocks does not include the land in controversy, which is adjacent to lots 116 and 129, which are south of lots 115 and 128, the four lots composing one block.

Streets are laid off on the plat, those running east and west being numbered from 1 to 11, and the street north of the block described above is First Street, leaving the block between the street and the disputed land.

The dispute is not called a street on the plat, nor is there any line within three blocks indicating a purpose to leave an open space for the use of the public.

The town of Lumberton has not opened and improved it for street purposes, although the plat is one hundred and thirty-three years old, and it would be difficult to do so on account of natural conditions.

The only circumstance favorable to the plaintiff is that the old plat is worn away on the edges, and on its eastern side there is a line running a short distance, and then disappearing where a part of the plat is gone, which might have extended originally across the plat so as to indicate a street covering the dispute.

There is no evidence outside of the plat to strengthen this suggestion, and it is weakened by the fact that there is a line in another part of the plat which does not extend across it, and by the failure of the plaintiff to use and occupy the disputed territory as a street, and in our opinion a line, which may have existed on a plat supposed to be the original is too indefinite to establish the dedication of a street, and that his Honor was correct in holding against the plaintiff on its own title.

There is also very little, if any, dispute that the defendant and those under whom he claims have been in the adverse possession of the land since 1867 under deeds, and it is settled in *Threadgill v. Wadesboro*, 170 N. C., 643, in which the authorities relied on by the plaintiff are reviewed, that title to land could be acquired against a municipal corporation prior to the act of 1891 (Rev., 389), by adverse possession.

If not, why pass the act?

No error.

CIVIL HAYES v. WILLIAMSON-BROWN LUMBER COMPANY.

(Filed 4 November, 1920.)

1. Deeds and Conveyances—Adverse Possession—Presumptions—Outer Boundaries—Boundaries—Title.

When, in an action of trespass *quare clausum fregit*, the plaintiff's evidence tends to show that he and those under whom he claims, have been in sufficient adverse possession of a part of the *locus in quo* under a paper chain of title antedating that set up by the defendant, an adjoining owner, who had about two years prior to the commencement of the action entered upon the lands and had cut timber therefrom, claiming that the plaintiff's deed did not cover it, and the evidence thereon is conflicting: *Held*, an instruction is correct, that the rights of the parties depended largely on whether the boundaries of plaintiff's deed, by correct location, covered the land in dispute, under the principle that when one enters possession of a part of the lands within the boundaries of his deed, claiming the ownership of the whole, there being no adverse occupation of any part, the force and

effect of such occupation will be extended to the outer boundaries of his deed, and his sufficient adverse possession will ripen his title to the whole. *Ray v. Anders*, 164 N. C., 311, cited and applied.

2. Same—Trespass—Wrongdoer—Lappage.

The principle that extends the possession of one entering a part of the lands within the boundaries of his deed, or to the outer boundaries therein given, is not affected by the fact of a casual entry of a wrongdoer, nor by a lappage created merely by a line of deeds covering the land, without more, when the opposing deeds do not contain the true title. *Currie v. Gilchrist*, 147 N. C., 648, cited and applied.

CIVIL ACTION of trespass *quare clausum fregit,* tried before *Allen, J.,* and a jury, at August Term, 1919, of COLUMBUS.

On issues joined, the jury rendered the following verdict:

"1. Is the plaintiff the owner of the land in dispute? Answer: 'Yes.'

"2. Did the defendant wrongfully and unlawfully enter upon said lands and cut and remove the timber therefrom, as alleged? Answer: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$156.25, interest to be added.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Schulken, Love & Schulken and Donald McRackan for plaintiff.
L. V. Grady and H. L. Lyon for defendant.

HOKE, J. On the trial plaintiff offered in evidence a line of deeds, beginning in 1829, the last one purporting to convey the property to Sallie Hayes in 1872. There was also testimony on the part of plaintiff tending to show that Sallie Hayes died in 1880; that plaintiff was her child and heir at law, or one of them, and that she and those under whom she claims had been in the actual occupation of the land, asserting ownership under these deeds, having known and visible lines and boundaries, and including the *locus in quo* for forty-nine or fifty years; that about two years before action instituted, defendant company had entered on forty or fifty acres of the land and wrongfully cut the timber therefrom, amounting to about one hundred thousand feet, etc.

Defendant put on evidence a deed from J. B. Williamson to the company, dated in 1907, for a large tract of land, also a deed from the sheriff of the county to said Williamson, dated in 1904, purporting to convey the same tract pursuant to a tax sale in which the land therein conveyed was sold for taxes as the property of Abram Vann, and deeds therefor to this Abram Vann, dated in 1854 and 1855, and offered testimony tending to show that plaintiff's deeds did not cover the land in

controversy, but that same was in the deeds held by defendant; and further, that the amount of timber cut was not near so great as plaintiff claimed.

Upon this, the opposing evidence of the parties, his Honor, in substance, charged the jury, among other things, in reference to the claim of ownership and possession of property on the part of plaintiff, that when one entered and occupied a tract of land, asserting ownership under deeds having known and visible lines and boundaries, the law would ordinarily extend the force and effect of his possession to the outer boundaries of his claim as set forth in his deeds, and on the facts in evidence, if accepted by the jury, the determination of the rights of the parties would depend largely on whether the boundaries of plaintiff's deeds by correct location covered the land in dispute. This ruling of the court is in accord with our decisions on the subject, and under it the jury, accepting plaintiff's version of the controversy, have rendered a verdict in her favor, and we find no valid reason for disturbing the results of the trial. *Ray v. Anders,* 164 N. C., 311-313; *Simmons v. Box Co.,* 153 N. C., 257; *Currie v. Gilchrist,* 147 N. C., 648; *McLean v. Smith,* 106 N. C., 172; *Bynum v. Thompson,* 25 N. C., 578; *Osborne v. Ballew,* 34 N. C., 373; *Myrick v. Bishop,* 8 N. C., 485.

In *Ray v. Anders* the principle is stated as follows: "It is the established principle in this State that when one enters on a tract of land under a deed having known and visible lines and boundaries, and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation will be extended to the outer boundaries of his deed, and if exclusive and continuous for seven consecutive years, the title being out of the State, such possession will ripen into an unimpeachable title to the entire tract. *Simmons v. Box Co.,* 153 N. C., 257; *Currie v. Gilchrist,* 147 N. C., 648."

These and other cases hold further that the operation of the principle is not interfered with by the casual entry of a mere wrongdoer, nor by a lappage created merely by a line of deeds covering the land without more, unless these opposing deeds contain the true title. Thus, in *Simmons v. Box Co., supra,* it was held, among other things: "That one in the exclusive possession of a tract of land can maintain trespass *quare clausum fregit* against the casual entry of a mere wrongdoer even before his title matures," and further, "That the principle of constructive possession operates only in favor of the true title, and the force and effect of an actual and exclusive occupation of land is not interrupted or impaired because of a deed of some adjoining claimant under an inferior title extending its description so as to overlap the lands thus held." And the well considered case of *Currie v. Gilchrist, supra,* is in full approval of these positions.

Under these principles correctly laid down by the court, the jury, as stated, have established plaintiff's title and right of possession to the outer boundaries of her deed, covering the land in dispute, and this being true, the question of whether plaintiff had been seen in the actual physical possession of that portion of her property, that being a question excluded by his Honor becomes immaterial.

We find no error in the trial of the cause, and judgment for plaintiff is affirmed.

No error.

C. C. HAGGARD v. J. H. MITCHELL.

(Filed 4 November, 1920.)

1. Municipal Corporations—Cities and Towns— Streets— Maps— Easements—Actions.

The purchaser of a lot abutting on an open space shown on a plat, laying off the lands of the owner into streets, etc., may maintain an action in protection of his proprietary rights in the open space, by showing that he had purchased with reference to the map under assurance by the owner that such space should be left open for the use and benefit of his own lot, and of those similarly situated, and the remedy, on pertinent findings, by injunction, mandatory or otherwise, is open to him.

2. Same—Dedications—Limitations of Actions—Adverse Possession.

Where an action involves the issues as to whether the plaintiff had the right to the use of an open space abutting his property by dedication of the original owner, in dividing his lands into streets, parks, etc., and selling the lots with reference to the plat, etc., or by adverse user by the public for twenty years, on a verdict of both of these issues in the affirmative, the result of the trial will not be disturbed unless the defendant can show error both on the finding of a dedication and of adverse user for twenty years on the part of the public.

3. Instructions—Appeal and Error—Harmless Error.

The charge of the court to the jury should be construed as a whole in the same connected way as it was given, with the presumption that the jury has not overlooked any portion of it, and when, so construed, it presents the law fairly and clearly, the judgment will not be reversed because some portion might be regarded as erroneous.

4. Municipal Corporations— Cities and Towns— Dedication— Streets— Easements—Acceptance—Instructions.

Where there is evidence to support the charge of the court to the jury, in effect, that the original owner of lands platted it into streets, open spaces, etc., and sold the lots with reference to the map and under assurance that these streets and spaces were to be left open for the use of the purchasers, with the intent to so dedicate them, and a purchaser of a lot abutting on one of these open spaces bought upon such assurances and

with reference to the map: *Held*, on a verdict of the jury in the affirmative, and under a correct charge to the jury, when construed as a whole, an irrevocable dedication of the disputed open space is established so far as the seller is concerned, whether the general public has accepted and acted upon it or otherwise.

5. Municipal Corporations—Cities and Towns—Streets—Public User—Limitations of Actions—Adverse Possession.

An easement in an open space on a street may be acquired through open, uninterrupted, or continuous occupation and enjoyment adversely to the original owner by the public for twenty years, when the occupation is so general and of such a kind as to permit the inference, and apprize the owner, that the public has assumed control of his property and is exercising it as a matter of right. *Kennedy v. Williams*, 87 N. C., 6, cited, distinguished, and applied.

6. Same—Evidence—Nonsuit—Trials.

Evidence, in this case that the plaintiff bought a lot of defendant shown by him, or his agent, on a map made for the purpose of sale and with reference to the plat, and upon assurance that a space left open thereon should be kept open for the public use; that for twenty years or more the public had continuously used it, with evidence of ownership by the municipal authorities, etc., is *Held* sufficient upon the issue as to whether the *locus in quo* had been in public use, occupation and enjoyment as a matter of right, for more than twenty years, and to sustain a judgment in plaintiff's favor upon an affirmative finding on that issue.

BROWN, J., dissenting; ALLEN, J., concurring in the dissenting opinion.

CIVIL ACTION, tried before *Devin, J.*, and a jury, at April Term, 1920, of HERTFORD.

The action is instituted by C. C. Haggard, present owner of a store abutting on a street and open triangular space in the town of Ahoskie on the western side of the present Atlantic Coast Line, formerly the Norfolk and Carolina Railroad, to restrain the defendant, J. H. Mitchell, from fencing up said space, and otherwise interfering with the use of same on part of plaintiff and general public. There were facts on evidence tending to show that prior to 1893, defendant, J. H. Mitchell, and his brother, J. A., subject to a life estate in their father, Col. George Mitchell, owned a tract of land in the vicinity where the town of Ahoskie now stands; that the Atlantic Coast Line Railroad, then the Norfolk and Carolina, was built through the land, running north and south, or near that. Several lots had been sold and improved by the purchasers, lying on the east of said railroad; that in 1890 the railroad had bought a lot on the western side for use as a station, and thereafter plaintiff claimed and offered evidence tending to show that in 1893 he and others had bought, and defendant, through an agent, A. J. Parker, had sold, lots in a block on the western side of the railroad, plaintiff's lot being

No. 10, and in reference to a plat, showing a street and open space extending from said lots to the railroad; that at time of plaintiff's purchase, said agent, and defendant himself, by said plat and by direct verbal assurances, had represented that this street and space would be kept open for use of the public and plaintiff and others buying lots in the locality, and plaintiff and others in like case were induced to buy and improve the property by reason of these representations.

Plaintiff claimed also that this street and open space had been used by himself and others, and the general public, as a street and highway adversely and as of right for more than twenty years next before suit brought.

Defendant claimed, and offered evidence in support of his position, that the lots had not been sold by plat or other representations as to keeping this entire space open, but the plat showed that a street of sixty feet width was contemplated by a line thereon at the time, and the remainder of this space a small triangular piece of ground nearest the railroad, has never been conveyed or dedicated by defendant or any one for him. There was also claim and evidence by the defendant to the effect that there had been no adverse occupation of this triangular space on the part of the public, but defendant and others had been under the impression that it was covered by the deed to the railroad for the station place until the latter part of 1915, when a survey disclosing that the plat in dispute was not included in the railroad lot. Defendant asserted title and entered. There was evidence, further, for plaintiff that neither defendants, nor any one for them, had listed this lot in dispute or paid taxes thereon or made any claim thereto since 1890 or 1893, until the latter part of 1915, as stated. It appeared also that the life tenant had died before suit brought, and defendant had acquired the right of his brother; that the interference complained of was by defendant, J. H. Mitchell, his brother not having been made a party, or making any present claim to the property. On issues submitted, the jury rendered the following verdict:

"1. Has the defendant heretofore dedicated to the public use the triangular-shaped piece of land described in the pleadings in this cause? Answer: 'Yes.'

"2. Has the public been in the use, occupation, and enjoyment as a matter of right of the said triangular lot of land for more than twenty years prior to fencing same by defendant? Answer: 'Yes.'"

Judgment on the verdict for plaintiff and defendant excepted and appealed.

D. C. Barnes, F. S. Spruill, and Winston & Matthews for plaintiff.

W. D. Boone, Stanly Winborne, and S. Brown Shepherd for defendant.

HOKE, J. It appearing that plaintiff owns and has improved the lot abutting on the open space in dispute, the authorities are to the effect that he has such a special interest as to entitle him to maintain an action in protection of his proprietary rights, and that on pertinent findings the remedy, by injunction, mandatory or otherwise, is open to him. *Keys v. Alligood,* 178 N. C., 16; *Pruitt v. Bethell,* 174 N. C., 454; *McManus v. R. R.,* 150 N. C., 655.

And a verdict on either issue being sufficient to uphold the judgment, the results of the trial will not be disturbed, unless the defendant is able to show error both on the finding of a dedication and that of adverse user for twenty years on the part of the public. It is urged for error in the determination of the first issue, an excerpt from his Honor's charge, as follows: "If you find from the evidence and by the greater weight thereof that the defendant Mitchell, the then owner, caused, or permitted, a memorandum plat or map of the lot of land to be made and exhibited to the purchaser of the lot now owned by plaintiff, and said purchaser bought the said lot according to the way the said map or plat showed the same with streets and vacant space in front thereof, and such map or plat so showed such streets and vacant place in question, and the purchasers relied upon showing the streets and vacant space thereon, then that would be a dedication of the said street and vacant place to the use of the public and to purchaser of the lot now owned by plaintiff, and defendant having once made such dedication could not recall the same, and if you so find, you will answer the first issue 'Yes.'"

It is the accepted principle with us, applicable to the trial of causes and the court's instructions to the juries therein, "that the charge should be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions when standing alone might be regarded as erroneous." This position taken from Second Thompson on Trials, sec. 2407, is recognized as sound and just in reference to criminal causes in *S. v. Exum,* 138 N. C., 599-619, and as to civil suits in *Kornegay v. R. R.,* 154 N. C., 389, has been again and again approved and applied in our decisions, and in this record is in full support of his Honor's instructions on the first issue.

After explaining to the jury the nature of the controversy, and significance of the two issues, submitted, the entire charge of the court more directly pertinent to the question is as follows:

"Now, upon this first issue, it is admitted by all the parties that in 1893, J. H. Mitchell conveyed to the plaintiff and to his brother a certain lot of land described as fronting 30 x 70 feet, described in the conveyance

as bounded on the east by the street running between said lot and the railroad, and referred to in the description as lot No. 10 on the memorandum plat, it is admitted by both parties that A. J. Parker was agent for the defendant for the sale of those lots, and that A. J. Parker made a plat or memorandum plat showing the subdivisions of the lots.

"There is a controversy between the parties as to what this map showed in detail and as to what acts were said and done by the parties, so that upon consideration of this first issue, if you find that the defendant, or his duly authorized agent, sold the lot to the plaintiff by reference to the map, and which was exhibited, and the map showed the subdivisions into blocks and streets, and showed the street and vacant space open between the lot and railroad, and represented that the street and vacant space indicated on the map were to be kept open for the purpose of the public, and the plaintiff, relying on that, purchased the lot—this was and would continue to be a public street to the railroad, and if you find that it was so by greater weight of the evidence, you will answer the first issue 'Yes.' But in consideration of the question that a dedication may be by express language, reservation or conduct showing an intention to dedicate, such conduct may operate as an express dedication, as when a plat is made showing streets and open spaces, and by showing that the map was used and referred to in the negotiations. The acts and declarations of the landowner indicating his intent to dedicate his land to the public use must be unmistakable in their purpose and decisive in their character, to have that effect. The intention to dedicate must clearly appear, though such intention may be shown by deed, by words, or by acts. If by words, the words must be unequivocal and without ambiguity. If by acts, they must be such acts as are inconsistent and irreconcilable with any construction except the assent of the owner to such dedication. That it makes no difference if the legal title to the triangular shaped piece of land in dispute should turn out to be in Mitchell, he could still have paper title to the land and the public have an easement in it, provided it be acquired in the way allowed by law. That the acquiring of an easement, in a street or public square can be by deed, by special dedication, or by use adversely for twenty years. It may be by express language, or by conduct showing an intention to dedicate, as when a plat is made showing streets, alleys, or public squares, and land sold either by express reference to such plat, or by showing that they were used and referred to in the negotiations. If you find from the evidence, and by the greater weight thereof, that the defendant Mitchell, the then owner, caused, or permitted a memorandum plat or map of the lot of land to be made and exhibited to the purchaser of the lot now owned by plaintiff, and said purchaser bought the said lot according to the way the said map or plat showed the same with

streets and vacant space in front thereof, and such map or plat so showed such streets and vacant place in question, and the purchasers relied upon showing the streets and vacant space thereon, then that would be a dedication of the said street and vacant place to the use of the public and to the purchaser of the lot now owned by plaintiff, and the defendant, having once made such dedication, could not recall the same, and if you so find you will answer the first issue 'Yes.' That if the jury find from the evidence, and by its greater weight thereof, that the defendant, or either of them, caused a memorandum plat or map of their lands to be made, and on such memorandum plat or map there were streets and a public square laid off, and either they or their agent Parker, under their authority, in selling the lot to plaintiff and his brother, known as lot No. 10 of such memorandum plat, exhibited the map or plat to plaintiff, or those under whom he claims, that the space between his lot and the right of way of the railroad was to be kept open and remain open for the public use, and relying on such statement plaintiff bought the lot and took the deed written by Parker, and afterward signed and acknowledged and delivered by defendant and those acting with him, then that would be a dedication of the open space to the use of the plaintiff and the public, and defendants would have no right to take possession of the space and fence the same, and if you so find, you would answer 'Yes' to the first issue."

If it be conceded that the excerpt from this charge objected to is not sufficiently definite in requiring that the sale should be made in reference to the plat showing thereon a vacant space "to be left open," when the charge is considered as a whole and in reference to the wholesome principle adverted to, and particularly both that which immediately precedes and follows the portion excepted to, we think it sufficiently and clearly appears that the jury were instructed in effect that in order to a dedication by plat, and assurances in reference thereto, it is required that the sale should be made in reference to the plat, showing the streets and open spaces, and under circumstances showing also an intent to dedicate the same, and the jury must have so understood it. Where these facts are accepted by the jury, and, under the charge, they have been so received and established by the verdict, the decisions apposite are to the effect that in so far as the defendant is concerned there has been an irrevocable dedication of the disputed space, and this whether the general public has thus far accepted and acted on it or otherwise, and the defendant has therefore been properly restrained. See *Wittson v. Dowling,* 179 N. C., 542, and cases cited.

In regard to the second issue, the court held in effect that a public easement could be acquired through an open, uninterrupted, continuous occupation and enjoyment for twenty consecutive years, adversely and

as of right, and submitted the question to the jury whether the user and occupation by the public of this way or place had been of the character and for the time required, and we are of the opinion that this ruling of his Honor is in accord with the true significance of our decisions on the subject, and that the cause has been properly submitted to the jury on the issue. These decisions recognizing that a square or public place is substantially a part of the public highway, and subject to the same general principles, are to the effect that such an easement can be acquired by adverse user when the occupation is so general and of such a kind as to permit the inference and apprize the owner that the public has assumed control of his property and is exercising it as a matter of right. *S. v. Haynie,* 169 N. C., 277; *Snowden v. Bell,* 159 N. C., 497; *Tise v. Whitaker,* 146 N. C., 374; *State v. Eastman,* 109 N. C., 785; *S. v. Long.* 94 N. C., 896; *Kennedy v. Williams,* 87 N. C., 6; *Boyden v. Achenbach,* 86 N. C., 397; *S. c.,* 79 N. C., 539; *Crump v. Mims,* 64 N. C., 767; *S. v. McDaniel,* 53 N. C., 284.

In some of the later cases on the subject, it is recognized that the existence of a public way may not be inferred by the mere user on the part of the people of a community for twenty consecutive years, but there must be evidence further that such user is openly adverse and not permissive, and in one of them, *Kennedy v. Williams,* intimation is given that there should be some proof of recognition of the highway on the part of the public authorities, as by the appointment of an overseer and hands, and the working of the road as a public charge. In this last case, however, the road in question had only been open and used for about six years, and while the case is undoubtedly well decided, this reference to a working by an overseer and hands is only by way of suggestion on the part of the able and learned judge who wrote the opinion, and it was by no means the effect and intention of that decision to hold that in order to establish a public way by user, there must be direct proof of formal recognition by the public authorities having charge of the matter, but such recognition and other essentials could be inferred from the occupation itself, when sufficiently general and of an extent and character as to permit the inference as stated that the public had assumed control, and were exercising it adversely and as of right. Accordingly, in the subsequent case of *S. v. Eastman,* 109 N. C., 785, indictment for nuisance in obstructing a public square, it was expressly decided that a public square was in effect a part of the public highway; that the appointment of an overseer and hands was not an essential, and in this and several of the other authorities cited, it is fully recognized that the existence of a highway can be established by other facts showing adverse user on the part of the public. Thus, in *S. v. Haynie,* the correct general principle is stated as follows: "In order to establish an easement

for the public use over the lands of a private owner, there must be a dedication thereof by the owner, and an acceptance on the part of the proper authorities, or acts on the part of both which would, expressly or impliedly, amount thereto or presume a grant, or an acquisition thereof for the public use in some legal and recognized manner. Rev., 3784."

And in *S. v. Long,* 94 N. C., 896, indictment for obstructing public square, it was held, among other things, that, "An easement in land may be presumed from long, continuous, and uninterrupted enjoyment, and its abandonment and discontinuance may be presumed from nonuser and obstructions acquiesced in, and submitted to without resistance, for a period sufficient to raise such presumption. This applies to public as well as private easements."

Appellant does not seriously contend that there is error as a legal proposition in the charge of his Honor on the second issue, but it is insisted that under this ruling there is no evidence to carry the case to the jury, but, in our opinion, such an objection is without merit.

From a perusal of the record and facts in evidence, it appears that in 1893, more than twenty-two years before the alleged interference by defendant, one A. J. Parker, acting as defendant's agent, sold a number of lots on the west of the railroad at Ahoskie; that this sale was made and lots bought and paid for and improved by plaintiff and others in reference to a memorandum plat, showing this disputed property was to be left open as a street, and that in the negotiations, verbal assurances were given to that effect both by Parker, the agent, and defendant himself, and that this plat having this significance was one of the principal inducements for plaintiff and others to buy. These facts are not now referred to as tending to show a voluntary dedication by defendant, a question that has been submitted and determined on a separate issue, but as tending to show the character of the user by the public, and pertinent to the second issue. That after such sale, the space, a great part of which has been an old public road, was left open and generally used by the public, both in vehicles, and on foot, and the right to do so had never been questioned or interfered with by defendants or others. Parker, the agent, testified that it was left open as a part of the streets, and was used as such. C. C. Haggard, plaintiff, testifying as to defendant's assurances, said that he bought in reference to the plat, and at the time. J. H. Mitchell, defendant, pointed out to plaintiff the lot and the street, and that the latter extended to the railroad, and further, that but for such representation he would not have purchased. Also, that Parker, the agent, told him that his lot would be a desirable one because of this open space from its front to the railroad, and that there would be no obstruction between witness and the railroad. R. J. Haggard, as

pertinent to this issue, testified that the space was used by the public going to and fro, that neither J. H. Mitchell or any other individual exercised any control over it, no more than any other street of the town; that the public used this as they did all other streets. J. A. Copeland, among other things, testified that he had known this place for sixty years; that there was an old road through this disputed space; that the town cleaned off the streets and straightened them up; that this triangle had been used by the public to pass back and forth, and used all the time; that it had never been listed by defendant for taxes unless he had included it as a part of his farm. J. Powell, another witness, said that this piece of land had been used by the public until J. H. Mitchell fenced it up in 1915, and before that time no one had exercised control over it except the general public. That part of it being a low place, witness and Parker had hauled trash in there, and the town had paid for it.

Another witness testified to the town's having had brickbats hauled there to fill it in. There was other testimony to the effect that in 1896 the commissioners of Ahoskie had formally adopted a plat showing the streets of the town and describing this disputed land as an open space, in this respect, an exact copy of the plat, by which the agent, Parker, had sold, and plaintiff had purchased the property. Another witness, H. W. Stokes, testified that he had lived in Ahoskie for twenty years, and had been secretary and treasurer from 1911. That the town had put a night light on this place, and had given the light and power company, and the Western Union the right to erect their poles upon it. That they had also paid for having dirt hauled on the lot as they did on other streets; that it had been used by the public, and by parties going to and coming from the station in any direction they wished, and no person had ever made any claim of ownership to it; that in the minds of all it was regarded as a street, and known as Railroad Avenue.

Throughout the record there is, to our minds, plenary evidence that the town authorities in acceptance of defendant's alleged offer, had continuously used this space as a part of the public streets of the town, adversely and of right. That during all of that period from the sale in 1893 till some time in 1915, defendant had neither made any claim nor exercised any control over the property or listed it for taxes, and on the record, the court could only have ruled that this issue also be referred to the jury for decision. From the entire facts in evidence, the verdict for plaintiff is fully justified on both issues, and, in our opinion, it is eminently proper that both the public and the abutting owners shall be protected from further molestation in the due enjoyment of their established rights.

No error.

BROWN, J., dissenting: This action involves the right of defendant to a triangular lot of land in the town of Ahoskie, which the plaintiff claims was dedicated to the public by virtue of a certain map from which lots are claimed to have been sold, which map it is contended shows a vacant space across the street between the lots of the plaintiff and others and the railway station and railroad. The original map appears to have been lost and the map offered by the plaintiff is made from recollection of witness Parker, who originally sold the lots for the defendant. The map introduced by plaintiff was made from memory by Parker some 20 years after the sale to plaintiff of the abutting lot.

The value of such a map is very questionable and such evidence is well calculated to upset titles, but I will not discuss that, although it was excepted to.

I am of opinion that there should be a new trial for error in the charge.

The judge charged the jury as follows: "If you find from the evidence and by the greater weight thereof, that the defendant Mitchell, the then owner, caused, or permitted, a memorandum plat or map of the lot or land to be made and exhibited to the purchaser of the lot now owned by plaintiff, and said purchaser bought the said lot according to the way the said map or plat showed the same with streets and vacant space in front thereof, and such map or plat so showed such streets and vacant place in question, and the purchasers relied upon showing the streets and vacant space thereon, then that would be a dedication of the said street and vacant place to the use of the public and to purchaser of the lot now owned by plaintiff, and defendant having once made such dedication could not recall the same, and if you so find, you will answer the first issue 'Yes.'"

It is the vacant space that it is claimed was thereby dedicated to the public. That this is error is practically admitted by the Court, but it is claimed that taking the charge as a whole the error is corrected.

The instruction is specific and directs the jury to answer the issue "Yes" if they found there was a *vacant space* on the map exhibited to the purchaser in front of the lot sold.

There is nothing in the charge to correct this instruction. The judge did not call the attention of the jury to any error in it or withdraw it.

In *Edwards v. R. R.*, 132 N. C., 101, *Justice Walker* says: "It is well settled that when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly." To same effect see *Edwards v. R. R.*, 129 N. C., 78; *Williams v. Hand*, 118 N. C., 481; *Tillett v. R. R.*, 115 N. C., 662.

"We must assume," says *Justice Walker*, "in passing upon a new trial, that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous."

No court has ever held, so far as I can find, that the leaving a blank unmarked space on a map of land from which lots are being sold, is any evidence of dedication or that the owner and seller intended to give up his authority over the land represented by the unmarked space. Such space simply represented land not then sold.

I find that where clearly defined maps have been made showing areas marked "Park," "Square," "Court," "Driveway," and the like, the dedication is sustained, as the intention is expressed, but where there is merely a space not subdivided it is held not to be evidence of dedication. The following are a few of the cases sustaining the above: *New York v. Stuyvesant*, 17 N. Y., 35, which was in case of a blank space; *Schuchman v. Homestead*, 111 Pa., 48, which was in case of an open space between the lots and a river; *McLaughlin v. Stevens*, 18 Ohio, 94, open space between street and river; *Attorney-General v. Whitney*, 137 Mass., 450, large triangular-shape lot, near point where streets crossed, not included within street line; 18 La., 122, space between river and street; 155 Ill., strip of 100 feet on each side of railroad track; 218 Ill., 503, blank triangular space on plat of lots and streets; 21 Ohio C. C., 239, plat showing triangular lot at intersection of streets, colored same as streets; 30 Colo., 467, irregular-shaped lot in center of town, colored green and separated from other tracts by highways; 34 Minn., 143, open, unmarked triangular-shaped lot on river, with lots on each side; 10 La. Ann., 81, square, with nothing to distinguish limit from streets. See, also, 36 Kansas, 184; 94 Kentucky, 1.

In *Hurley v. Boom Co.*, 34 Minn., 147, it is held that the public places on a map, as well as the streets, must be properly marked and designated as such before it is evidence of an intention to dedicate a particular space.

This so-called map is no evidence of an intention to dedicate, and cannot be unless it so appears on the map.

The question whether one has dedicated his land to the use of the public is one of intention, and such intention must be manifested in an unequivocal manner. *Milliken v. Denny*, 141 N. C., 229.

The instruction excepted to was clearly erroneous, and very harmful and misleading. It was not corrected, and could not be short of clearly withdrawing it and instructing the jury, as requested by defendant, that the map was no evidence of dedication of the blank space. I don't think there is any evidence of adverse possession.

ALLEN, J., concurs in this opinion.

F. H. NEAL v. J. S. YATES.

(Filed 4 November, 1920.)

Appeal and Error—Harmless Error—Instructions—Expression of Opinion.

An excerpt from the instructions of the court to the jury, in effect, that the one party had offered evidence on the issue to support his contentions, and the other, evidence "which he says" supports his contention, though objectionable as the expression of an opinion, will be regarded as harmless when, construing the charge as a whole, the jury must have correctly understood the law.

CIVIL ACTION, tried before *Ray, J.*, at April Term, 1920, of NASH, upon these issues:

"1. Is the defendant indebted to the plaintiff, and if so, in what sum? Answer: '$500.'

"2. Is the plaintiff indebted to the defendant, and if so, in what sum? Answer: 'No.'"

From the judgment rendered the defendant appealed.

R. A. Doughton and Bowie & Austin for plaintiff.

G. L. Park and Charles B. Spicer for defendant.

BROWN, J. On 13 March, 1917, the plaintiff and defendant entered into a written contract (which contract is fully set out in the record), by the terms of which the defendant contracted to sell, and the plaintiff contracted to purchase, one hundred thousand feet of lumber; the plaintiff sued the defendant for an alleged breach of said contract, and the defendant denies the breach and alleges the plaintiff breached the contract and set up counterclaim for damages.

The defendant's first assignment of error is as follows: "Upon the contentions, gentlemen, the plaintiff and defendant have offered you evidence. Each contend that you believe their contentions, and by reason of the plaintiff offering evidence which supported his contention, and the defendant offering evidence which he says supports his contentions, and it being at variance, it raises what is known to the law as an issue of fact—"

It is contended by the defendant that his Honor expressed an opinion upon the weight of the evidence in his charge when he stated that the plaintiff offered evidence which supported his contention, and the defendant offered evidence *which he says* supports his contentions. Standing alone, we would say, without hesitation, that this charge amounted, in a measure, to an expression of an opinion of the weight of the supporting evidence offered by the plaintiff, but we think, upon an examination of the entire charge, that the jury fully understood that the evidence

offered by the plaintiff was intended to support the plaintiff's version of the facts. It is not altogether fair to a trial judge to take one excerpt from a charge. It must be construed with the context and in connection with the whole charge. *S. v. Lilliston,* 141 N. C., 857; *Liles v. Lumber Co.,* 142 N. C., 39.

Where the charge covers the entire case, as this did, and the matters in controversy are submitted fairly and correctly to the jury, there is no just ground for complaint.

We have examined the other assignments of error and find them to be without merit.

No error.

J. H. REICH v. BERNARD M. CONE.

(Filed 4 November, 1920.)

Employer and Employee—Master and Servant—Scope of Employment—Negligence—Automobiles.

The owner of an automobile, who has lent it to his servant who used it for his own purposes, is not liable in damages for the servant's negligence, when it appears that the servant was competent to drive the car, and was not engaged, at the time, in his employer's service.

APPEAL by defendant from *Ray, J.,* at May Term, 1920, of FORSYTH.

This is an action for damages sustained by plaintiff's automobile caused by defendant's automobile while being driven by one Clay Horn. The defendant admitted the ownership of the automobile, and there was evidence for the plaintiff that her automobile was injured by the negligence of the driver of the defendant's car, causing the collision. The evidence for the defendant is that at the the time of the collision his car was being driven by his butler, to whom he had loaned it while off duty; the said butler was not his chauffeur, but he had another man for that duty; that Clay Horn was using the car for no purpose of the defendant, and was not in his employment at the time, but was using it solely in his own business and for his own pleasure; that Horn had worked for him for about three years, and he had loaned him the car 5 or 6 times; that he did not permit Horn to use the car whenever he wanted it, but had loaned it to him only on a few occasions, and had refused to lend it to him at several other times. There was evidence that Clay Horn had taken lessons in driving automobiles, and was not an incompetent driver.

John C. Wallace and R. M. Robinson for plaintiff.

J. S. Duncan for defendant.

CLARK, C. J. The court instructed the jury that the defendant, upon his own evidence, was "responsible for the negligence of the man who was driving his automobile, Clay Horn, provided the jury found that the collision was caused by the negligence of Clay Horn, as alleged, and that such negligence was the proximate cause of damage to the plaintiff's automobile." This was error.

In *Linville v. Nissen*, 162 N. C., 99, the Court said: "The owner of an automobile is not liable for personal injuries caused by it merely because of his ownership"; and, again, "Even if the son had been the servant of his father in driving the machine, the father would not be liable for his negligence unless the son was at the time acting in the scope of his employment, and in regard to his master's business." This was quoted and approved in *Bilyeu v. Beck*, 178 N. C., 482, *Allen, J.*, saying that the responsibility where the driver, though a child of the owner, is of mature years and experienced as a driver, is not dependent upon the ownership of the machine, but upon the principle of agency, express or implied, and distinguished those cases where the car is bought and being used for family purposes, when the injury occurs. See, also, *Clark v. Sweaney*, 176 N. C., 529.

When a motor car is used by one to whom it is loaned for his own purposes, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent, and that injury might occur. *Armstrong v. Sellars*, 182 Ala., 582; *Erlick v. Heis*, 192 Ala., 669; *Campbell v. Arnold*, 219 Mass., 160; *Levyn v. Koppin*, 183 Mich., 232; *Freidbaum v. Brady*, 128 N. Y., 121 (in which case the car was being driven by the owner's chauffeur to whom it was loaned); *Smith v. Burns*, 71 Ore., 133; 29 Cyc., 39.

In *Thorp v. Minor*, 109 N. C., 152, it was held that where one loaned a horse to his clerk to use for his own purposes, and by his negligence the horse was left unhitched, and, running away, caused damage, the owner was not liable, the clerk while using the horse not being in the lender's employment or using it for his purposes.

Error.

FRANK GOUGH v. VIRGIL BELL ET AL.

(Filed 4 November, 1920.)

1. Judgments—Default—Motions— Irregular Judgments— Laches— Reasonable Time—Statutes.

A judgment by default taken after answer has actually been filed in time, though, by mistake in the date thereof, appearing not to have been, is irregularly entered and the remedy is by motion in the cause to set it aside, made within a reasonable time under existing conditions. Rev.,

274, relates to judgments taken in the course and practice of the courts, and has no application to judgments irregularly entered.

2. Same—Mortgages—Sales—Purchaser for Value—Improvements.

Where an irregular judgment by default final has been taken against a mortgagor of lands and he has been ousted from the possession thereof by proceedings for the purpose, without protest, or motion in the cause to set aside the judgment for more than 5 years, and after improvements have been made thereon by the purchaser or his vendee, a purchaser for full value without notice, the delay is *Held* to be an unreasonable one, and the motion will be denied.

3. Judgments—Irregular Judgments—Motions—Laches—Merits.

Upon motion to set aside an irregular judgment, the right of the movant is not absolute and without limit as to time, and in order to obtain relief in case of judgment voidable for irregularity, it is required of him that he should move within a reasonable time and make a reasonable show of merits, which, under the facts in this case, he has not done.

4. Judgments—Irregular Judgments—Motions—Judgments Set Aside—Rights of Third Persons—Purchasers for Value Without Notice.

The power of the court in setting aside a judgment by default final, for the want of an answer, extends to modifying the judgment and imposing conditions pertinent to the scope of the inquiry, as the right and justice of the case may require; and, in proper instances, it may set aside the judgment as between the original parties, and protect the rights of an innocent purchaser of lands for full value, without notice, which have arisen to him under the judgment vacated.

PROCEEDINGS, heard on motion to set aside judgment of foreclosure of mortgage on real estate, before *Allen, J.*, at February Term, 1920, of ROBESON.

On perusal of the record and affidavits filed, the court finds the facts and ordered that the judgment be set aside as between the parties because same is irregular and contrary to the course and practice of this court, and the cause be dealt with as the matter is presented in the pleadings filed in the cause.

Plaintiff excepted and appealed.

McIntyre, Lawrence & Proctor for plaintiff.
McNeill & Hackett for defendant.

HOKE, J. It appears from a perusal of the record and affidavits and the pertinent findings of fact predicated thereon that, in February, 1914, plaintiff, at a regular term of the court on a verified complaint, recovered judgment by default final for definite amount alleged to be due, $800, and interest, and for foreclosure by sale of defendant's real estate pursuant to a mortgage executed to secure plaintiff's debt; that thereafter, and in early part of 1914, sale was had after due advertisement by a court commissioner, and plaintiff became the purchaser at the price of

$550, report made and duly confirmed at June Term, Superior Court, 1914; that on proceedings instituted, defendant was ejected from the property, and plaintiffs, having bought other lands adjoining, commenced to make valuable improvements on the property and later sold said property with a lot of the adjoining lands to one O. L. Joyner for $9,000, part cash; that the latter bought without actual notice of any infirmity in the proceedings, and, since acquiring title, has made further and valuable improvements on the property; that when the judgment by default was taken, it appeared that there was an answer of record by defendant, in effect claiming a credit of about $400 on plaintiff's debt, apparently verified nine or ten months after the time allowed by the court for such filing and verification, but it now appears that said answer was duly verified and filed within the time, but the apparent neglect was due to the mistaken entry by the notary public of the date on the verification made and entered by him.

It appears further that defendant was fully aware of the court proceedings and judicial sale of his land at the time, or shortly after the sale occurred, and neither at the time nor in the proceedings to oust him from the property, nor at any other time, made any formal application to set the judgment aside for irregularity or otherwise till 1920, shortly before this proceedings was instituted.

On these facts chiefly relevant, we concur in his Honor's view that the judgment complained of is irregular, and, in such case, it is within the power of the court to set the same aside. *Becton v. Dunn,* 137 N. C., 559. The power extends also to modifying the judgment imposing such conditions, pertinent to the scope of the inquiry as the right and justice of the case may require, and the order made, in this instance, which, in effect, assures the title of the innocent purchaser for value while allowing the immediate parties to further litigate their rights in reference to the condition, thus presented comes well within the principle. *Geer v. Reams,* 88 N. C., 197; 23 Cyc., 901, citing *Craig v. Major,* 139 Ind., 624, and other authorities.

Our cases on the subject are to the effect, further, that the restriction of one year, in motions to set aside judgments, for surprise, excusable neglect, etc., Rev., sec. 274, applies only to those judgments which are in all respects regular and taken according to the course and practice of the Court, and is not controlling in reference to irregular judgments. *Cox v. Boyden,* 167 N. C., 320, and authorities cited. While this statutory restriction as to time does not prevail in judgments of the present kind, the right of defendant to invoke the aid of the court, on applications of this character, is not absolute and without limit as to time, and it has been held with us in numerous decisions that, in order to such relief in case of judgments voidable for irregularity, it is incumbent on defendant that he should move with reasonable promptness and make a

reasonably probable show of merits. *Rawls v. Henrie,* 172 N. C., 216; *Harris v. Bennett,* 160 N. C., 339; *Glisson v. Glisson,* 153 N. C., 185; *Proctor v. Dunn, supra; Matthews v. Joyce,* 85 N. C., 258. A proper application of the principles approved in these and other like cases, is in our opinion against the exercise of the power in the present instance. It appearing from the affidavits and findings that the judgment complained of was in 1914; that shortly thereafter, not later than June, 1914, defendant was fully aware of the judgment and its consequences; that he was ousted from possession of the property by judicial proceedings, and neither then nor at other time has he made formal objection to the judgment and sale of his property until the institution of the present motion, in 1920; that during this period the plaintiff, purchaser at the sale, which has been fully confirmed by the court, has made expenditures in improving the property; has bought and improved other lands adjacent, and, after three years, the tract including this and some of the other lands has been bought for full value by an innocent purchaser, without notice, and he has also made extensive outlays and improvements thereon.

A perusal of the record, including the affidavit of defendant himself, will disclose further that he is a man well accustomed to litigation; that he has been substituting one mortgage for another without much apparent progress, and that his allegations of merits, on the face of it, is open to serious question, and, from the admissions and facts in evidence, we are clearly of opinion that there has been inexcusable laches on the part of defendant, and for that reason his application for relief should be denied.

Reversed.

GEORGE F. WILSON ET AL. v. W. M. STOREY LUMBER COMPANY ET AL.

(Filed 4 November, 1920.)

Contracts—Offer—Acceptance—Breach—Damages—Counterclaim.

The acceptance of an offer must be unequivocal to make a contract, so that the minds of the contracting parties may agree upon the subject; and where three carloads of lumber are ordered, and the seller replies, "Will ship you one carload within the next ten days and possibly three," it is not sufficiently definite to establish a contract for the three carloads, or to sustain a counterclaim for damages for the failure of the seller to ship more than one of them.

CIVIL ACTION, tried before *Long, J.,* at Fall Term, 1920, of FORSYTH, upon appeal from his Honor, *Judge Starbuck,* at the Spring Term, 1919, Forsyth County Court.

Defendant appealed.

Jones & Clement for plaintiff.
Swink, Korner & Hutchins for defendant.

BROWN, J. This action is brought to recover $347.67, admitted to be due by the defendant to the plaintiff for certain lumber purchased by the defendant. The defendant sets up a counterclaim, which is based upon the following letter:

PFAFFTOWN, N. C., 27 June, 1917.

W. M. STOREY LUMBER COMPANY,
New York.

DEAR SIRS:—Your order received for three carloads, and in answer will say will ship you within the next ten days one carload, and possibly three. We sold this lumber to Mr. Stemple, widths to run from four inches up. Mr. Stemple stopped at our place Monday morning, think he decided it was a better average in widths than usual. We will notify him when we will be ready to ship. Yours truly,

WILSON BROS.

The plaintiff shipped the one carload mentioned in the letter, and did not ship the other three. Judge Starbuck held that this was not sufficient evidence to establish the counterclaim of the defendants, and dismissed the same and rendered judgment for amount admitted to be due the plaintiff. This judgment was affirmed upon appeal to the Superior Court.

We agree with the learned judge that no definite contract to ship more than one carload of lumber was entered into by the plaintiff. The words used in the letter bound the plaintiff to ship only one carload. The words "possibly 3" are too indefinite and uncertain to constitute a binding contract.

It is well settled that where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is a mere expression of willingness, and is not a definite agreement to perform. 9 Cyc., 267-269. In order to construct a contract, there must be a proposal squarely assented to. *Cozart v. Herndon,* 114 N. C., 252. There must be a meeting of two minds in one and the same intention in order to constitute a contract, and an acceptance of an offer varying its terms is a rejection of the offer. *Gregory v. Bullock,* 120 N. C., 261. The letters of the plaintiff to the defendant was no more than an agreement to ship three cars if it suited their pleasure to do so.

The judgment is
Affirmed.

ALLEN, J., concurring in result.

J. W. WILLIAMS v. MAGGIE M. WILLIAMS.

(Filed 4 November, 1920.)

Divorce—Pleadings—Residence—Affidavit—Statutes.

It is not required that the two years residence in the State of the plaintiff in an action for absolute divorce be alleged in the complaint to confer jurisdiction, but it is sufficient if it is set out in the accompanying affidavit. C. S., 1661; Rev., 1565.

APPEAL by defendant from *Ray, J.*, at June Term, 1920, of ROCKINGHAM.

This is an action for absolute divorce. The defendant excepts because the plaintiff was allowed to testify that he had been a resident of the State for two years next preceding the bringing of the action, and submitting an issue upon that proposition.

J. M. Sharp for plaintiff.

C. O. McMichael and N. Leland Stanford for defendant.

CLARK, C. J. The defendant contends that his exceptions should be sustained because the complaint does not allege that the plaintiff had been a resident of the State for two years next preceding the bringing of the action, but this allegation is clearly made in the affidavit as required by C. S., 1661; Rev., 1563. This is necessary to give the court jurisdiction, and it is sufficient if it appears in the affidavit. *Kinney v. Kinney,* 149 N. C., 325., in which it is said as to the knowledge of the existing cause of adultery, "The statute does not require that such knowledge be alleged in the complaint, but in the affidavit or verification of the pleading. When the proper affidavit is made the court acquires the jurisdiction of the cause."

These and other allegations are required to be in the affidavit to show jurisdiction. They are no part of the grounds for divorce. C. S. 1659, 1660; Rev., 1561, 1562, and hence need not be set out in the complaint itself. The allegations in the affidavit and in the complaint in actions for divorce are deemed denied, and the issue as to the plaintiff's residence was properly submitted, together with the allegations of marriage, adultery, and condonation, and were all found by the jury, in this case, in favor of the plaintiff.

The proceedings in this case were strictly in accordance with the statute and the settled practice of the Court. *Moore v. Moore,* 130 N. C., 335, and cases cited. *Hopkins v. Hopkins,* 132 N. C., 23; *Nichols v. Nichols,* 128 N. C., 108; *Holloman v. Holloman,* 127 N. C., 16.

No error.

J. W. KIMBROUGH v. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, AND ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 10 November, 1920.)

1. Instructions—Conflicting Charge—Appeal and Error—Reversible Error.

When the trial judge erroneously instructs the jury on the issue of contributory negligence, under conflicting evidence, as to the duty of one driving upon a railroad track, at a street crossing in a town, to stop, as well as to look and listen for an approaching train, the error is not cured by a correct but conflicting instruction thereon, in another part of the charge, as the jury will not be presumed to know which of these conflicting instructions is the correct principle of law applicable to the evidence.

2. Railroads— Crossings— Collisions— Negligence — Contributory Negligence—Instructions—Appeal and Error—Reversible Error.

Where, upon the trial of an action against a railroad company to recover damages for a personal injury sustained by one driving upon a railroad track at a street crossing in a town, there is evidence tending to show that the view of the plaintiff was obstructed by box cars the defendant had permitted to remain on spur or lateral tracks at the crossing; that the plaintiff knew of the frequent passing of trains at this place, and the train causing the injury approached without sounding its whistle or ringing its bell, and the plaintiff was prevented from seeing the train approach by the intervening box cars, or hearing it by reason of the noise of the running engine of his automobile, and that he did not come to a full stop before going on the track, but, not hearing or seeing the train, he increased the speed of his automobile, and was immediately struck upon passing the end of a box car, which would not have happened had he stopped his machine to investigate: *Held*, an instruction to answer the issue as to contributory negligence in the negative, if the plaintiff looked and listened before entering upon the track, under the circumstances, without reference to the law relating to his not stopping to ascertain the danger, is reversible error.

BROWN, J., concurring in result; CLARK, C. J., and ALLEN, J., dissenting.

APPEAL by defendant from *Daniels, J.*, at March Term, 1920, of WAKE.

Plaintiff brought this action to recover damages for personal injuries sustained at Selma, N. C., 27 January, 1919, as the result of a collision at a public crossing between the automobile which he was driving and a train on the track of the Atlantic Coast Line Railroad Company, which was being operated by the United States Railway Administration. There was testimony on behalf of plaintiff that the train was running at a speed of thirty or forty miles an hour; that no signal of approach to the crossing was given by whistle or bell; that the view of the track was cut off by a string of cars on a spur track, and that these cars extended two or three feet into the public road. Plaintiff testified that

he looked and could not see down the track in the direction from which the train was coming because his view was obstructed by the cars on the spur track.

There was testimony on behalf of defendant that the cars on the spur track did not obstruct the plaintiff's view of the train; that notice of the approach of the train had been given by blowing the whistle and ringing the bell, and that the speed of the train did not exceed ten or twelve miles an hour.

The defendants pleaded the plaintiff's contributory negligence as a defense, and contended at the trial that the failure of the plaintiff to stop before entering upon the track, when it was his duty to do so, was the proximate cause of his injury.

There was evidence that plaintiff was familiar with the crossing, having passed over it on the morning of the accident on his way from Raleigh to Pine Level. He knew that he was approaching a crossing, and says he slowed down. In describing the condition at the crossing and the circumstances of the accident, he says: "There were eight or ten box cars on the track connecting the Coast Line and Southern Railways; the doors of the box cars were closed, and I could not see through them. The first box car was on the crossing two or three feet. I had to turn my car to get around it. There were some eight or ten cars back on the connecting track that prevented me from seeing the train coming toward the crossing from the South, and I came along up to the crossing and slowed the car down and did not hear anything, and just as I passed the car the engine struck me and carried me down the track. I listened for the train. I could not see the track at any point to the south. I did not hear the whistle blow and there was no sound of bell. I listened and looked all I could. I thought there might be a shifting engine going by. As I came toward the track at Selma that morning I looked for the train and could not see it; the box cars prevented it. I could not see south on account of the box cars. I just looked right in the box cars; that was all there was to look at. That was all that I could see until I got right down on the railroad track; I was looking right at the cars, and I had to come around the edge of the box cars and they projected out two feet in the road; the box cars were within four or five feet of the main line of the Atlantic Coast Line. I knew that trains moved north and south at that point. Through passenger trains passed on that track. I drove around the edge of the box cars. When I got around the end of the box cars my front wheel was on the track the train was on; I did not stop; I just slowed up and listened. I did not get out and go to the edge of the box cars and look. I did not stop to see if anything was coming from behind the box cars. I just slowed up, and when I did not hear anything I just pulled through; when I

decided to pull through I speeded up; I did not stop to look around the edge to see if anything was coming. I did not stop anywhere after I came by the Union Fertilizer Company; I just slowed up and listened just about as slow as a car would go and not stop, and I did not hear anything; when you stop a Ford automobile the engine still runs unless you choke it; I slowed down just enough to keep from choking; they cannot chug away pretty heavy in that condition; my engine was running; I did not cut it off; I did not have plenty of time to cut it off behind those box cars; I listened for the train coming with the Ford engine running under my feet; you could not hear the Ford engine 30 yards away; it was running as smooth as a Cadillac; the Ford had been running a year or two, and had just been overhauled; it was not a second-hand car; I had been running it since August; I have no idea how far I had run the car; I expect I would run about 250 miles per week; I had run this car about 5,000 miles. A man ran it before when he traveled for Swift & Company. I should think he made about the same miles as I did. I do not know how long Swift & Company had had the Ford; some one said they had it about a year."

D. T. Oliver, witness for plaintiff, testified: "If Mr. Kimbrough had stopped before he got to the crossing, the train would have gone on by and not hit him."

Richard Britt, witness for plaintiff, testified that plaintiff "was going ten miles per hour. He slowed up just before he got to the crossing and speeded up and went on by."

D. T. Oliver, plaintiff's witness, further testified: "Mr. Kimbrough was going about ten miles an hour at the crossing. He was running about as slow as a Ford would go. He kept on running that way until the train hit him. He slowed up from what he was doing possibly. A Ford will not run any less than ten miles an hour."

Defendant contends that this testimony on behalf of plaintiff, construed in the light most favorable to him, establishes the fact that if he had exercised ordinary care under the circumstances he would have stopped before entering upon the track, and the accident would not have occurred.

In addition to the reasons above set forth, the Atlantic Coast Line Railroad Company and its codefendant contended that the motion to nonsuit should have been granted upon the ground that the record fails to show that this company was in any way connected with the control or operation of its line of railroad at the time of the accident.

Defendants contended that the court not only failed to give the jury appropriate instructions as to plaintiff's duty to stop, or take other precaution for his safety, or, in other words, to exercise due care, besides looking and listening, but if the judge did so he gave another instruction

in conflict with it, when he told the jury that if he looked and listened only, they should answer the second issue "No." And that if he had listened, and the company failed to give him proper warning of the approach of the train, it cannot be imputed to him as negligence that he went on the track. Defendants further contended that the instructions on the issue of contributory negligence are erroneous, because they withdraw the question of plaintiff's duty to do more than this, if necessary, from the jury's consideration, and directed the jury to find that plaintiff was not guilty of contributory negligence if he only looked and listened.

The trial judge gave the following instructions on the issue of contributory negligence: "Upon this issue the burden shifts, and it is upon the defendant to satisfy you by the greater weight of the evidence of the truth of their contention, and the defendant alleges that the proximate cause of the plaintiff's injury was his own failure to exercise care and prudence for his own safety; that as he approached this railroad track at the crossing, the track being a warning of danger, it was his duty to look and listen for the approaching of a train, and the defendant alleges that he failed to exercise care and to perform this duty, and that his failure was the real, or proximate cause of the injury. Now, if this evidence satisfies you by its greater weight that as he approached the zone of danger he failed to look and listen, and that if he did look and listen he could either have seen the train or heard the signal, and that under these circumstances he ventured upon the track, then you should answer this fifth issue 'Yes,' because he would be guilty of contributory negligence, which would exist and extend up to the time of the injury, and would be the proximate cause of it. Unless you are so satisfied, you will answer this issue 'No.' Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to go on the track, then the failure of the company to warn the traveler of danger cannot be imputed to his contributory negligence. Unless you are satisfied by the greater weight of the evidence, the burden being upon the defendant under this issue, that the plaintiff failed to exercise the care and prudence that the law required of him, as I have indicated to you, then you would answer this issue 'No,' or, if the evidence leaves your mind in such condition that you cannot say how it is, then you will answer it 'No,' because the burden is upon the defendant to satisfy you affirmatively that the plaintiff was negligent, and that his negligence was the proximate cause of his injury."

Defendants contended that by the instructions of the court, which are set out above, the jury were directed to answer the issue of contributory negligence "No," if they found that the plaintiff, as he approached the crossing, merely looked and listened, and the principle that, under the

exceptional circumstances which the jury were fully justified in finding to exist in this case, it was plaintiff's duty to stop, look, and listen, was entirely ignored. In other words, if the jury should find from the evidence and by its greater weight, the burden being on defendant, that for a distance of several hundred feet the view of defendant's track to the south was cut off by box cars; that the cars extended two or three feet into the public road; that plaintiff being fully aware that he was approaching a crossing, was driving at a speed of ten miles an hour; that the automobile which he was driving could not be driven at less than ten miles an hour; that as he approached the crossing he drove around the cars and immediately after passing the cars his automobile was upon the track on which the train was approaching; that he did not hear the train and could not see whether a train was approaching until he was on the track; that as he listened for a train the engine of his automobile immediately in front of him was running with the noise usually incident to the operation of a gasoline engine, and the jury should find that under such circumstances a prudent man would have stopped his automobile and his engine before driving beyond the box cars and onto the track, then it would be the duty of the jury to answer the issue of contributory negligence "Yes," it having been admitted by plaintiff that he did not stop, and the uncontradicted evidence of plaintiff's witnesses having established the fact that if he had stopped the accident would not have happened.

There was a verdict for the plaintiff, with damages assessed at $20,000. Defendants reserved exceptions, and appealed.

J. M. Broughton and Douglass & Douglass for plaintiff.
Murray Allen for defendants.

WALKER, J., after stating the essential facts of the case: The defendants contend that the instruction covered by their exception No. 28, which was taken to the instruction of the court to the jury, was erroneous, and agreed that it is especially objectionable because by it the jury were told that if the plaintiff looked and listened, and did no more, before entering upon the crossing and the track, they should answer the issue as to contributory negligence "No." We will not discuss the question whether other instructions on this phase of the case were given which were, in themselves, correct, because, even if they were, the other one was erroneous, and in conflict with them. The rule of this Court upon such a question is thoroughly well settled by our decisions. Where such a conflict occurs, a new trial is granted, because the jury are not competent, as we have often said, to decide which instruction is correct, or which is incorrect. We find this rule thus stated in *Edwards v. R. R.*,

132 N. C., 99, where the leading authorities are cited: "The fact that the court, in one part of the charge, told the jury that it is the duty of an engineer, when approaching a crossing, to ring the bell or blow the whistle, did not cure the error he committed in the respect already indicated, that he must ring the bell and sound the whistle. It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly. We must assume, in passing upon the motion for a new trial, that the jury were influenced in coming to a verdict by that portion of the charge which was erroneous." Other cases are, *S. v. Barrett,* 132 N. C., 1010; *Tillett v. R. R.,* 115 N. C., 662, and *Williams v. Haid,* 118 N. C., 481.

The court charged the jury that it was sufficient in law if the plaintiff "looked and listened," without doing anything more, and if the jury found that he did, they should answer the second issue, as to contributory negligence, in the negative. This instruction was erroneous, because that it is not all that is required of the plaintiff, but in addition thereto he must further do what a man of ordinary prudence would have done, as, for instance, stopped his car (if the jury would have found that a man of ordinary prudence would have done so), under the same or substantially similar circumstances, to save himself from injury. So that the instruction fell short of the full measure of plaintiff's duty under circumstances which the jury could have found to exist, and this is true, although the jury should find that one of the defendant's engineers, who was at the time in control of the engine, had failed to give the proper signal.

The rule thus stated was the one adopted in *Cooper v. R. R.*, 140 N. C., 209. Even though the plaintiff looked and listened, the jury may have found that the situation was such as to require him to do more, even to stopping his car, as a man of ordinary prudence would have done in like circumstances, or they may have found, by using their common sense and observation, that, notwithstanding what the plaintiff says as to the noise of his car, his ability to hear was so diminished by the noise of the same as to make it imperative that he should stop it, so that he might hear either the noise of the train as it approached nearer and nearer, or the sound of its signal. The jury could have arrived at this conclusion if they accepted the defendant's evidence as true, that the proper signals were given, and there was no reason why the plaintiff should not have heard them and prevented injury to himself, unless his hearing was deadened by his own fault in not stopping his car. And they could also have found that no man of ordinary prudence would venture on the track under the circumstances without assuring himself of the fact that the train, then expected and behind its schedule time,

was not actually coming at that time and near the crossing, or that some shifting engine was about to pass over the crossing, as he testified: "I thought there might be a shifting engine about to pass." Again he stated, "I just slowed up, and when I did not hear anything I just pulled through; when I decided to pull through I speeded up; I did not stop to look around the edge to see if anything was coming. I did not stop anywhere after I came by the Union Fertilizer Company." The jury may have found from this testimony, taken with some other facts, that a man of ordinary prudence would have looked around the edge of the box cars, which were five feet from the track, to see if a switching engine or train was coming, and that it was negligence, tested by the rule of the prudent man, not only not to do this, but to "speed up" when he decided to "pull through." There are, perhaps, other combinations of facts which the jury may have found to exist, and from which the jury, by applying the rule just mentioned, may have inferred that plaintiff's conduct was imprudent, if not very risky, and was not that of the ideally discreet and careful man. The instruction was wrong in itself, inherently so, and if there was a correct one, it was in conflict with it, and left the jury in ignorance of the true principle of law which should govern them in finding a verdict, or, at least, in a state of utter confusion as to what principle applied to facts as they found them to be. If the instructions were not in conflict, but in perfect harmony, as the last one was erroneous, both were wrong, which required the case to be referred to another jury.

In *Shepard v. R. R.*, 166 N. C., 539, it was said by *Justice Hoke*, citing many cases, and among them *Cooper's case, supra:* "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury,'" citing *Judson v. R. R.*, 158 N. Y., 597; *Malott's case*, 159 Ind., 127-134; 3 Elliott on Railroads (2 ed.), sec. 1095, note 147; 33 Cyc., pp. 1010, 1020. In *Judson's case, supra*, the rule is stated as follows: "A person approaching a railroad crossing is not required, as a matter of law, to stop before attempting to cross, but his omission to do so is a fact for the consideration of the jury." And in *Malott's case, supra:* "Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact." And *Justice Hoke* thus concluded, in *Shepard's case:* "On a careful perusal of the record we are of opinion that the issue of contributory negligence must be referred to the decision of another jury, when the question whether, on the entire facts and circumstances, as the jury may find them to be, the plaintiff was in

the exercise of reasonable care at the time in entering on the crossing *without having come to a full stop.*" (Italics ours.)

And yet the court ignored those principles, and omitted important and essential matter from his instruction on the second issue, and confined plaintiff's contributory negligence to the single fact, whether he "looked and listened," with the instruction that if he did to answer the issue "No." When the court undertakes to define what is negligence, it must do so fully, and not leave out any essential element of it, *S. v. Phifer,* 90 N. C., 721, or to state it differently. When the court attempts to charge the law, it must be done correctly. *S. v. Merrick,* 171 N. C., 788, and cases cited, especially *Carleton's case,* 43 Neb., 373, and *Simmons v. Davenport,* 140 N. C., 407.

As to the motion for a nonsuit we will reserve our opinion, as the facts may more fully and definitely appear on the next trial. Defendants may renew their motion at that time without prejudice.

We are, therefore, of the opinion, and so hold, that there was substantial error as pointed out by us, and a new trial is ordered.

New trial.

BROWN, J. While I concur in granting a new trial, I am of opinion the motion to nonsuit should be granted.

It is well settled that where the facts necessary to constitute contributory negligence are established by the evidence of plaintiff, motion for judgment of nonsuit should be sustained. *Keller v. Fiber Co.,* 157 N. C., 575. I think the motion should have been allowed in this case.

Plaintiff testified that he could not see down the track on account of box cars; that he was looking right at the cars, and had to go around the edge of the box cars, as they projected out two feet onto the road crossing. He admits that he knew that many trains passed over the crossing on that track. He admits that he did not stop his automobile, but only slowed down and listened. He distinctly says that he did not get out and go to the edge of the box cars and look, and further states: "I did not stop to see if anything was coming from behind the box cars." This evidence shows such a high degree of carelessness that I do not think, as a matter of law, plaintiff can recover. I am aware of the fact that it is said in *Shepherd v. R. R.,* 166 N. C., 545, that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury. The case at bar differs very materially from the *Shepard case.* There is nothing here to go to the jury. The plaintiff's own evidence shows that his conduct was such as cannot be justified in law under the rule of the

prudent man. He admits that his view was obstructed and that he could not see whether a train was coming or not. He did not take the trouble to stop his car and walk to the edge of the box cars and look. His car was running, his engine going, and we know from common experience that under such circumstances he could not hear anything like as well as if his engine had been stopped. Under such conditions, testified to by himself, I think the law made it the imperative duty of the plaintiff to stop his car before going on the track. It must be admitted that if he had done so he would not have been injured.

As far back as 1873, *Judge Sherswood,* an eminent judge of the Supreme Court of Pennsylvania, said: "There never was a more important principle settled than that the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se* and a question for the court. It was important not so much to railroad companies as to the traveling public. Collisions of this character have often resulted in the loss of hundreds of valuable lives of passengers on trains, and they will do so again if travelers crossing railroads are not taught their simple duty not to themselves only, but to others." *R. R. v. Beale,* 73 Pa., 503.

"The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train and to stop for such purpose, where the view of the track is obstructed, or where there is noise which he may control, is negligence *per se,* which will bar a recovery for an injury resulting from a collision with a train at such crossing." *Blackburn v. R. R.,* 34 Oregon, 215, citing numerous cases in support of this position at page 222.

In *Chase v. Maine Central R. R. Co.,* 167 Mass., 383, it is said to be a general rule "that, if there is anything to obstruct the view of a traveler on a highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross in safety." The same principle is laid down in *Shotts v. R. R.,* 121 Fed., 678; *R. R. v. Holden,* 93 Mo., 417; *Ely v. R. R.,* 158 Pa., 233. The Supreme Court of Maryland said, in *R. R. v. Hogeland,* 66 Md., 149: "It is negligence *per se* for any person to attempt to cross tracks of a railroad without first looking and listening for approaching trains; and, if the track in both directions is not fully in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen before attempting to cross. Especially is this required where a party is approaching such crossing in a vehicle, the noise from which may prevent the approach of a train being heard. And, if a party neglects these necessary precautions, and receives injury by collision with a passing train, which might have been seen if he had looked, or heard if he had listened, he will be presumed to

have contributed by his own negligence to the occurrence of the accident. This is the established rule, and it is one that the courts ought not to relax, as its enforcement is necessary as well for the safety of those who travel in railroad trains as those who travel on the common highways."

In *Davis v. R. R.*, 159 Fed., 10, it is held: "One who drives on a trot toward a railroad crossing when the view along the track is obstructed, until within 20 or 25 feet of the track, and then continues to walk his horses toward the crossing without taking the precaution to stop and listen for a train, is guilty of negligence which will preclude his holding the railroad company responsible for collision with a train."

In *Shufelt v. R. R.*, 96 Mich., 327, the Court said: "He who does not choose to stop and listen, where he cannot see, must suffer the consequences of his own negligence."

In a later Massachusetts case, *Chase v. R. R.*, 208 Mass., 137, decided since automobiles came in vogue, it appeared that a chauffeur operating a seven-passenger automobile was driving along a country road about noon on a bright day, and as he approached a grade crossing with which he was familiar, and knew that trains might come from either direction at any moment, at a speed from 12 to 15 miles per hour until he was very close to the track, when he reduced his speed to eight miles an hour, and while crossing the track the automobile was struck by a train running 25 miles an hour. The Court held that the driver of the automobile was guilty of contributory negligence as a matter of law, and in the opinion of the Court it is said: "The rules of law applicable to the driver of a horse-drawn vehicle approaching a railroad crossing have been laid down in many cases. He must look and listen in a reasonable way, so as, if possible, to secure his safety. The proper application of this rule for one driving an automobile is simple, and in concrete cases far less difficult than for the driver of horses. As was said in *Hubbard v. Boston & A. R. Co.*, 162 Mass., 132, 'There are very few horses that can safely be stopped within 15 or 20 feet of a railroad track to await the passage of an express train. One driving there before the accident was obliged to choose between the risk of driving across and being struck by an express train whose approach he might fail to hear, and the risk of stopping to look so near the track as to expose him to great danger from the fright of his horse if an approaching train would be near.' The driver of an automobile is in no such danger. If his machine is a good one, it can be controlled easily and perfectly, and there is no danger from it if he stops to look and listen within six feet of the track."

In the *Chase case* the driver of the automobile, Hancock, did not stop, and it was indisputable that had he stopped the injury would not have occurred. In concluding its opinion the Court says: "With proper

care on the part of the driver, there is no danger in crossing a railroad with an automobile upon an ordinary highway in a country town. In this case, considering that part of the testimony most favorable to the plaintiffs, there is no evidence that Hancock was in the exercise of due care; but, on the contrary, the accident seems to have been caused by his great carelessness."

In *R. R. v. Maidment,* 168 Fed., 21, and in *Brommer v. R. R.,* 179 Fed., 577, the Federal Courts hold that it is the imperative duty of the drivers of motor-driven vehicles to stop as well as to look and listen before crossing railroad tracks.

I could cite many other cases from many other Courts holding similar views. They all base them upon the idea that an automobile in good condition can easily be stopped and started, and that no hardship is imposed by requiring them to stop before crossing a railroad track. It is perfectly obvious that by stopping collisions are certainly avoided, injuries prevented, and human lives saved. The use of automobiles has grown immensely in the last decade. Their use involves many dangers not only to the users but to the public as well. The public interest demands that the courts should be rigid and inflexible in requiring those who operate such vehicles to exercise a high degree of care in order to prevent injuries. The statistics show, as I have seen it stated in the public prints, that 126,000 persons were killed by automobiles within the past year, of which 21,000 were children. Such mortality is appalling, and surpasses by far the number of deaths caused by railroads.

I am very strongly of opinion that this Court should align itself with the Courts of other States, some of which I have quoted, and hold that under all circumstances an automobile shall come to a full stop before crossing a railroad track. This is the universal rule established by railroads for the purpose of preventing collisions where one railroad crosses the track of another. An automobile can come to a full stop very much easier and in far less time than a railroad train, and it is no hardship to require it to do so, and it would insure the safety of its occupants as well as those who travel on a train.

In conclusion, I will say that this case is one of many others where the jurors seem ready and willing to take the word of the party injured, who is pecuniarily interested in the result, as against the engineer's and firemen, who have no such interest. In this case the engineer and fireman, men against whose character not a word is uttered, both swear positively that the whistle blew for the crossing, and that they kept a vigilant look. The plaintiff, who expects to recover a large sum of money, does not swear that the whistle did not blow, but only that he did not hear it. Of course he did not with his motor throbbing and his

car crossing the tracks. The engineer could not see him because the plaintiff was behind the box cars and out of the engineer's vision.

There is no way to do justice to all parties and to save life and personal injury except to require those who cross railway tracks in motor cars to stop and look and listen.

CLARK, C. J., dissenting: It was earnestly contended by counsel for defendant that this Court should hold it to be law that the drivers of all automobiles or other conveyances traveling along a public road shall come to a full stop whenever such road is crossed by a railroad track. This would be to make law, for it has never been so held in this State. This proposition is based upon a misconception, as it seems to me, of the respective rights of the people and the railroads. The public roads of the State belong to the people, and are used by them freely as a part of their sovereignty. Formerly they were the "King's Highway." Now they are the people's highway—the public roads. The railroads, with us, are not owned, as in other countries, by the Government, but by aggregations of individuals for the purpose of private gain. Being useful for the public, they are held to be *quasi*-public corporations, are granted the right of eminent domain to take private property for their use as right of way, and are subject to public regulation as to their conduct and charges. Where they cross the public roads it is in derogation of the right of the public to use these roads, and potentially a serious danger, and, therefore, in all other countries they are forbidden to cross on the same grade, but must make their crossings either above or below the public roads. By force of necessity, in many of our States this has been required by statute to be done by the railroads at their own expense, though it was not enacted when the railroads were built originally.

In this State the Corporation Commission was authorized, in 1907, to require this to be done wherever desirable, C. S., 1048, and the railroads have voluntarily made the change in some few cases where most urgently needed. Where this has not been done, recognition of the superior right of the public to use its own roads requires that whenever the railroad track crosses the public road on the same grade, the railroad company should give the fullest notice by the engineer blowing the whistle and ringing the bell, and by installing electric gongs to warn travelers, and in all much-frequented places (especially places like this, situated in town limits) to have gates and custodians to keep them.

In Germany for 40 years the approach of trains has been announced in railroad stations by electric gongs, operated automatically by the wheels of the engine making an electric circuit as it passes over a device located several hundred yards distant which rings the gong over the annunciator in the station, giving notice as to what train is arriving,

instead of the human voice, as is usual here. The same device is used on some railroads here to give warning at crossings, in addition to signals by whistle and bell. It is an inexcusable disregard of the right of the public to use their own roads for the railroads not to install these electric gongs as a warning at all grade crossings in addition to whistle and bell, —and gates and custodian, where these latter are needed.

In absence of these proper signals, or if there are no gates where the crossing is, as in this case, in a town, or where the travel on the public road is frequent, the liability of the railroad for injury caused by such negligence on the part of the railroad should be conclusive. The right of the people to use their own roads should not be impaired by the negligence of the railroad authorities in not taking the precaution of giving the fullest notice at all crossings, and to establish gates where the track crosses a public road on the same grade where it is much used.

In this State there are over 5,500 miles of railroad tracks and very many times as large a mileage of roads owned by the public, over which latter there passes constantly 150,000 automobiles and motor trucks licensed by the State, besides horse-drawn vehicles many times as numerous, and other conveyances of both kinds from other States. These carry an immense number of persons, and a vast quantity of freight. To require every one of them to come to a full stop every time a driver of any conveyance sees a railroad track crossing a public road would be an incredible inconvenience, and would be in the aggregate, an enormous expense to the public in the aggregate loss of time by reason of the interference with the volume of traffic and travel along the public roads which is vastly greater than that which passes over the railroads. When we consider that the volume of travel and traffic, both on the public roads and railroads is constantly increasing, and that the mileage of both will also grow, a rule that will require all the travel and traffic over the public roads to come to a full stop at the bare sight of a railroad track will be an enormous burden.

This would require stoppage by everybody, all the time, whether a train is approaching or not. But as vehicles pass along the public roads far more frequently than do trains along the railroad tracks, it is a more reasonable rule that the railroads should be required to give notice by signals and, where necessary, by gates, of the approach of one of their dangerous agencies, so that the traffic and travel by the public over their public roads shall not be interrupted, except when absolutely necessary.

The railroads are granted existence by legislation, and are operated for private profit. They have no superiority over roads owned and used by the public, either in dignity or in right. On the contrary, it is incumbent on the railroads, wherever to save expense they persist in crossing the public roads on the same grade, to avoid accidents which

may be inflicted by their engines to give fullest notice of their approach by signals, and in proper places, by lowering gates. In the absence of these the users of public roads should be free to proceed without fear or liability of injury to persons or property from the railroad engine.

At times the railroads have imposed upon the traveling public the inconvenience of a halt of 5 or 10 minutes as a forced tribute of respect on the death of some railroad official whom few of the public had the honor of knowing. This could happen only rarely. Gessler placed his hat upon a pole and compelled the public to pay obeisance to it. But neither of these are more repugnant to our sense of propriety and right than to require the people traveling their own roads to come to a full stop at the sight of two parallel bars of iron laid across the public highway, simply because the railroads, while saving themselves the expense of avoiding grade crossings, are unwilling to take the trouble or responsibility to give proper signals or to establish gates and custodians wherever needed. At this point, where the railroad track crossed the public road, the latter was a street in the town of Selma, and when the plaintiff reached that point and was not warned by any bars kept by a custodian for the defendant, which should be maintained at such places, nor by any whistle nor by the ringing of any bell or an electric gong by the defendant, and the train was 6 hours behind, and running at a speed, it is claimed, of a mile a minute, it was irrebuttable proof of the negligence of the defendant, and the proximate cause of the injury which was inflicted by its engine upon the plaintiff.

The principle maintained in *Goff v. R. R.*, 179 N. C., 219, and in *Johnson v. R. R.*, 163 N. C., 443, and in all other North Carolina cases was not that every traveler using the public roads must come to a full stop at the sight of a railroad track, but that he "must use his sense of sight and hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so from the fault of the railroad company." This the plaintiff did according to his uncontradicted testimony, and was prevented from seeing the approaching train by the fault of the defendant in obscuring a fuller view by empty cars which were negligently placed by the defendant on a sidetrack obstructing his view. This and the enormous speed of the train which approached, possibly, at a mile a minute, and running 6 hours behind the schedule when no train was expected, and without giving warning, without whistle or signal at this crossing of a street which was so much traveled, and in violation of the lawful town ordinance which limited the speed of trains within the town limits, were found by the jury to have been the proximate cause of the injury inflicted on the plaintiff.

As has been held by *Allen, J.*, in *Perry v. R. R.*, at this term, quoting from *Johnson v. R. R.*: "If his (the traveler's) view is obstructed or his hearing an approaching train prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being the proximate cause of any injury he received." *Mesic v. R. R.*, 120 N. C., 490; *Osborne v. R. R.*, 160 N. C., 310.

In *Cooper v. R. R.*, 140 N. C., 221, *Hoke, J.*, said: "Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing; and if he does listen and is induced to enter upon a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not be imputed to him for contributory negligence."

In the *Perry case, Judge Allen* thus states the facts which are very similar to this: "The evidence in this case tends to prove that as the plaintiff approached the crossing his view was obstructed by bushes which the defendant permitted to grow on its right of way so high and so close to the track that he could not see until he was on the track; that the plaintiff was traveling from four to five miles an hour; that he looked and listened, and the inference is permissible that if notice of the approach of the train to the crossing had been given that the plaintiff would have heard it, and would not have gone on the track, and if so, the jury was justified in finding that the failure to give notice caused the plaintiff to go on the track, and was the proximate cause of his injury." And, in sustaining the verdict of the jury, held that it could not be declared a matter of law that the failure of the plaintiff to stop was a failure to exercise ordinary care, but was a circumstance to be considered by the jury. In that case, the view was obstructed by the defendant permitting bushes to grow on the right of way; and in this case by the greater negligence of the defendant in shunting a dozen cars which obstructed the view down the track by travelers using the public road.

There are a very few Courts elsewhere who have deemed railroad trains such a deadly instrumentality of injury to the public that as a matter of law it is negligence that defeats a recovery for those using a public road not to come to a full stop at seeing a railroad track across a public road. But this loses sight of the vital fact that the railroads have a right to cross the public roads only *sub modo*, that is, on condi-

tion that they shall use every precaution by giving signals and preserving an unobstructed view for travelers and providing gates with custodian wherever the volume of traffic and travel requires it. It is their duty to make the use of the public roads as safe from injury by them, and to interfere therewith as little, as possible.

So far from holding with these Courts, however, it has been held by us, and cited with approval by *Allen, J.*, in *Perry v. R. R., supra,* and it has been held in other cases (citing *Shepard v. R. R.*, 166 N. C., 545), that "it is not always imperative to come to a complete stop before entering on a railroad crossing; but whether he must stop, in addition to looking and listening, depends upon all the facts and circumstances," which is a question for the jury.

Judge Allen further says, pertinently, in the *Perry case:* "The authorities favoring this view proceed upon the idea that the traveler has a right to rely upon the performance of its duty by the defendant, and that when he looks and listens, and neither sees nor hears a train, he has the right to act on the presumption that none is approaching. . . . The sign placed at the crossing, with the warning, 'Stop, look, and listen,' has no other *legal* effect than to call the attention of the plaintiff to the duty imposed upon him by law to exercise ordinary care for his own safety."

In *Perry's case,* as in this, "The evidence of the plaintiff that he might have heard the running of the train if he had stopped was submitted to the jury in support of the defendant's position, and was given the significance to which it was entitled."

I think the verdict and the judgment in this case should be sustained upon the law and the facts.

ALLEN, J., dissenting: The questions raised by this appeal, and particularly the duty imposed upon the traveler as he approaches a railroad crossing with reference to stopping, are fully considered in *Perry v. R. R.*, at this term, and that opinion is a controlling authority on this appeal.

It is true that in a part of the charge the presiding judge made the issue of contributory negligence depend on the failure of the plaintiff to look and listen, when, although he looked and listened, he was also required to exercise the care of one of ordinary prudence, but he also charged the jury that "Omission of the railroad company to give proper warning does not relieve the traveler from looking and listening; in other words, such omission does not discharge the traveler from exercising due care for his own safety. It is the duty of one approaching a railroad to use ordinary and reasonable care to avoid an accident, and to keep a proper lookout for an approaching train, and if he does not

do so, but goes on and an injury results from such failure, he is guilty of contributory negligence, and under those circumstances it would be your duty to answer the issue 'Yes.' "

Again, after the parts of the charge which are criticised were given and near the conclusion of the charge, on contributory negligence, he said: "I should charge you, gentlemen, as a qualification of what I have already said, that the failure to look and listen as a traveler goes into the zone of danger is of itself contributory negligence, and would justify you in answering that fifth issue 'Yes.' There is a further duty incumbent upon the plaintiff, that is, in respect to conducting himself as a man of ordinary and reasonable prudence, and if this evidence should satisfy you that there was such failure in that respect, and that this failure was the proximate cause of the plaintiff's injury, then you would answer this issue 'Yes.' "

It will be noted that the judge here imposed upon the plaintiff the duty of conducting himself as a man of ordinary and reasonable prudence, and that this was added as a qualification of what he had already said, and under this qualification the jury could, and doubtless did, consider all of the surrounding circumstances, including the failure of the plaintiff to stop.

Upon careful consideration of the whole record, I think the judgment ought to be affirmed.

T. C. PERRY, DARIUS WHITE, AND H. G. WHITE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 10 November, 1920.)

1. Railroads—Collisions— Negligence— Contributory Negligence— Crossings—"Stop, Look, Listen"—Evidence—Questions for Jury.

While it is evidence of contributory negligence for the plaintiff to drive his automobile upon the defendant's track at a public crossing without stopping, it may not be so held, as a matter of law, when he slowly and cautiously had approached the track, had looked and listened, and was prevented from seeing the coming train by growth that the defendant had permitted to remain on its right of way, or from knowing that the train was approaching because of the failure of defendant's employees to sound the whistle or ring the bell of the locomotive.

2. Railroads—Collisions—Signals—Negligence—Evidence.

It is the duty of the employees of a railroad company to give reasonable and timely notice of the approach of its train to a public crossing, by ringing the bell or blowing the whistle of the locomotive, or doing both, when the circumstances demand it, and its negligence in the failure to

perform this duty may be shown upon the testimony of nearby witnesses to the effect that they did not hear the whistle or the bell at the time of the injury.

3. Same—"Stop, Look, Listen"—Proximate Cause—Questions for Jury.

Upon evidence that the plaintiff did not stop on a public highway before entering on the defendant railroad company's right of way while driving an automobile, resulting in a collision with defendant's train, and that the plaintiff was prevented from seeing or hearing the approach of the train by the negligence of the defendant in failing to give warning by ringing its bell or blowing its whistle, and permitting growth to remain upon its right of way, and that the plaintiff was carefully observant and slowly driving at the time of the collision: *Held*, the question of proximate cause is presented upon the issue of contributory negligence.

4. Railroads—Negligence— Contributory Negligence— Crossings— "Stop, Look, Listen"—Signs.

A sign maintained by a railroad company at its crossing with a public highway, for travelers thereon to "Stop, look, and listen," has no other legal effect than to call to their attention the duty imposed upon them by law to exercise ordinary care for their own safety.

WALKER, J., dissenting.

APPEAL by defendant from *Devin, J.*, at the February Special Term, 1920, of PASQUOTANK.

This is one of three actions, two to recover damages for personal injury, and the third, damages for loss of services of a minor son, brought on account of injuries sustained at a public crossing by the train of the defendant striking an automobile in which the plaintiffs were.

The plaintiff Perry was driving the automobile. He testified as follows: "I was 55 years old last August, and live near Okisko. The railroad crosses the public road at Pasquotank station. The road has been there ever since I can remember. It was there and maintained by the county at the time the railroad laid its track across it, and has been there ever since. It is the main road. It is traveled more than any road we have. It is about the only way, except by going around by Okisko to come to Elizabeth City.

"I was hurt on 16 August, 1918, somewhere between three and four o'clock in the afternoon. I was going home. I live about one and one-half miles or one and one-fourth miles from Pasquotank station. In going from Elizabeth City to my home I crossed the railroad at that station. The right of way of the railroad between the track and where its boundary was grown up in sycamore bushes, different kinds. The sycamore bushes there were higher than anything else, some eight or ten feet high, the sprouts sprouted off and made a pretty good clump; they had very wide leaves, so you could not see until you got up on the rail-

road bed. The train was coming from my left. There is a field of corn that butts up to the right of way. I should judge the road is four or five hundred yards from the woods. The corn was eight or ten feet high.

"It is some thirty-three feet, I suppose, from the edge of the right of way to the middle of the track. You could not see up the road where the train was coming, until you climb on top of the road bed, because the bushes had grown up there and you could not see it. They were on the right of way. The train that struck me was known as 'Waddy's train,' and was coming from Edenton going towards Norfolk. That was on my left. I was in a Ford automobile. I was not going over four or five miles at least at that time. I was climbing the road bed. Up to the time I got to the right of way I was going twelve or fifteen miles; that's as fast as I ever go any time. When I got to the right of way I slowed down. I heard no train, no sound.

"Q. Did you listen for one? A. Yes, sir.

"Q. And you didn't hear it? A. No, sir.

"Q. Did you look? A. Yes, sir. I never heard one until I got up to the track.

"Q. Did the train blow? A. I didn't hear it.

"Q. Ring any bell? A. I didn't hear it.

"Q. State what signal, if any, it gave crossing the public road? A. I didn't hear it.

"I was not running over four or five miles at the outside when I drove up the railroad. As I drove up on the track I had two others with me; Darius White, a young white man, and Mr. Oscar Bundy. When I drove up on the track the train looked as close as from here to that door. I reached down for the clutch and brake, and tried to back off, and by the time I got my foot on the clutch the train hit me. All the time I was slowing the automobile. The train was going at lease forty-five or fifty miles an hour. I just got the front wheels up on the track. It knocked us in every direction. I could not say how far, because I was knocked so badly I did not know but very little afterwards, until I was put in the hospital. I was knocked out of the car and alongside of the road bed. I was lying right side of the ties when the train was running by me.

"In August, 1918, Pasquotank was a flag-stop, and for this train, and it had been for a number of years before that. I knew that the trains of the Norfolk Southern never stopped at that station except when signaled to do so. They had sold no tickets there. I never bought any ticket there. There are three or four houses right near there. The nearest one is Mr. Henry Whitehead's. Mr. Whitehead had another little house across the road which belonged to him. There are about six

houses within one-half mile. There are and never have been any gates across the railroad at that point. But there is and has been for the last eight or ten years, certainly, if not longer, a sign there, 'Stop, look, and listen, railroad crossing.' That sign is there on the side of the county road on the other side of the railroad in the direction I was going. I could not say how long it has been there. I suppose five or six years. I suppose I saw it on the occasion in question. I don't know I was particularly noticing that one thing though. I know it was there then. The railroad is straight along there for a considerable distance. For a mile, as I understand it, clear to Okisko.

"Q. When did you slow down from twelve to four miles an hour? A. Right at the track.

"Q. How close to the track? A. Twenty-five or thirty yards I began to slow down.

"Q. You began to slow down when you were twenty-five or thirty yards away? A. Yes, sir.

"Q. You began to slow down then? A. It might have been sooner, I could not say.

"Q. Well sir, when did you commence to run at the rate of four miles an hour? A. When I was going up on the track.

"Q. How far from the track were you when you first commenced running four or five miles an hour? A. Well, I guess that track, you say, is thirty-three feet, I understood you? Q. Yes. A. For instance, when I struck the roadbed raise, that was when I was not running over four or five miles.

"Q. How fast were you running when you struck the right of way? A. I call it all the roadbed—the right of way. I am positive I was not running over four or five miles when I struck the right of way.

"I could have stopped my car in three feet or less. I did stop after I got on the track. I saw the sign up there for me to stop, look, and listen, and I did not stop until I got on the track. If I had stopped eight or ten feet from the track I might have heard the train. If I had stopped my car, no matter if the train was ringing the bell or sounding the whistle, I would have heard it coming, when it was a hundred yards from me, if I had looked in that direction. I can hear a train coming half a mile, and I can always hear it coming a quarter of a mile away, if I listen.

"Q. As a matter of fact, when you were as much as ten feet from the track, how far was the train from the crossing? A. I don't know about that. I never saw the train until I got up on the track. I never heard any noises, no sound, no whistle.

"Q. Well, you did not listen? A. I was running my car.

"Q. Well, if there was anything that kept you from hearing it on that day it was because your car was running, and not because the train was not making the usual amount of fuss? A. I don't know.

"Q. You won't say no? A. No.

"Q. If anything prevented your hearing that train on that day when you were ten feet from the track it was the running of your car? A. I could not say.

"Q. I understand you to say this: You can easily hear a train running on the track, whether it is blowing or sounding the whistle, as much as a quarter of a mile away? A. Well, it is owing to what you are in. Cars make a noise as well as the train.

"Q. Then if you can ordinarily hear it when it is that distance away when your car is not running, then if you don't hear it and your car is running, the reason you didn't hear it is because the car is running? A. Might have been; I don't know.

"If my car had not been running that day I suppose I would have heard the train when it was within one hundred yards of me. I could not say whether I have ever been within a hundred yards of a train running, and was in an automobile running at that time, and did not hear it. Most any man could hear a hundred yards if he had nothing to break the sound. I cannot tell the jury that the whistle did not blow or the bell did not ring."

There was other evidence in corroboration of the plaintiff.

The defendant introduced evidence tending to prove that the crossing was in good condition, and that the whistle was blown and the bell rung as the train approached the crossing.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

There was a verdict and judgment for the plaintiffs, and the defendant appealed.

Aydlett & Simpson for plaintiffs.
Thompson & Wilson for defendant.

ALLEN, J. The principles announced in *Goff v. R. R.*, 179 N. C., 219, fully sustain the ruling of his Honor in refusing to enter judgment of nonsuit.

It was there held that it was the duty of the defendant to give reasonable and timely notice of the approach of its train to a public crossing by ringing the bell or blowing the whistle, or by doing both when peculiar conditions demanded; that a failure to do so is negligence, and that the evidence of witnesses nearby who testify that they do not hear the ringing of the bell or the blowing of the whistle, is evidence that no such signal was given.

We also approved in that case the following principle as to the duty of the traveler as he approaches the crossing, laid down in *Johnson v. R. R.*, 163 N. C., 443:

"4. On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. R. R.*, 140 N. C., 209; *Coleman v. R. R.*, 153 N. C., 322; *Wolfe v. R. R.*, 154 N. C., 569, in the last of which cases the rule was applied to an employee charged with the duty of watching a crossing and warning travelers of the approach of trains, and he was required to exercise due care, under the rule of the prudent man, for his own safety by looking and listening for coming trains.

"5. The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. R. R.*, 140 N. C., 255; *Wolfe v. R. R., supra.*

"6. If he fails to exercise proper care within the rule stated, it is such negligence as will bar his recovery: *Provided, always,* it is the proximate cause of his injury. *Cooper v. R. R., supra; Strickland v. R. R.*, 150 N. C., 7; *Wolfe v. R. R., supra.*

"7. If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. R. R.*, 120 N. C., 490; *Osborne v. R. R., supra.*"

The evidence in this case tends to prove that as the plaintiff approached the crossing his view was obstructed by bushes, which the defendant permitted to grow on its right of way so high and so close to the track that he could not see until he was on the track; that the bell was not rung and the whistle was not blown; that the plaintiff was traveling at from four to five miles an hour; that he looked and listened, and the inference is permissible that if notice of the approach of the

train to the crossing had been given that the plaintiff would have heard it and would not have gone on the track, and if so, the jury was justified in finding that the failure to give notice caused the plaintiff to go upon the track and was the proximate cause of his injury.

Some authorities impose the further duty on the plaintiff of stopping before reaching the crossing, while others hold that this cannot be declared as matter of law, but that a failure to do so is a circumstance to be considered on the exercise of ordinary care by the plaintiff.

The authorities representing the opposing views are collected in the notes to *Wacksmith v. R. R.,* 1913 B. Anno. Cases, 681, but as the question has been decided by this Court four times in recent years, as applied to collisions between automobiles and trains at public crossings, and a definite conclusion reached without dissent, we do not regard it as needful or helpful to go outside of our own authorities, and reëxamine the decisions of other Courts, which we have heretofore fully considered.

Shepard v. R. R., 166 N. C., 545, was an action to recover damages to an automobile caused by collision with a train at a crossing, and the question was raised as to the duty of the driver to stop, and the Court said: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury.' *Alexander v. R. R.,* 112 N. C., 720; *Judson v. R. R.,* 158 N. Y., 597; *Malott v. Hawkins,* 159 Ind., pp. 127-134; 3 Elliott on Railroads (2 ed.), sec. 1095, note 147; 33 Cyc., pp. 1010, 1011-1020."

A new trial was ordered because of an error in the charge, and on a second appeal (169 N. C., 239) the principles declared on the first appeal were not only affirmed, but the Court proceeded a step further and held that the plaintiff could recover although he approached the crossing running in excess of the speed limit prescribed by statute, unless it appeared that the excess of speed was the proximate cause of the collision, and that this was for the jury.

Hunt v. R. R., 170 N. C., 444, was an action to recover damages for wrongful death caused by a collision between an automobile and a train at a crossing, in which the Court says: "There was evidence tending to show that the driver of the automobile looked and listened before entering on the crossing, and it is held with us that it is not always, and as a matter of law, required that a vehicle should come to a stop before endeavoring to cross. *Shepard v. R. R.,* 166 N. C., 539, and *Elkin v. R. R.,* 86 S. E., 762."

Brown v. R. R., 171 N. C., 269, is another action to recover damages for injury at a crossing caused by collision between an automobile and

a train. *Walker, J.,* writing the opinion for the Court, reviews the authorities, and, among other things, declares: "We held in *Shepard v. R. R.,* 166 N. C., 539, following two of the rules laid down in *Cooper v. R. R.,* 140 N. C., 209, and *Johnson v. R. R.,* 163 N. C., 431, as follows: 'Where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by doing so he could see the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence. Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.' . . . *Shepard's case* was again before the Court, and is reported in 169 N. C., 239, where the former decision was approved, and where it was further held that if plaintiff (in that case) was running his automobile at a rate of speed prohibited by the statute (Laws 1913, ch. 107), he was not, as a matter of law, debarred of a recovery, as the question of proximate cause was involved and was for the jury to determine."

And again, referring to *Shepard's case:* "In that case, at p. 545, the Court said: 'It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing'; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury.'"

These three cases of *Shepard v. R. R., Hunt v. R. R.,* and *Brown v. R. R.* are cited and approved in *Dail v. R. R.,* 176 N. C., 112, on the point that failure to stop before crossing a railroad track cannot be declared to be contributory negligence as matter of law, but that it should be considered by the jury in connection with the surrounding circumstances in determining whether the party was exercising the care of one of ordinary prudence.

The authorities favoring this view proceed upon the idea that the traveler has the right to rely upon the performance of its duty by the defendant, and that when he looks and listens and neither sees nor hears a train, he has the right to act upon the presumption that none is approaching.

Also that while a failure to stop should be considered in connection with the other circumstances, it is not conclusive of negligence on the part of the plaintiff.

The sign placed at the crossing with the warning "Stop, look, and listen" has no other legal effect than to call the attention of the plaintiff

to the duty imposed upon him by law to exercise ordinary care for his own safety.

His Honor, however, gave the defendant the benefit of all it was entitled to, as he instructed the jury as follows: "If you shall find that the view down the railroad track was obstructed or restricted, and that the plaintiff could not hear on account of the noise of his automobile, then it was his duty to bring his car to a stop before entering upon the track, and to stop, look, and listen at a place where doing so would be effective, and if you find that there was a place on the road where the view was sufficiently open for him to have done so and have ascertained the approaching of the train, then his failure to do so was contributory negligence, and you will answer the second issue 'Yes.'"

The evidence of the plaintiff that he might have heard the running of the train if he had stopped was submitted to the jury in support of the defendant's position, and was given the significance to which it was entitled.

The notice to which the plaintiff was entitled was not the noise of the moving train, but the blast of the whistle or the ringing of the bell, or both, and while he might have heard the train if he had stopped, it is also true that he might have been halted before he reached the track, with the car running, if the signals required by law had been given, and it could not be said to be contributory negligence as a legal conclusion if the failure to stop was caused by the breach of duty on the part of the defendant in that it failed to give any notice of the approach of its train.

Notice by bell or whistle is required, because the noise of the train, which is always present, is not a sufficient protection to life and property, and when the defendant has by its negligence permitted obstructions on its right of way so the traveler cannot see, and has failed to give the proper signal, which prevents him from hearing what he has the right to expect if a train approaches, it ought not to be absolved from the consequences of its negligence, because the traveler, relying on the performance of duty by defendant, might have heard the noise of a train if he had stopped.

There are several exceptions to the evidence, which we have examined, and none of them would justify ordering a new trial, nor do the other appeals involve additional questions which require discussion.

The case of *Hurst v. R. R.*, which was disposed of by a *per curiam* judgment in favor of the defendant, is in some respects like this, but the question on which it was decided was the condition of the crossing and not the failure to give notice of the approach of the train.

After careful examination of the record we find

No error.

WALKER, J., dissenting: Statement of essential facts.

These three cases, which grew out of the same accident, were, by consent, tried together below, and by consent are heard together in this Court upon one record, which is applicable to each, and they arose out of a collision between an automobile and a railroad train—the sort of accident that has become all too prevalent in these days of reckless driving along our country roads by those in charge of what seems to be one of the most deadly machines in existence, when not carefully driven.

On 16 August, 1918, about 3:30 o'clock in the afternoon, the plaintiff, T. C. Perry, was driving his Ford automobile from Elizabeth City to his home near Okisko, down the country road which crosses the railroad of defendant at Pasquotank station, it being a flag-stop for the trains of defendant, and a place where no tickets are sold, where none of the trains ever stop, unless signaled to do so, and within the radius of half a mile of which there are only about six houses. In the car with Mr. Perry, who was driving, were the plaintiff Darius G. White, who is a boy about sixteen years of age, and a man by the name of Oscar Bundy. Plaintiff Perry and Mr. Bundy were sitting on the front seat, the boy and part of a cake of ice were in the rear of the machine. Plaintiff Perry was driving, and consequently was on the left side of the car, which was the side in the direction of which the train in question was approaching. He had been running at a speed of twelve to fifteen miles an hour, but according to his testimony had slowed down to four or five miles an hour when he got to the right of way, which was about 33 feet from the center of the track. The roadbed is some higher than the right of way, and also considerably higher than the country road. On the side of the track, in the direction opposite to which the car was approaching, in plain view of plaintiff and those in the car as they drove up, was a crossing sign with the words "Stop, look, and listen" upon it, as will clearly appear in the photograph taken by the witness Davidson and sent up as an exhibit. The map made by the witness Mathew, and also sent up as an exhibit, shows the distances and elevations.

Plaintiff Perry had been living at Okisko all of his life, had frequent opportunities to be at Pasquotank station, had gotten on the train there a number of times, and for the past twenty years he had traveled the country road and crossed the railroad at Pasquotank station, possibly half a dozen or a dozen times a month. He knew that, at the time in question, Pasquotank station was a flag-stop for the train in question, and that it had been such for a number of years, and that trains only stopped there when signaled so to do. He knew the schedule of the train and that there had been no change in it for at least five years. He

knew there had never been any safety gates across the railroad at that crossing; he knew the sign, "Railroad crossing, stop, look, and listen," had been there for eight or ten years, if not longer. He knew that the view down the track from the country road was obstructed by the corn in the field of J. H. Whitehead, which extended up to the right of way, or some thirty-five feet of the track. Plaintiff further knew that there were some sycamore bushes growing in a ditch near the track which he claimed obstructed the view down the track, which was straight for over a mile. These bushes were more than three feet from the track. Plaintiff Perry, although conscious of all these things, did not stop his car until after he got on the track. He testified:

"I did not stop until I got on the track. If I had stopped eight or ten feet from the track I might have heard the train. If I had stopped my car, no matter if the train was not ringing the bell or sounding the whistle, I would have heard it coming when it was a hundred yards from me. I can hear a train coming half a mile, and I can always hear it a quarter of a mile away if I listen.

"Q. As a matter of fact, when you were as much as ten feet from the track, how far was the train from the crossing? A. I don't know about that. I never saw the train until I got up on the track. I never heard any noises, no sound, no whistle.

"Q. Well, you did not listen? A. I was running my car.

"Q. Well, if there was anything that kept you from hearing it on that day it was because your car was running, and not because the train was not making the usual amount of noise? A. I don't know.

"Q. You won't say so? A. No.

"Q. If anything prevented your hearing that train on that day when you were more than ten feet from the track, it was the running of your car? A. I could not say.

"Q. I understand you to say this: You can easily hear a train running on the track, whether it is blowing or sounding the whistle as much as a quarter of a mile away? A. Well, it is owing to what you are in. Cars make a noise as well as the train.

"Q. If you can ordinarily hear it that distance away when your car is not running, then if you don't hear it and your car is running, the reason you didn't hear it is because the car is running? A. Might have been; I don't know. If my car had not been running that day I suppose I would have heard the train when it was within one hundred yards of me. I cannot tell the jury that the whistle did not blow or the bell did not ring.

"Q. As a matter of fact you were not thinking about the train? A. I don't know that I was so much, only getting home."

After plaintiff Perry drove on the track and stopped his car, defendant's train, which was running practically on schedule time, ran into it and knocked it off and threw the occupants out, injuring Mr. Perry and the boy.

Mr. Perry and the boy instituted actions for personal injuries, and the father of the boy for damages on account of loss of the services of his son. The jury returned a verdict of $4,500 for T. C. Perry and Darius G. White, and $500 for H. G. White. The court gave judgment thereon, and defendant appealed.

To my mind the above is a startling result. If plaintiffs are entitled to a verdict for the heavy damages they received, or even for any damages for injuries received under the circumstances of this case, then it would seem, as I will show hereinafter, that a railroad is almost practically helpless in our courts, as against the suit of a careless and reckless driver. I will try to demonstrate, and I think I must surely succeed in doing so, that the doctrine of imputed negligence cannot shield the two Whites, as the proximate cause of Darius G. White's injury was not the fault of the railroad company, but that of his companion, T. C. Perry, the driver of the car in which he was when the collision took place, even if his own fault was not also proximate thereto. *Crampton v. Ivie Bros.*, 126 N. C., 894. I will refer to this case more at large when I reach the proper place for a discussion of it. At present I am merely stating the grounds of my dissent.

The motion to nonsuit should have been granted, and this brings me to a consideration of the evidence in the light of the law and well settled principles in this Court. The plaintiffs base their right to recover upon these grounds: 1. Failure of the engineer of the train to blow his whistle. 2. Running the train at an unusual speed. 3. Permitting bushes and weeds to grow on its right of way. First. There was ample evidence to prove that the engineer blew one long whistle for Pasquotank station, and in about two or three seconds thereafter he sounded the road-crossing blow—two long and two short, and then he put on the emergency brakes and stopped the train. Mr. Winslow, a witness, and not connected with the railroad company in any way, testified that he was at Okisko when the train in question left the station for Pasquotank, saw the train leave Okisko, and heard its whistle blow before it reached Pasquotank, and about the whistle post. There was one long blast and then two or three short ones. There was much other testimony from persons who saw the train, and were near the track of the railroad between Okisko and Pasquotank, and who stated that they heard the whistle blow twice and heard the bell ringing. Some one phoned to Okisko about fifteen minutes after he heard the train blow and told about the collision. Mr. Daughtrey testified that Mr. Perry

stated immediately after the accident that "he did not know what he could have been thinking of, and that it was nobody's fault but his own," and that, in my opinion, after a most careful study of the entire evidence, is a perfectly correct description of the true situation. The physician (Dr. H. D. Walker) who looked after the injured men and carried them to St. Vincent's Hospital in Norfolk, Va., testified that on the way to the hospital "Mr. Perry said—in fact Mr. Bundy, too—that they had been to Elizabeth City to get some ice. They had a sick horse and were on the way home. When they got to Pasquotank station, in an effort to cross the track, they were hit by the train; they didn't see the train; didn't even think anything at all about the train." There was evidence that the vision either north or south was not obstructed, and especially that the bushes, spoken of by plaintiffs' witnesses, were not high enough to interfere the least with it. The sycamore bushes in the ditch were about four or five feet high, and only two or three bushes, and down the road about a hundred yards a small cluster of bushes, three or four feet high, but they did not obstruct the view at all, and box cars could easily be seen at a distance of 400 yards or more. Whitehead's corn field was about thirty-five feet from the center of the track, and of course could not obstruct the view. Mr. Rowland, one of the witnesses who testified to the above facts as to the obstruction of the view, also stated that he said to Mr. Perry: "Crowden, what made you let the train bump you like that?" To which he replied, "I don't know, for I did not have my mind on the train." Mr. Whitehead, a farmer, who owned the corn field, testified that he examined the track carefully, and found that there was nothing to obstruct the view, and he could stand at the corner of his fence at the right of way and see as far as Okisko, a mile from there, the track being straight at that part of it, and that he saw box cars at the distance of 400 yards on the other side of the main track, and that the same was true standing at any place between the corner of his fence and the railroad track. Mr. Perry said to several other persons than those already mentioned, and who have no interest in the controversy, when asked how the collision happened: "I don't know; I was not thinking about the train until we ran together," or "I don't know, to save my life, what I was thinking about," or "I was not thinking about anything but getting home." These witnesses were friends of Mr. Perry, and one of them stated that he was a "particular friend." The engineer testified that he was running at the usual speed, about 35 or 40 miles an hour, and was two minutes late. He blew the station signal, as Pasquotank was not a regular station but a signal station, and when there was no response from the station-master he blew the crossing signal. That he could not see Mr. Perry until after his car had emerged from behind the corn in the field, and that it was not

possible for him to stop his train before hitting him, but that Mr. Perry had ample time to stop. He further said: "When he got in a few feet of the crossing he just gradually began to stop, and stopped with his front wheel right on the rail, and the car, I suppose—its right much up-grade—would have rolled back, but there's about three-inch space between the rail and the inside crossing plank, and it checked there and the car stuck." There is much more testimony of the same general kind, but it is not necessary to give it in detail. There was evidence that Mr. Perry knew the road he was traveling very well, having passed over it for some time, and several times a week. He lived one and a half miles from Pasquotank station.

There was a sign, placed there by the defendant, immediately in front of a person approaching the track, with the words upon it, in large letters, "Railroad crossing—stop, look, and listen." It could easily be seen by every one who attempted to cross the track at the place where the accident occurred.

The plaintiff testified that he could not hear the whistle blast, because his car was running at the time and making a noise, and he could not hear, because the public road over which he was traveling was sandwiched between thick forests, which also obstructed his hearing. But the defendant was not responsible for the forests being there, and no negligence can be imputed for that reason. If the plaintiff was prevented from hearing or seeing because of these impediments, even up to the track, his plain duty, as I will presently show, was to stop his car and go where he could see and hear before entering upon the track. Common prudence would suggest this to every man, situated as he was according to his own testimony. But he had at least eight feet of clear space where he could have seen from his car, or heard *from his car,* and certainly if he had stopped his car, and thereby its noise, and this is true according to his own testimony, for he stated that he could easily hear the noise or rumbling of a train, and much more the sound of its whistle, a quarter of a mile when there is no noise, like that of an automobile, to prevent. But if he was handicapped by the forests and also by the corn, which were not there by the defendant's fault, or by small sycamore bushes on the edge of the ditch and near the track, it was not only gross negligence to have entered upon the railroad crossing without "stopping, looking, and listening," as he was warned to do, or as he should have done without any warning. He could have done these things as proper measures for his safety without leaving his seat in the car, and the situation would *plainly* dictate such a course as a manifest precaution to be adopted by a prudent man. "The degree of caution he (the traveler) must exercise (at a railroad crossing) will be affected by the situation and surrounding circumstances. In crossing a railroad

there is obvious and constantly impending danger, not easily or likely to be under the control of the engineer." 3 Sherman & Redf. on Negligence (6 ed.), sec. 654, p. 1713; *Moebus v. Herrman,* 108 N. Y., 349; *Eaton v. Crisp,* 94 Iowa, 176; *Hall v. Ogden R. Co.,* 13 Utah, 243. No omission of the railroad company, such as failure to give crossing signals, will excuse the traveler on a highway from exercising proper and adequate care, and taking due precaution for his own safety before entering upon a railroad crossing. The danger is so very great that the care to be used should be exactly proportioned to it, and to enter upon so perilous a place as a railroad crossing blindly, or without knowing if there is imminent danger, or that a train is approaching, is not only gross negligence, but rashness, and even recklessness. But plaintiff knew the schedule and that a train was then due, hence the greater his negligence. Plaintiff took his life in his own hands. The terrible result was due to no culpable fault of the defendant.

"If his (the traveler's) view is obstructed in any degree or from any cause (even by the fault of the railroad company), he must look again after passing the obstruction, and if he cannot see, he must listen with increased vigilance. So, also, if for any reason he cannot hear distinctly, he must use all the more vigilance in looking. . . . It is no excuse for failure to look and listen that the traveler did not think, just then, about the railroad or its dangers, or that his attention was diverted by some trivial matter, or that he believed that all trains stopped short of the crossing, or that no regular train was due, or that a train had recently (but not immediately) passed, or that the usual or statutory signals of approaching trains were not given. Though it has often been said that the traveler has the right to rely on the railway company doing its duty, as by the giving statutory signals, and if injured in consequence of its failure to do so, he has his action, no Court has, it is believed, ever held that such failure on the part of the company dispensed with all care for his own safety by the traveler." 2 Sherman & Redf., sec. 476, at pp. 1201, 1202, 1203, 1204.

The railroad track is itself a warning of danger, as has been held by all the Courts, and especially by ours. *Abernathy v. R. R.,* 164 N. C., 91, and cases cited; *R. R. v. Houston,* 95 U. S., 697; *R. R. v. Hart,* 87 Ill., 529; *Smith v. R. R.,* 141 Ind., 92; *Boyd v. R. R.,* 50 Wash., 619. Said one of those Courts: "A party cannot walk (or drive) carelessly into a place of danger." *Houston's case, supra.* The plaintiff, without hearing or seeing a train approaching, because of the noise of his Ford car, and being warned by the railroad company to "stop, look, and listen," and without actually knowing whether a train was coming or not, and apparently not caring whether it was or not, though he knew it was then due, drives upon the track where his car is

choked, or at least stopped, and is stricken by the train. He could have stopped eight feet (at the lowest) distant from the track and seen up and down the track, according to the testimony, and even if he could not have done so, he should not have ventured upon so dangerous ground without stopping the car and ascertaining whether a train was coming or not, regardless of the notice given by the railroad company. His conduct does and should defeat his action.

It has been held by a Court whose opinion we greatly respect that where a driver of a wagon and team, whose view and hearing were obstructed, and where the track was straight for about a mile in the direction a train was coming, failed to listen properly or to make sufficient outlook, but drove onto the track without stopping, or knowing whether a train was approaching or not—there can be no other inference than that such failure was the proximate cause of the resulting accident, and a verdict should have been directed for the defendant. *Cable Piano Co. v. Southern R. Co.*, 94 S. C., 143. And another Court, for whom we have the same high opinion, has held that "A traveler on a highway crossing is bound to look and listen for approaching trains before attempting to cross, and to use ordinary care to make looking and listening effective." *Southern R. Co. v. Valentine's Personal Rep.*, 113 Va., 388. A traveler about to pass over a railroad crossing should *stop*, look, and listen if the situation requires it, by reason of his inability otherwise to hear or see approaching trains, in the exercise of reasonable care for his own safety; and his failure to do so, when there are noises to prevent his hearing or obstructions to prevent his seeing, bars his recovery. *Carnefix v. Kanawha & M. R. Co.*, 7 W. Va., 534. It is practically admitted by the plaintiff that his hearing was prevented by the noise of his car, for he virtually says as much himself; and further, that when there is no noise he can hear the rumbling of the train a quarter or half a mile, and of course, the sound of the whistle much further. But when must the traveler look or listen? *Justice Brown*, for this Court, which was unanimous, said in *Coleman v. R. R.*, 153 N. C., 322: "A writer in the Personal Injury Law Journal of July, 1910, declares that all conflicts of opinion on this subject may be avoided by adopting the common-sense rule that the traveler should look when about to enter upon the track. 'A look when about to enter the zone of danger for an approaching car is not only the most availing, but it is then that the most accurate and reliable judgment can be formed as to the safety of an attempt to cross.' Personal Injury Journal, page 11; see, also, *Wexker v. R. R.*, 120 N. Y. Supp., 1020. The duty of looking when one approaches a street railway crossing is not adequately discharged by merely looking as the dangerous point is approached, and then when it is reached going blindly forward. *Baxter v. R. R.*, 190 N. Y., 439;

Fowler v. R. R., 74 Hun., 144; *Coleman v. R. R.,* 98 Am. Dec., 349; affirmed 188 N. Y., 564. See, also, *Cranch v. R. R.,* 186 N. Y., 310. This is the standard of prudence fixed by *Trull v. R. R.,* 151 N. C., 550, where it is held that the traveler must look 'in time to save himself,' and by *Mitchell v. R. R.,* 153 N. C., 116; *Inman's case,* 149 N. C., 125, as well as by numerous other decisions of this Court. In *Mitchell's case* plaintiff had eleven feet unobstructed view up and down the track before reaching it. He failed to look, and it was held that his negligence was the proximate cause of his injury, and that he could not recover."

The Court said further, in that case, that the plaintiff looked when he could not see, his view being obstructed by bushes, and failed to look as he got near the zone of danger, when he could see, and drove right on the track. The evidence in our case is that there was a clear space of eight feet before going on the track, where plaintiff could see the train, but he did not look, and preferred taking the risk of outrunning the train, if there was one coming. His brother, who was his witness, testified that the corn field was 15 feet from the middle of the track, the right of way 32 feet on either side, and a clear space of 8 feet next to the track. This being so, there was no reason why the view down the track should be intercepted, in which event the *Coleman case, supra,* would be substantially on all fours with this one, and it is in all essential respects. According to the witnesses, not contradicted, plaintiff said repeatedly he was not thinking of the track or train. The case of *R. R. v. Freeman,* 174 U. S., 379, is, therefore, analogous to the case at bar. It was said there: "The oral testimony on the subject tended to show that Freeman neither stopped, looked, or listened just before attempting to cross the track: *Held,* the testimony tending to show contributory negligence upon the part of Freeman was conclusive, and that nothing remained for the jury, and that the company was entitled to an instruction to return a verdict in its favor." In the opinion, *Justice Henry Billings Brown* said: "She was (under the circumstances) bound to listen and look before attempting to cross the railroad track in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and see the train which was coming. If she omitted to use them and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain about them. If using them she saw the train coming and undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

Referring again to *Coleman v. R. R., Justice Brown,* for our Court, said, in that case: "From its very nature, and for public convenience,

the train has the right of way, but the law imposes upon the engineer the duty to give signals and to exercise vigilance in approaching crossings in order to avoid injury. The law imposes the equal duty upon the traveler when he reaches a crossing and before attempting to go on the track to both look and listen for approaching trains, for the traveler by doing so, if there is nothing in his way, can most certainly prevent a collision and save himself from harm. When he reaches the track it is no great hardship imposed upon the traveler to require him to exercise ordinary prudence and to cast his eye up and down the track. By so doing he has the last and most certain chance to prevent collisions and to save himself as well as the train, its crew and passengers from possible injury. In respect to cases of collision at crossings, *Judge Thompson* says: 'The leading rule is that there can be no recovery of damages where the negligence of the traveler contributed proximately to the injury, although the railway company was also guilty of negligence.' Thompson on Negligence, sec. 1605. He also said: 'A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence, and will be so declared by the Court.' Mr. Beach says: 'In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track; and a failure to do so is contributory negligence, which will bar recovery. A multitude of decisions of all the Courts enforce this reasonable rule.' There are of course exceptions to this, as well as most other rules, but where the traveler 'can see and won't see' he must bear the consequences of his own folly. His negligence under such conditions bars recovery, because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take advantage of it. This is the law as laid down by practically all the appellate courts in this country as well as by the Supreme Court of the United States." See, also, *Schofield v. R. R.*, 114 U. S., 615; *Stead v. Imp. Co.*, 95 U. S., 161. But this doctrine as to the necessity of "looking and listening," and of stopping if need be, in order to do so effectively, has been consistently recognized by this Court in at least thirty-odd cases, beginning with *Parker v. R. R.*, 86 N. C., 221, and ending with *Mitchell v. R. R.*, 153 N. C., 116, and there are later cases.

If the view was obstructed it was more incumbent on the plaintiff to proceed with a greater degree of caution for his own safety than if unobstructed. If he could not see before reaching the track, he should have stopped at the margin of the track, where he could see instead of driving 4 inches onto the track and into the very jaws of death. It was an act of the greatest temerity, and reckless beyond question, to have

gone on without taking any heed of the obvious danger. The unexpected happened, as it may at any time and generally does, as his car stalled right on the track, and this is not the only accident of the same kind that has recently occurred in this State, or that has come under the observation of this Court in an official way. The railroad train cannot move off the track or turn to one side, and the public, whom the railroad company serves, should not be delayed by careless drivers on the highway, who can stop or turn aside their cars at will, for the purpose of getting a view of the track before going upon it. But another case well decided by this Court lays down a rule somewhat similar to that of the *Coleman case, supra,* and practically the same. *Justice Hoke,* who wrote the opinion for the Court, referring to the instruction of the judge to the jury, that the plaintiff in that case was excused from looking and listening, if the engineer had failed to give the signal of the train's approach to the crossing, said this was error, and then remarked: "The portion of the instruction, however, addressed more particularly to the feature of contributory negligence, by fair and reasonable intendment, can only mean that though a traveler in approaching a railroad track is required to look and listen, yet this obligation is not upon him, nor will the consequences be imputed to him, if he failed to look and listen when such failure was caused by the negligent failure of the railroad train to give the necessary signals; and this, where there was evidence tending to show that if he had looked he could have seen the approaching train in time to have avoided the collision, or at least to have saved himself by the exercise of reasonable effort. In this we think there was error which entitles the defendant to a new trial. It relieves the traveler of all obligation to look and listen when there is failure on the part of the defendant to give the usual and ordinary signals, and places the entire responsibility for such a collision on the railroad company. It would, in effect, practically eliminate the defense of contributory negligence when there had been a negligent failure to give the warning; for ordinarily it is only by looking and listening that a traveler can inform himself of dangerous conditions. This is not a just principle by which the rights of parties in cases like the present should be determined, nor is it supported by any well considered authority. The general rule is well stated in Beach on Contributory Negligence, as follows: 'In attempting to cross, the traveler must look and listen for signals, *notice signs put up as warnings,* and *look attentively up and down the track,* and failure to do so is contributory negligence, which will bar a recovery.' A multitude of decisions of all the Courts enforce this reasonable rule. It is also consonant with right, reason, and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily

routine of life, that it would seem to be scarcely dependent upon the authority of decided cases in the law courts," citing *Randall v. R. R.*, 104 N. C., 410; *Mayes v. R. R.*, 119 N. C., 758; *Mesic v. R. R.*, 120 N. C., 490 *Laverentz v. R. R.*, 56 Iowa, 689; *Nixon v. R. R.*, 84 Iowa, 331; *Davis v. R. R.*, 47 N. Y., 400; *Rodman v. R. R.*, 125 N. Y., 526; *R. R. v. Brownell*, 39 N. J. L., 189.

The rule is not universal in its application, or always without exception, for under some possible circumstances, not present in this case, it may not apply. Among the cases cited in *Cooper's case, supra*, is *Mesic v. R. R.*, 120 N. C., 490, where this is quoted: "The rule is general and usual that whenever an approach to a public crossing over a railroad is made by any one in charge of a wagon and team, such person is bound to look and listen for approaching trains *and take every proper precaution to avoid a collision*, and this is so even though the approach be made at a time when no regular train is expected to pass; and in case the driver fails to look and listen and to take proper precaution to avoid a collision, and one does occur, the plaintiff cannot recover, even though the defendant was negligent in the first instance." In our case, as it appears from the testimony of the plaintiff's brother, Mr. J. I. Perry, who was his witness, a person approaching the crossing in a Ford car could see on the left a train coming down the track when within 8 or 10 feet of the track. He had then a clear and unobstructed view of the track for a long distance. This brings the case directly within the authority and control of the *Coleman* and *Cooper cases*. There is another decision of more recent date, where the facts were substantially like those now before us, in which the Court decided, *per curiam*, that there was no legal merit in the plaintiff's case, and nonsuited him, considering, of course, that the facts were so clearly against his contentions as to require no opinion from the Court. I fear this contrary decision will impair the authority of those three cases, if it does not overrule them, by being in direct conflict, I think, with what they held. *McAdoo's case*, 105 N. C., 140, also sustains my view.

The speed of the train makes no difference, and cannot change the result, which should follow from what has been said. *McAdoo v. R. R., supra*. Plaintiff, by the exercise of proper care, could just as easily avoid a collision with a fast-moving train as with a slow-moving one, as he could see or hear the one fully as well as he could the other. The speed could not prevent his hearing, or seeing. *McAdoo's case, supra*, has frequently been approved. See, also, 105 N. C. (Anno. Ed.), at p. 154. I know of no statute, or common law, limiting the speed of trains, running in the country, to any specified mileage. It were better that plaintiff and his guests should be delayed a little, than that the

public should be retarded, especially as plaintiff and his guests had time to spare, though he was in a hurry to get home, but for no special reason.

The plaintiff himself testified that the crossing sign, with the words on it, "Railroad crossing—stop, look, and listen," had been there 8 or 10 years, or perhaps longer. He had seen it often, and it was there on the day and at the time of the accident. He could see it easily, and did see it. We have seen from authority (Beach on Negligence) that it was his legal duty to take notice of it and heed its warning, and to govern his conduct accordingly, which he did not do. It was his duty to "Stop, look, and listen" anyhow, without the sign, but more exactingly and impressively his duty in the very presence of it.

As to the passengers in the car with Perry. The rule applicable to them is stated in *Crampton v. Ivie Bros.*, 126 N. C., 894. (On petition to rehear.) There it is held that while generally speaking the negligence of the driver is not to be imputed to a passenger who is his guest by invitation, yet the question of *proximate cause* is always to be considered, and if the negligence of the driver proximately caused the injury, neither he nor his passengers can recover, and for the simple reason that the defendant was not *legally* at fault. It is there decided that if the defendant's negligence did not proximately concur with that of the driver in causing the injury, the plaintiffs, who were the guests of the driver, cannot recover, and if the driver's negligence was the proximate cause of the injury, plaintiffs, the guests, must, in law, look to their driver and not to the defendant. Under this principle, even if defendant was negligent in not giving a signal, by bell or whistle, of the approach of its engine to the crossing, it was not the proximate cause of the injury, as it preceded defendant's negligence, if considered in order of time and sequence, as plaintiff Perry was negligent afterwards, because he failed to properly exercise care in going upon the crossing without looking and listening before or after he reached the margin of the danger zone, when he had a fair opportunity of doing so, and would have prevented any injury from the defendant's alleged omission (of which there was none), if he had done so. His was clearly the last and final fault in the line of causation, and therefore proximate to the result. But whether he could see or hear, he undertook to do the most hazardous, if not reckless, act by attempting to cross in utter ignorance of whether a train was coming or not. A court of the highest authority has said that where it is known, as it should be, that a railroad company's right of way is being constantly used for its trains, and is at all times liable to be used for their running and operation in transporting freight and passengers, as a public carrier, under the highest legal obligation to serve the public diligently and faithfully as such, "the track itself, as it

seems necessary to repeat with decided emphasis, is itself a warning. It is a place of danger, and a signal to all on it to look out for trains, and it can never be assumed that they are not coming on a track at a particular time when it is being used for the convenience of trespassers or licensees or others, and, therefore, that there can be no risk to a pedestrian, or others, from them." *Treadwell v. R. R.*, 169 N. C., 697.

The sign, "Stop, look, and listen," has far more legal significance than merely as a piece of evidence, or a circumstance of an evidentiary character, and of no more weight or importance than that. As we have shown, the disobedience of the warning is destructive of plaintiff's right to recover. Beach on Contributory Negligence, *supra*. The passage from Beach has been quoted by this Court with approval. As for the blast of the whistle, all of the evidence shows that the usual and customary station and crossing signals were given, and the plaintiff does not deny it, but simply said that he did not know whether they were given or not, as the noise of his car would have drowned the signals if they were given. This is not like saying that he was where he could have heard it, and that he did not hear it. If that had been the case, it is established with us that it would have been some evidence. The rule is, in itself and at best, an unsafe one, as the evidence is negative in its character and lacks the element of certainty. But however that may be, it should not be extended beyond its existing limits; requiring that both parties who testify contrarily should have equal opportunity to hear the sound.

I base my contention that it was plaintiff's duty to *stop, look, and listen,* when he was approaching the zone of danger and before he reached it, and when the precaution would have been of some avail, upon our own authorities, especially upon *Coleman v. R. R., supra* (153 N. C., 322), and upon the special facts of this case, which are not unlike those of other cases, where the case was withdrawn from the jury. We have not held that this duty to "Stop, look, and listen" is *always* one for the jury, but only that "it is usually a question for the jury." *Shepard v. R. R.*, 166 N. C., 545, and the other cases cited in the Court's opinion in this case. It may be negligence as a matter of law in some cases, and this is one of them.

My opinion, also, is that the *Brown case,* relied on by the Court, is not at all like this one. There the plaintiff was held to be negligent in going upon the track, as he did not "stop, look, and listen" before doing so, but he was allowed to recover because the engineer had sufficient time and opportunity to see his danger and did not stop or slow down his train, and was guilty of negligence after he saw the danger, and thus had the last clear chance to prevent the injury.

The quotation from *Johnson's case,* 163 N. C., 431, is squarely against the plaintiff upon the uncontradicted facts of this case. That case holds that a traveler on the highway, when approaching a crossing, must look, where he can see, or where there is a clear and unobstructed space for him to do so as there was here, it being eight feet wide, according to the testimony of the plaintiff's brother, who was one of his witnesses. In other respects the case is not analogous to this one, as here the plaintiff himself said that the noise of his car prevented him from hearing. This was caused by his own act, and is not imputable to the defendant as negligence. Plaintiff's plain legal duty was to stop his car and its noise, so that he could hear, instead of blindly rushing into danger, especially when there was no necessity or excuse for his doing so.

The remaining argument of the Court is fully answered when we consider that plaintiff himself testified that he could have heard the rumbling of the train for a quarter of a mile away if it had not been for the noise of his own car, and he would have heard the whistle blast but for the same noise. What difference can it make whether it is the noise of the bell, whistle or train if it is sufficient to give notice of the train's approach in the absence of plaintiff's own noise?

In their essential facts this case and that of *Hurst v. R. R.,* recently decided by this Court, are "on all fours" with each other, and cannot be successfully distinguished. In the *Hurst case,* as I read it, the decision of the Court did not depend upon the condition of the crossing, nor is it of less weight as an authority because the Court deemed an opinion unnecessary, the ruling below being considered too plainly right for discussion.

There are other important exceptions raising questions of serious moment, and certainly fit to be considered, but I will have to forbear consideration of them, as the question raised and already considered has prolonged this opinion far beyond my intention. One matter I will notice before concluding. As plaintiff admits the noise of his own car would drown the noise of the train and the whistle, his testimony as to not hearing the whistle of the train was of no value, and was not, under the ordinary rule, competent to be heard, while the positive testimony as to the whistle being blown was all one way, and the witnesses had full opportunity to hear, being near the train. The law that where a witness states that he did not hear the whistle it is some evidence that it was not sounded does not apply where others testified that they were near the train and did hear it, unless he had equal opportunity with them to hear it. The rule depends upon equality of opportunity. Here the plaintiff had practically no such opportunity, as the noise of his car completely deadened the noise of the train and that of the whistle. The noise of the train was certainly there, and yet he did not hear it, because,

as he says, the noise of his car prevented. The others did hear, because nothing interfered with their doing so.

In any possible or, at least, reasonable view of the case the plaintiffs, in my opinion, should have been nonsuited.

BROWN, J., concurs in the dissenting opinion.

L. H. DUFFY v. J. HENRY PHIPPS.

(Filed 10 November, 1920.)

1. Contracts—Sale of Lands—Price Per Acre.

Defendant's contract to sell about 204 acres of land known as a certain farm, adjoining named owners and others, at a certain price per acre, is a sale by the acre, and plaintiff is entitled to a rebate, or a return of the amount he has overpaid on account of less acreage than that specified in the contract.

2. Same—Deeds and Conveyances—Merger—Pleadings—Demurrer.

A contract for the sale of about 204 acres of land at a certain price per acre does not merge in a deed given for the tract specifying 197 acres, in assumed execution of the contract, and the plaintiff may recover of the defendant for the shortage of acres ascertained; and a demurrer to the complaint with these allegations is bad.

APPEAL by defendant from *Ray, J.*, at September Term, 1920, of GUILFORD.

The defendant entered into a written contract in November, 1919, as follows: "I agree to sell L. J. Duffy about 204 acres of land, known as the Buffalo farm, and adjoining the lands of Cicero Moore, C. D. Benbow, and Thomas Pemberton and others, at $100 per acre, and I acknowledge the payment of one hundred dollars as first payment on said lands, and in case the sale is not closed within 60 days then this $100 is forfeited and all agreements are null and void. I agree in case that L. J. Duffy completes this trade, to take $2,000 cash; $3,000 in six months; $5,000, 1 December, 1920; $5,000, 1 December, 1921; $5,000, 1 December, 1922—all notes bearing 6 per cent interest from date of deed, possession to be given by 1 January, 1920."

On 4 December, 1919, the defendant made a deed to the plaintiff reciting therein that he conveyed 197 acres, and stating that the tract contained that number of acres. The plaintiff paid cash and executed notes on that basis. On actual survey the tract was found to contain 156.565 acres, a shortage of 40.435 acres, and this action is brought to

recover cash or cancel notes for $4,043.50, for failure of consideration upon the ground that the lands were purchased by the acre and not as a tract.

The defendant demurred upon the ground that the complaint fails to state a cause of action because the contract had become merged in the deed, and further, because the contract was indivisible, and the plaintiff's remedy, if any, was to offer to return the land and recover the entire purchase money. The defendant appealed.

Brooks, Hines & Kelly and Broadhurst & Cox for plaintiff.
Fentress & Jerome for defendant.

CLARK, C. J. The defendant's contract to sell the plaintiff "about 204 acres of land, known as the Buffalo farm, and adjoining the lands of Cicero Moore, C. D. Benbow, Thomas Pemberton, and others, at $100 per acre" was a sale by the acre, and the plaintiff is entitled to a rebate, or a return, of the amount overpaid. *Henofer v. Realty Co.,* 178 N. C., 584.

The defendant contends that the contract was merged in the deed, and therefore the complaint does not state a cause of action. The deed representing that the acreage was 197 acres was the act of the defendant in *assumed* execution of the contract and the acceptance of it by the plaintiff does not estop him from showing a shortage in the acreage and from a recovery of the amount overpaid. *McGee v. Craven,* 106 N. C., 353; *Brown v. Hobbs,* 147 N. C., 77; *Kendricks v. Ins. Co.,* 124 N. C., 318.

The deed was made in pursuance of the contract, and the estimate in the contract, "about 204 acres," and the estimate in the deed, "197 acres," and the estimate in the contract of $20,000 are all subsidiary to the contract of sale "at $100 per acre." Whenever the true acreage was ascertained, whether it was more than the above estimates or less, the amount of the purchase money was to be ascertained by multiplying such acreage by $100. This is the basis of the contract. If it had turned out that the true acreage was more than this estimate, the plaintiff would have had to pay the increased amount. It proving to be less, the defendant must refund the overpayment.

Affirmed.

M. L. YOUNG v. J. W. NEWSOME AND SARAH NEWSOME.

(Filed 10 November, 1920.)

1. Husband and Wife—Married Women—Wife's Torts—Husband's Liability—Statutes.

The rule of the common law that made the husband liable for the torts of his wife, though living separate at the time, has been modified by statute so as to make him liable only when they are living together. Rev., 2105.

2. Same.

Rev., 2105, giving a right of action against the husband for the tort of the wife, while they are living together, modifying the common law, is not affected by the courtesy act of 1848, the constitutional provision vesting in the wife her separate estate; the marriage act of 1871-72 and other statutes giving her many of the rights of a *feme sole;* the Martin Act of 1911, ch. 109, allowing her to contract in certain cases as if unmarried, and the act of 1913, ch. 13, giving to a married woman her personal earnings, with right to sue alone for personal injuries, etc.; for the rights thus given are additional ones, without changing the common law principles as modified by the statute. Rev., 2105.

CLARK, C. J., concurring in opinion.

APPEAL by defendant from *Long, J.,* at the March Term, 1920, of FORSYTH.

This is an action to recover damages for slander against two defendants, who are husband and wife and living together.

The jury returned the following verdict:

"1. Did the defendant, Sarah Newsome speak of and concerning the plaintiff, M. L. Young, the words in substance, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what amount of compensatory damage is the plaintiff entitled to recover of the defendants, Sarah Newsome and J. W. Newsome? Answer: 'Six hundred and fifty dollars ($650).'"

His Honor held that the husband was liable on the verdict for the tort of his wife, and entered judgment accordingly, and the defendants excepted and appealed.

Jones & Clement and McMichael, Johnson & Hackler for plaintiff.
Sapp & McKaughn and Dallas C. Kirby for defendants.

ALLEN, J. At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she

could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress." *Roberts v. Lisenbee,* 86 N. C., 136.

This principle was modified by the act of 1871-2 (Rev., 2105), so that the husband could only be held liable for torts committed while the husband was living with the wife, the statute providing that, "Every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her."

This statute has not been amended or repealed, and since its enactment it has been held that "a husband is liable for slanderous words spoken by his wife in his absence and without his knowledge or consent." *Presnell v. Moore,* 120 N. C., 390.

In the *Roberts case* the doctrine of the liability of the husband was adhered to notwithstanding the courtesy act of 1848, the provisions of the Constitution of 1868 vesting in her the separate estate, the marriage act of 1871-2, and other statutes, giving her many of the rights of a *feme sole,* all of which were considered, and the Martin Act of 1911, ch. 109, allowing her to contract in certain cases as if unmarried, and the act of 1913, ch. 13, giving to a married woman her personal earnings and any damages sustained by her for personal injuries, with the right to sue alone, simply add additional rights without changing the principle.

These later statutes do not purport to change or modify the earlier statute, fixing liability on the husband, and as all may well stand together, and are certainly not irreconcilable, it cannot be held that they operate as a repeal by implication.

No error.

CLARK, C. J., concurring: The common law was formulated before there was any Parliament, or when they were enacting very few statutes. It was created by judges who were for centuries Catholic priests only, and for centuries more they all were priests or laymen. It is not astonishing that under the influence of priests, who presumably knew little about such matters, it was laid down as a conclusive and irrebuttable presumption of law and fact that the wife acted solely under compulsion of her husband, and therefore that he was liable for her torts.

A great writer, who was far better posted on such matters, in the last century presents that when Mr. Bumble was told that he was responsible for his wife's conduct, and that "indeed he was the more guilty of the two in the eye of the law; for the law supposes that your wife acts under your direction." Mr. Bumble replied: "If the law supposes that, the law is a ass—a idiot. If that's the eye of the law, the law's a bachelor; and the worst I wish the law is that his eye may be opened by experience." *Oliver Twist,* ch. 51.

Priestly judges seem to have based their whole doctrine of the subjection of woman upon Genesis, ch. 2:23-24: "And the *man* said, this is now bone of my bone and flesh of my flesh; . . . they twain shall be one flesh." But this was not the declaration of God, but of Adam, and is not a fact, and yet upon that false foundation was built the theory of the common law which has persisted in the minds of some down to the present day, much to the detriment of women whose legal rights have been far inferior to those of women in other civilized countries, and even to those living in semi-civilized countries under the domination of the Koran.

Blackstone, who 160 years ago opened the first law school in England, was an intense reactionary, and in his Commentaries emphasized these views, saying that sons take precedence over daughters in rights of inheritance, because "the worthiest of blood shall be preferred." 2 Com., ch. 14; and, again, stated that the "very being or legal existence of woman is suspended during marriage, or at least is incorporated and consolidated into that of her husband." 2 Blackstone, ch. 15. This theory of merger of the personality of the wife is the source of all the legal degradation of women which it has taken so many years to conquer—and which indeed is not entirely eradicated yet.

From the false assumption of the person of the wife becoming a chattel of the husband has logically followed the premise that he had the right to chastise her, and that her personal property became his upon marriage, and "The husband hath herein an immediate and absolute property devolved to him by the marriage, not only potentially but in fact, which never can again revert to the wife or her representative." 2 Black., ch. 29. And her realty became the property of her husband for his life, and there are further consequences, among them the anomalous "Estate by Entireties," which is a great injustice to her, but which it is held still exists notwithstanding the Constitution of 1868 vested women with absolute ownership of their property, as "if they were single." Then there is the provision still in our Code (C. S., 4225, 4339) that in trials for seduction and abduction the jury shall not take the testimony of the woman as true, even though they do believe her, unless she is corroborated; and this is still one of the few States in which the privy examination of the woman is still required in conveyances by her, and that in all dealings between the wife and her husband her contract is void unless reviewed and approved by some justice of the peace.

Long after most of the above doctrines were abandoned in England, *Pearson, C. J.*, in *S. v. Black*, 60 N. C., 263, reaffirmed the right of the husband to chastise the wife because it was his duty to "make her behave herself," and in *S. v. Rhodes*, 61 N. C., 455 (in 1868), *Reade, J.*, sus-

tained a charge of the court below that a husband had the right to whip his wife "without any provocation," stating, however, that the whole doctrine had been questioned in England, repudiated in Ireland and Scotland, and "had met with little favor elsewhere in the United States."

In view of the fact that in 1874, in *S. v. Oliver,* 70 N. C., 60, *Settle, J.,* repudiated the doctrine that the husband had the right to chastise his wife under any circumstances, saying simply, "We have advanced from that barbarism"; that the Martin Act, 1911, ch. 109, recognized the right of the wife to contract as if single (except with her husband), C. S., 2507, 2515; and the act of 1913, ch. 13, now C. S., 2513, under which the wife is entitled to recover her earnings and damages for torts, it would seem that all that part of the common law which is derived from the assumption of her being under the control of her husband should be deemed "obsolete" under the terms of our statute, 1778, ch. 133, now C. S., 970, which placed among the exceptions to our adoption of the common law all those provisions which have "become obsolete."

In view of the above provisions recognizing the equality of the wife with her husband as to her property and rights of person, and especially the recent amendment to the U. S. Constitution recognizing the equality of women at the ballot box, it would seem common sense had overcome the common law as to the inequality of the sexes, and that, as a correlative, the husband should no longer be held liable for the torts of the wife, committed without his knowledge or concurrence.

This would certainly be so if the principle rested upon the common law, because *"cessant ratione, cessat et lex."* But, as pointed out in the opinion of the Court, the act of 1872, ch. 193, now C. S., 2518, expressly provides that the husband "living with his wife shall be jointly liable with her for her torts." This is a modification of the common law under which the wife was not liable at all, and to that extent the doctrine is statutory, and the Courts have no choice but to declare it still in force until changed by statute.

BUILDERS' SUPPLY COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 November, 1920.)

(For digest, see *Perry v. R. R., ante,* 290.)

APPEAL by defendant from *Devin, J.,* at HALIFAX.

This is an action to recover damages to an automobile truck caused by collision with a train at a public crossing.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

George C. Green for plaintiff.
R. C. Dunn and Murray Allen for defendant.

ALLEN, J. The questions raised by this appeal are substantially those decided in *Perry v. R. R.*, at this term, and upon that authority the judgment is affirmed.

No error.

WALKER and BROWN, JJ., dissent for reasons stated in dissenting opinion in *Perry v. R. R.*, at this term.

R. M. JONES v. UNION GUANO COMPANY.

(Filed 10 November, 1920.)

Pleadings—Examination of Party—Statutes—Motions.

In order to examine the opposite party to an action to obtain evidence upon which to prepare a pleading, it must be properly made to appear that the evidence sought is necessary to be thus obtained; and where the facts relied on are fully set out in the complaint, the order to examine should not be granted; the remedy, in proper instances, being by motion to make the allegations more specific, or for a bill of particulars, especially when the defendant seeks no affirmative relief. Rev., 866; C. S., 901, 902.

APPEAL by plaintiff from *Ray, J.*, at chambers in Winston, 17 May, 1920.

This is one of 19 actions in Rockingham Superior Court by 19 farmers against the Union Guano Company for damages for breach of warranty in certain fertilizers, causing them losses in their crops. After the complaint was filed, the defendants filed a petition to examine said plaintiffs to secure information on which to file its answer. In absence of the plaintiffs and their attorneys, the clerk signed an order directing the plaintiffs to appear for examination on 19 April, 1920, on which date the plaintiffs filed an answer to said petition and order and asked that the order be set aside. Upon the hearing the clerk set aside the order and denied leave to examine the plaintiffs. Upon appeal to the judge at chambers, this order was reversed and judgment signed remanding the cause to the clerk at Rockingham with directions that the defendant should proceed with the examination of the plaintiffs, and

the plaintiffs appealed. It was agreed between the parties that the other 18 cases shall await and abide the decision of this question on appeal.

J. M. Sharp for plaintiff.
Swink, Korner & Hutchins for defendant.

CLARK, C. J. This proceeding for examination of the opposite party before trial was begun was under Rev., 866, now C. S., 901, 902.

This proceeding may be permitted to the plaintiffs to procure information to frame the complaint. *Holt v. Finishing Co.*, 116 N. C., 480, or after answer is filed the plaintiff may cause the defendant to be examined to procure evidence, *Helms v. Green*, 105 N. C., 251; *Vann v. Lawrence*, 111 N. C., 32. And by parity the defendant may have the plaintiff examined to procure information to file answer, or after the answer is filed, to procure evidence for the trial. It does not lie where, as in this case, the facts relied on are fully set out in the complaint, and the defendant can deny the same, or, if so disposed, it may answer on information or belief.

Both as to the plaintiff and the defendant, as is pertinently said in *Bailey v. Matthews*, 156 N. C., 78, "The law will not permit a party to spread a dragnet for his adversary in a suit in order to gather facts upon which he may be sued; nor will it countenance any attempt under the guise of a fair examination to harass or to oppress the opponent. It is a very rare case that requires exercise of this function of the courts, and this order should have not been made without careful consideration and scrutiny."

In *Lumber Co. v. R. R.*, 141 N. C., 170, it is said that if the pleadings are not specific enough the opposing parties may resort to a bill of particulars. The complaint herein is a clear, specific statement as to the purpose for which the fertilizer was bought, and the constituent elements which it was represented by the defendant to contain, and allegations of the falsity of such representations and of the damage.

It is evident that the defendant did not need any examination of the plaintiff to enable it to answer these allegations, and if the complaint had not been clear enough the remedy was by motion to make the allegations more specific, or for a bill of particulars, especially as the defendant has not set up a counterclaim or a demand for an affirmative relief.

In *Bailey v. Mathews*, 156 N. C., 81, *Walker, J.*, says that it is of first importance that an application for an order for such an examination be under oath, stating facts which will show that the nature of the action is such that "the testimony is relevant, and that the examination is material and necessary, and the information desired is not already

accessible to the applicant, and that the motion is made honestly and in good faith and not maliciously." This is reaffirmed in *Fields v. Coleman,* 160 N. C., 14; *Bank v. McArthur,* 165 N. C., 375, and cases cited.

It does not sufficiently appear upon the complaint and petition that these requirements have been complied with, and the order of the judge requiring the plaintiffs to be examined must be

Reversed.

J. B. RIDDLE ET AL. v. CUMBERLAND COUNTY ET AL.

(Filed 10 November, 1920.)

1. Schools—School Districts—Taxation—Statutes— Elections— Approval of Voters—Constitutional Law.

Under the provisions of Consolidated Statutes, sec. 5626, the board of commissioners of a county may form special school-tax districts without regard to township lines, and provide for a levy of a tax, when submitted to and approved by a majority of the voters in accordance with the statute.

2. Same—Ballots.

Under a statute which sets out a form of ballot to be used at an election, the use of such form is directory and not mandatory, unless the statute so declares, this matter being within the discretionary power of the Legislature; and the forms prescribed by Consolidated Statutes, sec. 5626, "for special tax" and "against special tax" in an election for the formation of a special school-tax district, will not render the election invalid when a free and fair opportunity has been afforded the voters therein to express their will at the polls, and from the order calling the election and the notice thereof, and from the special facts and circumstances, it appears that the result of the election was in favor of the tax, though voted for upon forms of ballots reading "for" or "against consolidated schools" of a certain territory within the township.

3. Elections—Schools—Special Districts—Taxation—Voters.

Where school-tax districts already exist within the territory embraced by a proposed new district to be created for the entire township under the provisions of Consolidated Statutes, sec. 5626, the majority vote of the proposed new district will control the result of the election fairly and freely held, and the contention that a separate election should have been held in the territory not embraced in the old districts is without merit.

APPEAL by plaintiffs from *Guion, J.,* at Fall Term, 1920, of CUMBERLAND.

The action was brought to enjoin the levy of a school tax in Gray's Creek Township. A restraining order was granted, and the cause came on before Judge Guion for final hearing, whereupon, after considering

the evidence and finding the facts, the judge dissolved the restraining order and directed the commissioners to proceed with the levy of the tax. The following facts were found by the judge:

"This cause coming on to be heard at the time and place agreed on by counsel for the hearing under the restraining order heretofore issued by his Honor, C. C. Lyon, and being heard upon the complaint and answer herein, and the exhibits and affidavits, and the oral testimony of D. L. Downing, register of deeds and *ex officio* clerk of the board of commissioners of Cumberland County, the court finds the facts to be as follows:

"1. That a petition signed by one-fourth of the freeholders of Gray's Creek Township, Cumberland County, North Carolina, asking for a special school tax for the entire township, duly indorsed and recommended by the board of education of Cumberland County to the board of commissioners of said county, was duly filed with said commissioners, considered, and favorably acted upon by them on 7 June, 1920, and an election ordered thereunder to be held on 7 July, 1920, and then and there at the said meeting N. H. Jones was appointed as registrar, and Frank Marsh and H. T. Budd as judges.

"2. That the said clerk of the board of commissioners was not present when the petition was acted upon by the board of commissioners, and that the petition did not actually come into his hands until on or about 21 September, 1920.

"3. That the said petition and action thereon were regular and sufficient, and that sufficient notices were posted, giving notice of said election, and also proper and sufficient advertisement was published in the *Fayetteville Observer,* a newspaper published in said county.

"4. That pursuant to the order and notice, the election was held on 17 July, 1920, at which election 126 qualified voters voted a ballot 'For consolidated schools, Gray's Creek Township,' and 35 qualified voters voted a ballot 'Against consolidated schools, Gray's Creek Township,' and that there were 183 voters in said township qualified for the said election.

"5. That the said vote was canvassed by the election officers, the result declared, and a report made to the commissioners of Cumberland County and accepted by them, as appears in this record.

"6. That 108 of the qualified voters of Gray's Creek Township fully understood the proposition before them to be for a special tax as appears by affidavits herein; that they were not deceived or misled by the wording of the ballots, which ballots read, 'For consolidated schools, Gray's Creek Township,' and 'Against consolidated schools, Gray's Creek Township,' and that the election was a free and fair expression of the will of the people on the proposition of tax or no tax for the township for school purposes.

"7. That said township has had for several years two special-tax school districts, and three nonspecial-tax school districts, the said five districts comprising the entire township.

"8. That less than one-fourth of the freeholders of the nonspecial-tax districts signed the petition for the election, and less than a majority of the qualified voters of the nonspecial-tax districts voted ballots reading, 'For consolidated schools, Gray's Creek Township,' and that the freeholders signed the petition and the qualified voters voted at the election without regard to school district lines.

"9. That a majority of the qualified voters of said township voted at said election for consolidation, which they understood carried with it a special tax for school purposes, in accordance with the petition for and notice of the said election, and the court so finds.

"It is now, therefore, ordered, adjudged, and decreed that the said election be, and the same is hereby declared valid and sufficient to authorize, and does authorize, the levy and collection of a special tax, as asked for in the petition; that the restraining order heretofore issued in this cause be, and the same is hereby dissolved; that it is the duty of the said commissioners of Cumberland County to levy tax, and they are hereby so directed to do, and it is further decreed that the defendants go hence without day and recover their costs of the plaintiffs and their sureties. O. H. GUION, *Judge.*"

To the foregoing judgment plaintiffs excepted and appealed to the Supreme Court.

The petition for the election, which was filed with the board, with the order thereon, and the notice of the election, all being mentioned in the judgment of the Court, are as follows:

To the board of county commissioners of Cumberland County, North Carolina:

We, the undersigned freeholders constituting one-fourth of the freeholders in Gray's Creek Township, Cumberland County, North Carolina, most respectfully petition your honorable board for an election to ascertain the will of the qualified voters within Gray's Creek Township, said county and State, whether there shall be established a special school-tax district in and for and comprising Gray's Creek Township, said county and State, as the boundaries of said township are now constituted, with the annual tax of not more than 30 cents nor less than 10 cents on the one hundred dollars valuation of property under the valuation ordered by the General Assembly of North Carolina at its session in 1919, or subsequent valuations, and not more than 90 cents and not less than 30 cents on the poll, for the purpose of supplying the public school fund

for said district and maintaining a high school as may be required by law. And whether the said township school district, through its proper school officials or authority, shall issue and sell bonds in an amount not exceeding $25,000 to run for a period of twenty years, the proportionate parts thereof being payable annually during the said term, and the tax levy to be sufficient hereunder to pay the interest and maturing bonds from year to year, the proceeds of said bonds to be paid to the proper school authorities of the said district for the purpose of erecting proper building or buildings for a public school under the law, rules and regulations governing the same, and for the purpose of purchasing a site for said buildings and the equipment of the said schoolhouse and buildings, and such accessories and transportation equipment as the governing authorities may deem necessary, and upon the voting of the said tax and sale of the bonds of Gray's Creek Township, then the existing tax *in and for* King Hiram and Gray's Creek districts in the said township shall automatically cease, and not be levied thereafter, such vote repealing the existing tax provided for in said districts, but a failure of the said vote hereby petitioned for shall not disturb or repeal the said existing tax, or existing school district boundaries within the said township. (Here the names of petitioners are set forth.)

Petition was filed and following order made: Ordered that a special election be held in Gray's Creek Township for the purpose of a special school tax on 17 July, 1920.

NOTICE OF ELECTION.

Notice is hereby given that the Cumberland County board of commissioners have called a special election to be held in Gray's Creek Schoolhouse, in Gray's Creek Township, on 17 July, to ascertain the will of the people of that territory comprising Gray's Creek Township lying and being in the county of Cumberland, as to whether there shall be levied a special tax of not more than 30 cents on the one hundred dollars valuation of property and 90 cents on the poll, and not less than 10 cents on the hundred dollars valuation of property and not less than 30 cents on the poll to supplement the funds apportioned to said district according to the acts of the Legislature of 1911.

It is further ordered that Neill Jones be and he is hereby appointed registrar for said election, and it is further ordered that Frank A. Marsh and Tom Budd be and they are hereby appointed judges of said election. It is further ordered that a new registration shall be made, and that the election shall be held under the general laws of 1901, and all acts amendatory thereof as near as may be, and that returns shall be made to the board of Cumberland commissioners at their next regular meeting. (Duly signed)

Plaintiffs assigned the following errors:

1. The court erred in rendering the judgment and decree set out in the record.

2. The court erred in dissolving the temporary restraining order, and refusing to continue the same until the final hearing.

3. The Court erred in finding as a fact that one hundred and eight of the voters in said election fully understood that they were voting for a special tax for Gray's Creek Township, when the record shows conclusively that they did not vote for such tax, but voted only for "Consolidated schools, Gray's Creek Township," and such a ballot carries with it a conclusive presumption contrary to that of special tax.

4. The court erred in finding as a fact that a majority of the qualified voters of Gray's Creek Township understood that their vote for consolidation carried with it a special tax for school purposes, for the same reasons set out in the third assignment of error.

5. The court erred in adjudging that said election was valid and sufficient to authorize the levy and collection of said tax, and to his ordering and directing the commissioners to levy and collect the same.

6. The court erred in directing a special school tax to be levied in the three nonspecial school-tax districts of said township, as less than one-fourth of whose freeholders signed the petition for said election, and less than a majority of whose qualified voters voted in said election "For consolidated schools, Gray's Creek Township," the voters in the said township as a whole having been allowed to vote, including those in the two special school-tax districts, same being equivalent to voting a tax on others that they do not have to pay themselves, the new territory being the only district that the election, in effect, required the levy of any additional tax upon, with the "automatic" discontinuance of the tax in the same amount in the two old special-tax districts.

Bullard & Stringfield for plaintiffs.
Sinclair & Dye and Oates & Herring for defendants.

WALKER, J., after stating the case: It is provided by statute that special-tax districts may be formed by the county board of education in any county, without regard to township lines under the conditions which are therein set forth. Consol. Statutes, sec. 5526. Those conditions refer altogether to the levy of a tax to provide a supplementary fund for the support of schools in the district, and this tax is not to be levied unless approved by a majority of voters at an election to be held to ascertain the will of the people, residing in the proposed district, with regard to it. Machinery is provided for holding the election, and it is required that the ballots to be used shall have printed or written on them

"For special tax" and "Against special tax." There is no provision that the use of such ballot shall be essential to the validity of the election, or that it shall be void if they were not used, but the statute simply designates what kind of ballots shall be used by the voters to express their choice. The provision of the statute, under the facts and circumstances of this case, where the form of the ballots cannot affect the merits, should be considered as directory and not mandatory. There is no intimation in the law that a failure to comply with it in this respect should render the election void. It was merely a convenient form of ballot designated to express the will of the qualified voters upon the question submitted to them, and the ballots used by them and the surrounding circumstances show clearly and unmistakably what their intention was, so that no doubt whatever can exist as to it. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, the statute provided that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory, if they do, and directory if they do not, affect the actual merits of the same.

This is the rule gathered by an able text-writer from the authorities (McCrary on Elections, secs. 187 to 190, both inclusive), and has been more than once adopted and approved by this Court. *Briggs v. City of Raleigh,* 166 N. C., 149-154. It has been held by us that statutes prescribing rules for conducting popular elections are designed chiefly for the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or imperative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector. This is, of course, subject to the rule as to the imperative or mandatory character of the statutory requirement. *DeBerry v. Nicholson,* 102 N. C., 465. When it has been found as a fact by the lower court that every qualified voter has had a fair and ample opportunity to register and vote, an election declaring for a special school tax will not be held invalid because of an irregularity not pertaining to the merits. This was substantially said in *Younts v. Comrs.,* 151 N. C., 582. It was held in *Briggs v. City of Raleigh, supra,* that an irregularity in the conduct of an election which does not deprive a voter of his rights or admit a disqualified person to vote, which casts no uncertainty on the result, and which was

not caused by the agency of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors. This liberal rule of the law relating to elections, where not forbidden by the language of the particular statute of a mandatory character, is thus stated and applied in *Hawes v. Miller,* 56 Iowa, 395, at 396-397: "These county-seat elections are governed by the same rules that are applicable to the election of officers. In canvassing votes of electors their intentions must be ascertained from their ballots, which must be counted to accord with such intentions. If the ballots express such intentions beyond a reasonable doubt it is sufficient, without regard to technical inaccuracies, or the form adopted by the voter to express his intentions. Of course the language of a ballot is to be construed in the light of all facts connected with the election; thus, the office to be filled, the names of the candidates voted for, or the subject contemplated in the proposition submitted to the electors, and the like, may be considered to aid in discovering the intentions of the voter," citing *S. v. Cavers,* 22 Iowa, 343; *Cattell v. Lowry et al.,* 45 Iowa, 478; *Carpenter v. Ely,* 4 Wis., 438; *The People v. Matteson,* 17 Ill., 167; *The People v. McManus,* 34 Barb., 620; *The State ex rel. v. Elwood,* 12 Wis., 552; *Railroad Co. v. Bearss,* 39 Ind., 600; *State ex rel. Phelps v. Goldthwait,* 16 Wis., 146. In the construction of statutes regulating elections, it is important to keep in mind two recognized principles: (1) The legislative will is the supreme law under the Constitution, and the Legislature may prescribe the forms to be observed in the conduct of elections, and provide that such method shall be exclusive of all others; (2) since the first consideration of the State is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment. Recognizing the principle first above stated, the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and in no other, such provisions are mandatory and exclusive. 15 Cyc., 317. The vital and essential question is, if the statute be not mandatory in its terms, in which case a failure to comply with it is fatal, whether noncompliance with it or a mere irregularity will avoid an election, if it does not affect the merits. Our decisions, and those of other States upon the same question, are to the effect that it will not in the specified instances.

We have discussed the question very fully in *Hill v. Skinner,* 169 N. C., 405, and *Hill v. Lenoir Co.,* 176 N. C., 572, and as to at least one feature of the question in *Reade v. Durham,* 173 N. C., 668. In

the last case we permitted the time when the recent constitutional amendments should take effect and be in force to be determined by something that did not appear on the ballots, and in the other case we disregarded irregularities and matters of form which did not affect the merits or the substance. It was required, in a special act, or charter, that election ballots were required to be of a certain kind, without declaring that those which were not of that kind should be void, and excluded from the count, and this Court held that, as there was no such declaration as that above stated in the statute, ballots of a different kind, cast in an election held under the statute were a mere irregularity, which did not exclude them from being included in the count of votes. *Wright v. Spires,* 152 N. C., 4. The Court said in *R. R. v. Comrs.,* 116 N. C., at pp. 568-569: "We think the object of all elections is to ascertain fairly and truthfully the will of the people—the qualified voters. That registration, notice of elections, pollholders, judges, etc., are all parts of the machinery provided by law to aid in attaining the main object—the will of the voters; and should not be used to defeat the object which they were intended to aid. This being so, it is held that a substantial compliance with the provisions of the statute, under which the election is held, is sufficient. . . . They have no power to issue the bonds demanded by plaintiff, unless a majority of the qualified voters voted for the subscription. But, having the power to submit the question, a substantial compliance with the formalities of the statute in submitting the question to the people, if there was no fraud practiced, and no design in doing so to impose on the people and get them to do what they would not have done if there had been a literal compliance with the terms of the statute in submitting the question, is sufficient. And if a majority of the qualified voters of the county voted for the subscription, it is the duty of defendant to issue the bonds."

In this case it appears that in the order calling the election, and in the notice thereof, it was stated clearly and distinctly what was the question submitted to the voters, it being whether or not a tax of thirty (30) cents on property and ninety (90) cents on the poll should be levied for a particular school purpose. We have seen that the wording of a ballot is to be read and considered in the light of all the facts and circumstances connected with the election, and the subject contemplated in the question submitted to the voters, so as to discover or determine the intention of the voters, or what they meant when they cast their ballots. Thus considered, it cannot be successfully questioned that a large majority of those qualified to vote cast their ballots in favor of the levy of the tax, though the form of the ballots was for the consolidation of the separate districts into one. The phraseology of the statute was such that a vote for consolidation was in effect one for the levy of the tax, for the one

could not exist without the other—they must coexist. The case, therefore, is even stronger in favor of the validity of the election than some of those we have cited. *Faison v. Comrs.*, 171 N. C., 411, and *Keith v. Lockhart, ibid.*, 451, in the last view taken of this case, are substantially "on all fours" with this one, and sufficiently so to control our decision of it. In those cases the ballots read "Stock law" or "No stock law," and we held that they were impliedly ballots for "Tax" or "No tax," as the statute, under which the election was held, provided that a tax should be levied to pay for a county fence of the majority voted for a free range territory, or no stock law.

There is nothing in the contention that a separate election should have been held in the territory not embraced in the old district, as that territory was consolidated with them into one school district and the election was ordered to be held in the new territory to be known as Gray's Creek Township. The entire township was to be established as a single school district, and the vote was to be taken accordingly. Those of the township who did not reside in the former school-tax districts were as much entitled to vote freely and unreservedly upon the question as those who did. If we should undertake to review the judge's findings of fact, our conclusion would be the same as his. It is perfectly plain that the voters of the proposed new school district were thoroughly aware that they were voting for the school tax. All of them so testified, or nearly all.

There was not, even "in effect," anything done which discriminates against those in the three districts untaxed under the former law, nor which allowed those in the two taxed districts to levy a tax upon those in the other districts, which they themselves did not have to pay. The case of *Comrs. v. Lacy, State Treasurer*, 174 N. C., 141, does not apply. The election was held in the township as one entire school district, every voter having an equal right with the others to cast his vote, and thereby to express his will. There was no suggestion of fraud or other irregularity. If any one failed to exercise his right to vote it was his own fault, and he has only himself to blame, and must abide the result.

The other exceptions were formal, and, if not so, are untenable.

We affirm the judge's ruling, because there is no error therein, and it will be so certified.

Affirmed.

C. B. PAGE v. CAMP MANUFACTURING COMPANY.

(Filed 10 November, 1920.)

1. Courts—Discretion—Verdict Set Aside—Weight of Evidence—Motions—Appeal and Error.

Where there is evidence to sustain a verdict, objection that it should be set aside as against the clear preponderance of the testimony is a matter within the legal discretion of the trial judge, and his refusal to do so is not reviewable on appeal.

2. Railroads—Fires—Negligence—Evidence—Issues—Burden of Proof—Res Ipsa Loquitur—Instructions.

Where, in an action to recover damages of a railroad for the negligence of the defendant in burning over plaintiff's lands, there is evidence that the injury was caused by sparks from the defendant's passing locomotive which started the conflagration, a *prima facie* case is established under the doctrine of *res ipsa loquitur*, and the burden of the issue remains with the plaintiff, the *prima facie* case being only sufficient evidence to carry the case to the jury and to sustain a verdict in the plaintiff's favor. An instruction to the jury which places upon the defendant the burden of satisfying the jury by a preponderance of the evidence that it was not negligent is error.

3. Same—Appeal and Error—Reversible Error.

It is reversible error for the trial judge to instruct the jury, in effect, that the burden of the issue did not remain with the plaintiff, in his action against a railroad company for negligently setting out fire from its passing locomotive to the injury of his land, where applying the doctrine of *res ipsa loquitur*.

APPEAL by defendant from *Kerr, J.*, at March Term, 1920, of DUPLIN.

George R. Ward and Ward & Ward for plaintiff.
Stevens & Beasley for defendant.

WALKER, J. Action for injuries to land caused by the negligent burning of the timber thereon. The fire, plaintiff alleged, originated from sparks emitted from one of the defendant's engines, which had a defective smokestack and spark arrester. It is the same fire and same engine that caused the injuries for which the plaintiff, in *Williams v. Camp Mfg. Co.*, 177 N. C., 512, recovered a judgment for damages, which was affirmed by this Court, as will appear from the reported case, *supra*, and after a careful study and comparison of the two cases we have been unable to discover any substantial difference in respect of the facts between them. Mr. Stevens argued the case for the defendant very ably, and contended that there was some difference in the facts of the two cases, but our investigation has irresistibly led us to the opposite conclusion, and we find no such difference in the essential facts. The

same principles which applied there are also applicable to this case, but there is an error in the charge of the court which prejudiced the defendant.

There was evidence that defendant's engine set out the sparks which started the conflagration, and thereby damaged plaintiff's timber and lands. It was not very strong or conclusive in its nature or its force, but rather inconclusive, and yet we cannot say there was no evidence of the fact in issue. The remedy for the false verdict, if it was false, was an application to the judge for relief by setting aside the verdict, as being against the clear preponderance of the testimony, and we presume this course was taken, and failed to have the desired effect. While the evidence presented a strong case for the exercise of the power which resides in the judge, we cannot review the ruling by which he refused to disturb the verdict on this ground. It must therefore stand, unless there be reversible error in law, and we think there was such error.

Instead of charging the jury that when plaintiff made out a *prima facie* case it was incumbent upon defendant to go forward with its evidence or take the risk of an adverse verdict, the court placed the burden upon the defendant to *satisfy* the jury by a preponderance of the evidence that it was not negligent. This was stating the principle of law much too strongly, and no doubt may have caused the jury to miscarry in their verdict upon the facts. We have repeatedly stated the true rule as formulated by this and other Courts. The present *Chief Justice* expressed it very clearly and tersely in *Shepard v. Tel. Co.*, 143 N. C., 244, where he held that though plaintiff has shown a *prima facie* case of negligence, it may be rebutted, but it is not necessary that the rebutting evidence of the defendant should preponderate, as the burden remains with the plaintiff throughout the case to establish negligence. He makes an apt quotation from 1 Elliott on Ev., sec. 137, which we approved, as follows: "The burden of the issue, that is, the burden of proof, in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is in turn compelled to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponder-

ance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." And the *Chief Justice* then likens the principle to that prevailing in criminal cases by this very clear illustration. We quote his language: "The burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the State throughout, and when evidence is offered (by defendant) to rebut the presumption of fact raised by the evidence (of the State), the burden is still on the State to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an alibi, for example, which goes to the proof of the act. *S. v. Josey,* 64 N. C., 56." He also says in that case that, "The burden of the issue as to negligence was upon the plaintiff. If no evidence had been offered in rebuttal, the court might have told the jury that if they believed the evidence to answer the issue 'Yes.' But when evidence was offered in rebuttal, it was not incumbent upon the defendant to disprove plaintiff's case by a preponderance of testimony, but upon all the testimony it was the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. This has been recently discussed," citing *Board of Education v. Makely,* 139 N. C., 35.

This would seem to be entirely sufficient to show the error of the learned judge in his charge, but the question has formerly been considered by this Court in *Stewart v. Carpet Co.,* 138 N. C., 60, which has been approved and quoted from in *Sweeny v. Erving,* 228 U. S., 233, to this effect: There was much discussion by counsel of the doctrine of *res ipsa loquitur* and its relevancy to the facts of this case. "The thing speaks for itself" is a principle applied by the law where, under the circumstances shown, the accident presumably would not have occurred, in the use of a machine, if due care had been exercised, or, in the case of an elevator, when in its normal operation after due inspection. The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes merely some evidence to go to the jury, which requires the defendant "to go forward with his proof."

"The rule of *res ipsa loquitur* does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant introduces evidence or not, the plaintiff in this case will not be entitled to a verdict unless he satisfies the jury by the preponderance of the evidence that his injuries were caused by a defect in the elevator, attributable to the defendant's negligence. The law attaches no special weight, as proof, to the fact of an accident, but

simply holds it to be sufficient for the consideration of the jury, even in the absence of any additional evidence." *Womble v. Grocery Co.*, 135 N. C., 474; 2 Labatt on Master and Servant, sec. 834; 4 Wigmore on Evidence, sec. 2509. In all other respects the parties stand before the jury just as if there was no such rule. The judge should carefully instruct the jury as to the application of the principle, so that they will not give to the fact of the accident any greater artificial weight than the law imparts to it. Wigmore, in the section just cited, says the following considerations ought to limit the doctrine of *res ipsa loquitur:* (1) The apparatus must be such that in the ordinary instances no injurious operation is to be expected, unless from a careless construction, inspection, or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrence must have happened irrespective of any voluntary action at the time by the party injured. He says further that the doctrine is to some extent founded upon the fact that the chief evidence of the true cause of the injury, whether culpable or innocent, is practically accessible to the party charged, and perhaps inaccessible to the party injured. What are the general limits of the doctrine, and what is the true reason for its adoption, we will not now undertake to decide. It is established in the law as a rule for our guidance, and must be enforced whenever applicable, and to the extent that it is applicable to the facts of the particular case.

It was said in *Sweeney v. Erving,* 228 U. S., 233-240: "In our opinion, *res ipsa loquitur* means that the facts of the occurrent warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

Kay v. Metropolitan St. Ry. Co., 163 N. Y., 447, was an action by passenger against carrier, and the New York Court of Appeals said (p. 453): "In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*), but when the proof was all in the burden of proof had not shifted, but was still upon the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary.

The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and in determining the weight to be given to the former as against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scales did not preponderate in favor of the presumption and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof." The rule thus declared has since been adhered to in the Courts of New York. *Hollahan v. Metropolitan St. Ry. Co.,* 73 N. Y. App. Div., 164, 169; *Adams v. Union Ry. Co.,* 80 N. Y. App. Div., 136, 139; *Dean v. Tarrytown, etc., R. Co.,* 113 N. Y. App. Div., 437, 439. A similar view appears to be entertained in New Hampshire. *Hart v. Lockwood,* 66 N. H., 541; *Boston & Maine R. Co. v. Sargent,* 72 N. H., 455, 466. The same rule has been followed in a recent series of cases in the North Carolina Supreme Court. *Womble v. Grocery Co.,* 135 N. C., 474, 481, 485; *Stewart v. Carpet Co.,* 138 N. C., 60, 66; *Lyles v. Carbonating Co.,* 140 N. C., 25, 27; *Ross v. Cotton Mills,* 140 N. C., 115, 120; 1 L. R. A. (N. S.), 298, 301." And again: "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with the care in the premises the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence. The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof." To which may be added, *S. v. Wilkerson,* 164 N. C., 432, and the cases therein cited, and *Cox v. R. R.,* 149 N. C., 117; *Aycock v. R. R.,* 89 N. C., 331 (Anno. Ed.); *Knott v. R. R.,* 142 N. C., 242 (the last three being for burning timber); *Shaw v. Public Service Co.,* 168 N. C., 611, and *Ridge v. R. R.,* 167 N. C., 510, the last case having been affirmed by the Supreme Court of the United States, upon a writ of error to this Court.

The result of all the decisions upon the question is that the plaintiff's *prima facie* showing merely carries the case to the jury, and upon it alone they may decide for him, but they are not compelled to do so, and whether there is evidence on both sides, or only on the plaintiff's, the latter has the burden of proving negligence.

Such, we think, is the view generally taken of the matter in all well considered judicial opinions.

It will be seen, therefore, that the rule as to the burden of proof is well settled with us against the charge by the judge to the jury in this case, and for this error there must be another trial.

It is true that expressions are to be found in some of our cases, filtered there from two or three cases based on the English rule, which justified his Honor's charge, but since they were decided we have adhered to the true and correct rule, which is stated in *Stewart v. Carpet Co., supra; Womble v. Grocery Co., supra; Cox v. R. R., supra; Shepard v. Tel. Co., supra,* and many other cases, and which we have applied in this case, the substance of which is that the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said "it is the duty of the defendant to go forward with his proof," it was only meant in the sense that if he expects to win it is his duty to do so or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence. The Supreme Court of the United States has so stated the rule, and it referred with approval to our cases above cited. We say this much again, in the hope that the rule, as we have stated it, may hereafter be considered as the correct one.

The other exceptions, while earnestly presented before us, need not be considered, as they are without any merit.

New trial.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, AND CITY OF HIGH POINT v. SOUTHERN POWER COMPANY.

(Filed 10 November, 1920.)

1. Removal of Causes—Mandamus.

Proceedings for the issuance of the writ of mandamus in a state court is not a suit of a civil nature at law or in equity such as can be removed from the State to the Federal Court under the Federal Removal Acts.

2. Mandamus—Corporations—Public-Service Corporations.

Mandamus is the proper remedy to compel a public-service corporation to perform the duties it owes for the public benefit.

3. Removal of Causes—Mandamus—Petition.

Where proceedings upon petition for a *mandamus* are sought to be removed to the Federal Courts under the Federal statute, the allegations of the petition for the writ must be taken as true.

4. Mandamus—Public-Service Corporations—Corporations—Statutes.

A petition in proceedings under the provisions of Revisal (Pell's) secs. 822-824 to force a public-service corporation to supply electricity to the plaintiff, and other users, alike, is to compel the performance of a continuous duty, and the remedy is by *mandamus*.

5. Same—Moot Questions.

Where a public-service corporation owes the plaintiff, in *mandamus* proceedings, the duty to supply it with electricity, the declaration of the defendant that it will, as an accommodation only supply the plaintiff with electricity until a stated time, after which it will be discontinued, is a present denial of plaintiff's right to the service, and the proceedings may be maintained without waiting until the service has been discontinued; and a moot question is not therein presented to the court.

6. Removal of Causes—Mandamus—Public-Service Corporations—Corporations—Statutes—Injunctions—Mandatory Injunctions.

Where a public-service corporation denies its customer the present right to its services of a continuous nature, and declares it will only do so for a specified time as an accommodation, upon a petition to remove the cause to the Federal Courts, under the Federal statutes: *Held*, the remedy is by *mandamus*, Pell's Revisal, secs. 822-824, and, when sought, the cause is not removable upon the theory that in fact it was a proceeding for a mandatory injunction.

WALKER, J., dissenting; ALLEN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Ray, J.*, at Fall Term, 1920, of GUILFORD.

This is a proceeding in *mandamus* heard by his Honor, Judge Ray, in Guilford County Superior Court, 14 September, 1920. The petition for a writ of *mandamus*, duly verified, was filed by the plaintiff according to the statute. On the return day in apt time the defendant filed a petition for removal of the proceeding to the District Court of the United States for the Western District of North Carolina. The petition was in due form, accompanied by the proper bond and in all respects regular. The judge denied the motion to remove, and the defendant appealed.

Brooks & Kelly and Roberson & Dalton for Public Service Company.
Charles A. Hines for city of Greensboro.
Dred Peacock for city of High Point.
Cansler & Cansler, Broadhurst & Cox, W. P. Bynum, and W. S. O'B. Robinson, Jr., for defendant.

BROWN, J. The motion to remove this cause to the Federal Court is based upon the contention that this proceeding, while denominated a petition for a writ of *mandamus*, is in fact a "suit of a civil nature at common law or in equity," of which the Federal Court has jurisdiction.

It seems to be well settled that a proceeding for a writ of *mandamus* in a State court is not a suit of a civil nature at law or in equity which can be removed from the State to the Federal Courts. 18 R. C. L., sec. 6. This is the decision of the Supreme Court of the United States in *Rosenbaum v. Bauer*, 30 Law Ed., p. 744. The question, then, to be considered is, Is this in fact a *mandamus* proceeding?

The record discloses that this is not an ordinary action returnable to term time in the manner prescribed by law for civil action. It seems to have been brought by law in strict accordance with the provisions of the statute regulating proceedings in *mandamus*. Pell's Revisal, secs. 822-824.

An examination of the complaint discloses that the cause of action is one for the enforcement of which *mandamus* has been held to be the proper remedy. Briefly stated, the plaintiffs allege substantially that the defendant is under legal obligations to furnish them electric current as a public-service corporation engaged in furnishing electric current to the public.

The reciprocal rights and duties, liabilities and allegations between the North Carolina Public Service Corporation and the Southern Power Company are set out in the opinion of this Court in 179 N. C., 19, and in the opinion of the Court upon a rehearing of the same case, 179 N. C., 30. It is not necessary to go into that matter now as the allegations of the petition, for writ of *mandamus* must be taken to be true so far as this matter for removal is concerned. The substance of this petition is that the defendant is now furnishing plaintiff with electric current, but has notified plaintiffs that it will cease to do so on and after 1 January, 1921. Plaintiffs aver that it is the legal duty of the defendant to continue to furnish the said current after 1 January, and upon such reasonable terms and rates as may be fixed by the Corporation Commission in case the parties fail to agree among themselves. Plaintiffs aver that this duty which the defendant has assumed, a public-service corporation under the laws of North Carolina, is a continuous duty, and that the defendant may be compelled to perform it by writ of *mandamus*. The prayer of the petition is as follows:

"Wherefore, plaintiffs pray for a writ of *mandamus* against the defendant power company to compel it to continue to furnish electric current and power to the public-service company through its substations at Greensboro and High Point, to operate the street car lines in both said cities, and for the use and benefit of the municipalities and the

citizens thereof for light and power, as is now being furnished, and for the cost of this proceeding, but for no other relief."

It is well settled under the decisions of this Court that *mandamus* is a proper remedy to compel a public-service corporation to perform its duties for the benefit of the public. In *Tel. Co. v. Tel. Co.*, 159 N. C., 17, the difference between a *mandamus* and a mandatory injunction is clearly stated as follows:

"In regard to the form of remedy available, where, as in this State, the same court is vested with both legal and equitable jurisdiction, there is very little difference in its practical results between proceedings in *mandamus* and by mandatory injunction, the former being permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature and in the enforcement of rights which solely concern individuals. High on Injunctions (4 ed.), sec. 2. Owing to the public interests involved, in controversies of this character, it is generally held that *mandamus* may be properly resorted to, *Godwin v. Tel. Co., supra; Commercial Union v. Tel. Co., supra; Mahan v. Tel. Co.*, 132 Md., 242; *Yancy v. Tel. Co.*, 81 Ark., 486."

In *Walls v. Strickland*, 174 N. C., 298, it is said by *Justice Allen:* "It was then held that the telephone companies serving the public must discharge their duties impartially and without discrimination, and that the right of *mandamus* issued by the courts was the proper remedy to enforce the performance of the duty."

It is contended, however, by the defendant that a writ of *mandamus* can only issue against a public-service corporation to secure the performance of a duty which it has failed to perform and will not lie to compel the performance of a continuous duty. It is insisted that there has been no actual default, and that there will not be at best until the first of January, 1921, and that the question involved is at best a moot question.

We admit that the general rule is that *mandamus* will not ordinarily lie in anticipation of a supposed omission of duty, and that in this case the omission of duty will not occur until 1 January.

Referring to this precise question, after stating the general rule, it is said in 18 R. C. L., p. 132, sec. 36, that, "This, however, is a general rule merely, and while *mandamus* will not ordinarily be available in advance of the time when the duty is to be performed, it is also recognized that extreme cases may well arise demanding the use of *mandamus* to control the performance of prospective duties."

The defendant contends that while it has notified the city and the plaintiff that it owed it no duty to continue to furnish light and power, and would discontinue same on 1 January next, that still for the pur-

poses of this action it might change its mind, and that therefore the Court is dealing with a moot question. This same defense was recently interposed by a light company in the State of Wisconsin. *Milwaukee v. Electric Ry.,* 144 Wis., 386. This was also a *mandamus* proceeding to compel the street railway company to sprinkle the streets between 1 April and 1 November, and the action was brought before the sprinkling season began. The Court states in this case that the defendant, among other things, expressly contended "that *mandamus* will not lie to enforce the performance of a continuous act, and that it will not lie because the case presents a moot question only." After disposing of other contentions, the Court continuing, says:

"Neither do we see any good reason for saying that relief should not be afforded by *mandamus* because the duty to sprinkle is a continuous one. If the legal duty on the part of the appellant is clear, the relator should not be denied an appropriate remedy because the right sought to be enforced is not of a temporary nature. There can be no more objection to a court of law granting permanent relief by *mandamus* in an appropriate action than there is to a court of equity granting relief in a proper case by a mandatory injunction. That *mandamus* will lie to enforce the performance of a continuous legal duty has been decided at least by inference in this Court. *S. v. Janesville St. R. Co.,* 87 Wis., 72. Such is the general current of authority elsewhere." (Citing numerous authorities.) "The contention that the case presents only a moot question we do not take seriously."

See, also, *Morrison v. Wrightson,* N. J., 22 L. R. A., p. 561. To the same effect is the decision of the Supreme Court of Colorado, 110 Pac., 197, in the case of *Berkey v. Commissioners,* citing *City of Austin v. Cahill,* 99 Tex., 172. This question was considered by the Supreme Court of Massachusetts in *Attorney-General v. Boston,* 123 Mass., 466. In that case the Court says: "Applications for writs of *mandamus* being addressed to the sound judicial discretion of the court, the circumstances of each case must be considered in determining whether a writ of *mandamus* shall be granted; and the court will not grant the writ unless satisfied that it is necessary to do so in order to secure the execution of the laws. But when the person or corporation against whom the writ is demanded has clearly manifested a determination to disobey the laws, the court is not obliged to wait until the evil is done before issuing the writ."

The case of *Missouri P. & R. Co. v. Larabie Flour Mill Co.,* 53 U. S. Law Ed., p. 359, involved a *mandamus* proceeding before the Supreme Court of Kansas, compelling the railroad company to transfer cars from another railroad company without discriminating in favor of other

concerns who were being similarly served. *Mr. Justice Brewer,* delivering the opinion of the Court, says:

"While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by *mandamus* or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Sante Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission or advisory board was necessary, for the duty arose from the fact that it was a common carrier. This was at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal services to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Indeed, all of these questions are disposed of by one established proposition, and that is, that a party engaging in the business of a common carrier is bound to treat all shippers alike, and can be compelled to do so by *mandamus* or other proper writ."

From a careful examination of the authorities, and of this Court's rulings in the past, we are satisfied that the defendant power company's contention that this proceeding should be construed to be a mandatory injunction and not a *mandamus* is untenable. The uniform procedure and practice of our courts has recognized the writ of *mandamus* as the proper and appropriate remedy in actions of this character, and it makes no difference that the duty which defendants owe the plaintiff is being denied today or unmistakably proposed to be denied tomorrow. Aside from the adjudicated cases and the procedure of our courts the defendant, by its letter of 8 January, 1920, to the plaintiff public-service company precludes it from controverting the fact that it has already denied and withdrawn any and all services to the plaintiffs as a public-service corporation. It clearly asserts that the current which it is now furnishing may be cut off at any time, and that it is only furnished as a matter of accommodation, and not in the performance of a public duty.

Thus it clearly appears that the defendant power company, while designating 1 January next as the time at which it will sever all connections and service to the plaintiffs, it has in fact asserted its present withdrawal from all obligations and duties owned as a public-service company to the plaintiff.

The current which is now being furnished is not furnished as a matter of right, but as a matter of accommodation. This we hold to be not only a denial but a present withdrawal of its public-service obligations to the plaintiff, and that this *mandamus* proceeding is properly instituted to obtain and enforce plaintiff's rights.

Affirmed.

WALKER, J., dissenting: This is an appeal by the defendant from the order of his Honor, Judge Ray, refusing to remove this case to the United States District Court for the Western District of North Carolina. His Honor found, as stated in the order, that the petition and bond for removal were in due form and in every respect legally sufficient, and that due notice of the petition and bond had been given the plaintiffs. The sole ground upon which his Honor refused to grant the petition is as stated in the order, "That the complaint filed herein by the plaintiffs states a case in which a writ of *mandamus* may properly issue and the United States District Court has therefore no original jurisdiction of such a case, and could not entertain jurisdiction of the action as set forth in the complaint by its removal from the State court, and that, therefore, this court has jurisdiction."

The action of the plaintiffs against the defendant is based upon two letters, each dated 8 January, 1920, from the defendant to the plaintiff, North Carolina Public Service Company, which appear on pages 24 and 27 of the record, and in which the defendant notified the plaintiff, North Carolina Public Service Company, that after 1 January, 1921, it would discontinue furnishing electricity to said North Carolina Public Service Company, for resale at Greensboro and High Point, offering in the meantime to let the public-service company have electricity at cost, the twelve months notice being given in order to afford the public-service company ample opportunity to equip itself in order to provide its own supply of electricity.

The complaint expressly alleges that the defendant is now discharging its public duty, as the same is alleged by the plaintiffs to exist, by selling current to the public-service company at wholesale for the benefit of said municipalities and their citizens.

The object and a purpose of the action is, as stated in the complaint, to prevent the defendant from cutting off and discontinuing service to the public-service company at Greensboro and High Point, after 1 January, 1921; to prevent the defendant from leaving both cities in darkness, and to prevent the stopping of the street car service, and to protect the valuable property rights which the two cities hold under existing contracts, which they now have with their coplaintiff for lighting their streets and other places, and in every way possible to protect the citizens against loss and damages from such an action.

The grounds upon which the relief sought is claimed is as stated in the complaint, that if the defendant power company is permitted to cut off its current and discontinue furnishing the same to the public-service company for the operation of its street cars and for lighting the streets of Greensboro and High Point untold and irreparable damage will result to the plaintiffs and the inhabitants of said cities, and paraly-

sis of business will follow. The relief prayed is that defendant be compelled to continue furnishing electric current and power to the public-service company through its substations at Greensboro and High Point for the purpose of operating their street car lines in both cities, and for the use and benefit of the municipalities and the citizens thereof, for light and power, as is now being furnished.

The plaintiffs contend that this is a proceeding for a writ of *mandamus,* and that, the United States District Court having no original jurisdiction of a proceedings for a writ of *mandamus,* the case cannot be removed to that Court; and, as will appear from his Honor's order, it was upon this ground alone that his Honor refused to remove the case to the United States District Court.

It is conceded by the defendant that the United States District Court has no original jurisdiction of a proceeding for a writ of *mandamus,* and if this be such a proceeding, and nothing else, the order refusing to remove the case was properly made, and this appeal must fail.

Bath County v. Amy, 13 Wall., 244; 20 L. Ed., 539, is probably the leading case holding that the Federal Courts have no original jurisdiction of a proceeding for a writ of *mandamus.* The reason of the ruling as there stated by *Mr. Justice Strong* was, that *mandamus* does not fairly come within the words of the Judiciary Act of 1789 (1 Stat. at Large, 73), conferring jurisdiction upon the Federal Court, which are, "All suits of a civil nature at common law, or in equity," etc., because it was not at common law a private remedy to enforce simple common-law rights between individuals, but was a high prerogative writ issuing in the King's name only from the Court of King's Bench, requiring the performance of some act or duty which it had previously determined to be consonant with right and justice. It is admitted that the power to issue such writs was given by sec. 14, with the restriction that they should be necessary to the exercise of the jurisdiction already given. If the Federal Courts have jurisdiction to issue the writ of *mandamus,* and we treat this case as an application for the same, it would be removable without a doubt, and this would necessarily follow from the plaintiff's own contention, but they have no such jurisdiction (*Rosenbaum v. Bauer,* 120 U. S., 450), and, if they had, the writ could not issue in a case like this one, as we will see hereafter, when there is no present or existing failure by defendant to perform its duty to the public, or to the plaintiffs.

The action of the plaintiffs is not a proceeding for a writ of *mandamus* but, on the contrary, is a suit for a mandatory injunction to compel the defendant to continue to furnish electricity to the plaintiffs, for the purpose stated in the complaint, and being such a suit, the United States District Court clearly has jurisdiction of it, and his Honor erred in refusing to grant the petition to remove.

Although the plaintiffs, by the use of the word *"mandamus,"* have sought to denominate this suit a proceeding for a writ of *mandamus*, yet the court will disregard the mere name by which the plaintiffs have undertaken to call the proceeding and look at its real nature, as disclosed by the facts alleged, the object sought to be attained, and the relief actually prayed, and when this is done, it clearly appears, upon the face of the complaint, that it is not a proceeding for a writ of *mandamus*, but a suit for a mandatory injunction. *Mandamus* is a remedial writ at law, and, in order for it to lie, there must have been an actual default on the part of the defendant, and it will never be granted in anticipation of an omission of duty; wherein lies the distinction between it and an injunction, which is a preventive remedy in equity, usually invoked to prevent threatened injury or omission of duty. So far from the complaint in this case showing that the defendant has been guilty of any actual default or present omission of duty, it is expressly alleged (bottom of page 16 and top of page 17 of the record) that the defendant is now discharging its public duty (the duty alleged by the plaintiffs to be due them, and the future neglect of which they seek to prevent) by selling current to the public-service company at wholesale for the use and benefit of the said municipalities and their citizens, and to their satisfaction; and the purpose and object of the action is, as stated in paragraphs 31 and 33 of the complaint, to prevent the defendant from discontinuing the furnishing of electricity to the plaintiffs, which it is alleged would result in untold and irreparable damage. The prayer of the complaint is to compel the defendant to continue to furnish such electricity as is now being furnished. The defendant does not contend that the action of the plaintiffs should be dismissed simply because they have used the wrong name to describe their remedy, nor does the position of the defendant involve any such result; but the defendant does contend that the court must look at the facts alleged, the object sought to be attained, and the actual relief prayed in order to ascertain the real character of the action, and having ascertained its real character, must treat it accordingly. The defendant contends that the jurisdiction of courts of equity to enforce the performance of their public duties by public-service corporations, through the medium of a mandatory injunction, is well recognized, and that where there has been no actual default in the performance of such public duties, but only a threatened omission of the duty, mandatory injunction is the only available remedy, and that the Federal Courts have repeatedly exercised original jurisdiction of such actions as the one here presented. If the real nature of the action is equitable, *i. e.*, one for a mandatory injunction instead of a proceeding for a writ of *mandamus*, as the distinction is recognized at common law, in the light of which distinction the terms

of the acts of Congress conferring jurisdiction on the Federal Courts must be construed, then even conceding that the State Court might, under the code of practice prevailing in the State, award the plaintiff the relief sought in this action in a proceeding which the State Court would permit to be brought and described as a proceeding for a writ of *mandamus,* the Federal Court cannot, upon this ground, or for this reason, be deprived of its jurisdiction of the action, if jurisdiction in fact exists under the acts of Congress, because the real issue presented upon this appeal is not what relief the State Court will grant in a proceeding brought or permitted, under the State practice, and described as a *mandamus,* but whether the Federal Court has jurisdiction of the action presented by the complaint of the plaintiffs; since, if the Federal Court in fact has jurisdiction of the action, the State is powerless, either through its Courts or by legislation, in any way or to any extent to limit, restrict, or abridge the jurisdiction of the Federal Courts, as conferred by the acts of Congress. It being admitted that this case has been duly docketed in the Federal Court, and is now pending there, comity between the two Courts suggests that this Court reverse the order of his Honor, Judge Ray, and leave the question here presented to be determined by the Federal Court upon a motion to remand, especially since the only question presented is the Federal one, as to whether the Federal Court has jurisdiction of this action, which is a question primarily and peculiarly proper to be determined by the Federal Court rather than by this Court. But we do not mean to intimate that the State Court should relinquish its possession of the cause unless it determines first that a removal cause is presented in the petition, and the suggestion just made is based upon our clear conviction that such a case is stated by the defendant. But treating this as an application for a *mandamus,* for the sake of the argument, we will pursue the discussion under that head a little further. *Mandamus* will not lie unless there has been an actual default on the part of the defendant, nor will it ever be granted in anticipation of an omission of duty. This proposition of law is based upon a fundamental distinction between law and equity jurisprudence, and is uniformly recognized and applied. As this principle is so important in these cases to be clearly understood and established as a determinative one, we may be indulged to quote from the highest authorities at some length. In High's Extraordinary Legal Remedies, sec. 6: "A comparison of the writ of *mandamus,* as now used both in England and America, with the writ of injunction, discloses certain striking points of resemblance as well as of divergence in the two writs. Both are extraordinary remedies, the one the principal extraordinary remedy of courts of equity, the other of courts of law, and both are granted only in extraordinary cases, where otherwise these

courts would be powerless to administer relief. Both, too, are dependent to a certain extent upon the exercise of a wise judicial discretion, and not grantable as of absolute right in all cases. It is only when we come to consider the object and purpose of the two writs that the most striking points of divergence are presented. An injunction is essentially a preventive remedy, *mandamus* a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and to enforce inaction, those of a *mandamus* to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, *mandamus* as an active one. The former preserves matters *in status quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is therefore a positive or remedial process, the other a negative or preventive one."

In Tapping on Mandamus, marginal page 10, it is said: "A *mandamus* will not be granted in anticipation of a defect of duty or error of conduct."

In Spelling on Injunctions and Other Extraordinary Remedies, sec. 1385: "*Mandamus* cannot be given effect prospectively. A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and until the time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default. The law does not contemplate such a degree of diligence as the performance of a duty not yet due. The general rule is that the writ will not be granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person sought to be coerced by the writ will refuse performance at the proper time. An important reason for refusing the writ in such cases is that, until the duty is due, no practical question can be presented to the court, but simply a supposed case." In *Ex parte Cutting*, 94 U. S., p. 14, *Chief Justice Waite* said: "The office of a *mandamus* is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such performance, and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default."

In *Board of Liquidation v. McComb*, 92 U. S., 531, *Mr. Justice Bradley* very clearly stated the distinction between a *mandamus* and an injunction, as follows: "It has been well settled that when an official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such a duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which

adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are somewhat correlative to each other."

In the case cited the action was brought in the Circuit Court of the United States for a perpetual injunction to restrain the Board of Liquidation of the State of Louisiana from using the bonds, known as consolidated bonds of the State, for the liquidation of certain debts claimed to be due from the State to the Louisiana Levee Company, or from using any other State bonds in payment of said pretended debt, and the jurisdiction of the Circuit Court over the action was sustained. In *Lyon v. Comrs.*, 120 N. C., 243, it is said: "*Mandamus* is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a *present* clear, legal right to the thing claimed, and that it is a duty of the defendants to render it to him. *Brown v. Turner*, 70 N. C., 93."

In *Scott v. Singleton*, 171 Ky., 117; 188 S. W., 302, the Court held: "Mandatory injunction is the only available and proper remedy for requiring the county clerk to prepare for a municipal primary election, the duty not devolving on him under Ky. St., sec. 3235-c, subsec. 6, till ten days before the election, *mandamus* not being grantable in anticipation of an omission of duty, *but only after actual default.*" The Court then advances conclusive reasons why the contention of the defendant there, and the plaintiff here, should not prevail.

In *Board of Education v. Hunter, Treasurer*, 87 N. W., p. 485, the proceeding was a *mandamus* to compel the city treasurer to set aside school taxes immediately after paying the city tax and before setting aside any sums for other purposes. In denying the relief prayed, because there had been no actual default on the part of defendant, the Supreme Court of Wisconsin, through *Mr. Justice Winslow*, said: "The general principle is frequently stated that *mandamus* will not lie to compel performance of an act by a public officer unless the act be due, that is actually due from the officer at the time of the application. Until the time arrives when the duty should be performed, there is no default of duty; and mere threats not to perform the duty will not take the place of default. The writ is not granted to take effect prospectively. Spell. Extr. Remedies, sec. 1385; High, Extra. Rem. (3 ed.), secs. 12, 36; Tapp., Mand., p. 10; Wood Mand. (2 ed.), p. 51; 14 Am. and Eng. Law (1 ed.), p. 105."

This so clearly and emphatically conforms to what seems to be the universal rule, as we have stated it, that it would add nothing to the strength of our position should we continue to quote from many other decisions of Federal and State Courts. We will therefore content ourselves with merely citing some of the authorities upon this feature of the

case. *R. R. v. Thompson,* 55 Texas Civil Appeals; 118 S. W., 618; *Northwestern Warehouse Co. v. O. R. & Nav. Co.,* 32 Wash., 218; High on Extra. Legal Remedies (3 ed.), sec. 12, where many cases are collected. They are all to the effect that no person can be compelled by *mandamus* to render a particular service till he had been given at least an opportunity to perform it, nor can another claim that he has been deprived of a service till he has placed himself in a situation to make an immediate demand for its performance. The writ will not issue to protect an anticipated omission of duty, but it must appear that there has been actual default of a clear legal duty then due at the hands of the party against whom the relief is sought. The complaint in the case shows that there has been no actual default on the part of the defendant, but there is only the statement that the defendant will, after 1 January, 1921, discontinue furnishing electricity to the plaintiffs, and the plaintiffs' action is, therefore, in fact and effect, a suit for mandatory injunction to compel defendant to continue to furnish them electricity after 1 January, 1921, and not a proceeding for a writ of *mandamus.* We have already referred to the allegations of the plaintiffs' complaint, which shows the above stated proposition to be true. After setting forth the prior negotiations and dealings between the parties, it is alleged in paragraph 24 of the complaint (bottom of page 16 and top of page 17 of the record) that, "It (the defendant) is now discharging this public duty (the public duty claimed by the plaintiffs to be owing to them by the defendant, and for the continued performance of which this action is brought) by selling current to the public-service company at wholesale, for the use and benefit of said municipalities and their citizens to their satisfaction." The prayer for relief is "to compel it (the defendant) to continue to furnish electric current and power to the public-service company, through its substations at Greensboro and High Point, to operate the street car lines in both said cities, and for the use and benefit of the municipalities and the citizens thereof, for light and power as is now being furnished." Thus it clearly appears from the complaint that there has been no actual default on the part of the defendant, and the entire action of the plaintiffs is predicated solely upon the avowed purpose of the defendant to discontinue furnishing electricity to the plaintiffs as it is now furnishing same, after 1 January, 1921, and the object of the action is to prevent the defendant from putting its purpose to discontinue service into effect. The complaint, therefore, clearly shows that the action of the plaintiffs is essentially one for an injunction. The object of the action is stated in paragraph 31 as follows: "To prevent the defendant from putting both cities in darkness, and to prevent the stopping of the street car service and to protect the valuable property rights which the two cities hold under existing contracts, which

they have now with their coplaintiff, for lighting their streets and other service, and in every way possible to protect the citizens against loss and damage by such an act." In paragraph 33 of the complaint the grounds upon which an injunction is asked are stated as follows: "That if the defendant power company is permitted to cut off its current and discontinue furnishing same to the public-service company to operate its street cars and to light the streets of Greensboro and High Point, and to furnish the citizens thereof with light and power, untold and irreparable damage will result to the plaintiffs and the citizens of said cities, and stagnation of business will follow." The plaintiffs forgot that "untold and irreparable damage" is the favorite reason in equity for granting injunctive relief. The calling of the remedy they seek a *"mandamus"* does not make it so. It is what in law it really is that determines its nature, nor does the expression finally used by plaintiffs, when they pray for a *mandamus,* namely, "but for no other relief," change the result. It is not the form but the substance of the relief that controls. Under our procedure the courts grant that relief to which the plaintiff entitles himself by the allegations of his complaint, and not by the form of his prayer. If he mistakes his remedy or relief, the courts will give him appropriate relief notwithstanding. Many of our cases support this proposition, but *Knight v. Houghtalling,* 85 N. C., 17, especially at 34, leads in the long array of cases, where *Chief Justice Ruffin,* who delivered the opinion for the Court, said: "We have not failed to observe that the answer of the defendant contains but a single prayer for relief, and that for a rescission of their contract. But we understand that, under the Code system, the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and the facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proof. In other words, the Code has adopted the old equity practice when granting relief under a general prayer, except that now no general prayer need be expressed in the pleadings, but is always implied." The case of *Whitfield v. Cates,* 59 N. C., 136, furnishes an instance where a plaintiff, though he failed as to his principal equity, was allowed to avail himself of a secondary equity not inconsistent with the allegations in his bill and the proofs in the cause. Numerous citations of *Knight v. Houghtalling, supra,* will be found in the annotated edition of 85 N. C., 17, and among them are the following: *Voorhees v. Porter,* 134 N. C., 591; *Staton v. Webb,* 137 N. C., 42; *Bradburn v. Roberts,* 148 N. C., 218; *Councill v. Bailey,* 154 N. C., 57, and 60; *Silk Co. v. Spinning Co., ib.,* 422, and more recently, *Bryan v. Canady,* 169 N. C., 579. In *Bradburn v. Roberts, supra,* the Court said: "Under our Code system

it is not required that a party should be confined to the specific relief which he demands. *Knight v. Houghtalling,* 85 N. C., 17. In *Voorhees v. Porter,* 134 N. C., at p. 595, this Court said: 'We hear the case upon the facts alleged in the pleadings, and if the plaintiffs have set forth in their complaint such facts as entitle them to relief they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional and different relief which is not inconsistent with the facts so alleged in their complaint, it being the pleadings and the facts proved which determine the measure of relief to be administered.' And at page 597 it is said: 'We find it to be well settled by the decisions of this Court that if the plaintiff in his complaint states facts sufficient to entitle him to any relief, this Court will grant it, though there may be no formal prayer corresponding with the allegations, and even though relief of another kind may be demanded.' *Knight v. Houghtalling, supra; Gillam v. Ins. Co.,* 121 N. C., 369." In the case last cited, *Clark, J.,* for the Court, says: "Under the Code, the demand for relief is immaterial, and the Court will give any judgment justified by the pleadings and proof," citing numerous cases. Clark's Code (3 ed.), p. 584, and notes to section 425. But this substantially is but the equity rule, as shown in *Bradburn v. Roberts, supra; Councill v. Bailey, supra,* and *Kansas v. Colorado,* 85 U. S., 145; *Jones v. Van Doren,* 130 U. S., 692; Daniels Ch. Pr. (4 Am. Ed.), 380; *English v. Foxall,* 3 Peters (U. S.), 595; *Texas v. White,* 10 Wall., 68; *Stevens v. Gladding,* 58 U. S. (17 How.), at p. 455. It has been suggested at this stage of the argument that defendant does not demur or move to dismiss plaintiffs' action because it desires the case to be heard upon its merits, as soon as possible, as it affects not only private but public interests, and it is further asserted that, by proper application in the United States District Court, where the record of this case has been duly certified, filed, and docketed, the defendant can, by proper application to the Federal Court, have an injunction to protect its rights until a final adjudication of the cause, but it seems it has resorted to no such proceeding, and we do not consider it, as it is not before us.

We now proceed, in the full development of the argument, to consider as next in order the proposition that the courts of equity have jurisdiction to enforce performance of the duties of public-service corporations, by means of mandatory injunctions, and where there has been no actual default, but only a threatened omission of duty, mandatory injunction is the only available remedy and, under this head of equity jurisdiction, the Federal Courts of equity have repeatedly exercised jurisdiction of suits of the character here presented. The Federal Judicial Code of 1911, sec. 24, confers jurisdiction upon the District Courts, as follows: "The District Courts shall have original jurisdiction . . . of all

suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars ($3,000), and . . . between citizens of different States." It has been repeatedly held that the statute confers original jurisdiction upon the Federal Courts of suits, identical in character with the one here presented, and this being true, it clearly follows that his Honor was in error in refusing to order the removal of this case to the Federal Court. The sole ground upon which his Honor refused to remove the case is as stated in the order, "that the United States District Court, therefore, has no original jurisdiction of such a case, and could not entertain jurisdiction of the action as set forth in the complaint." In other words, his Honor held that it would be futile to remove the case to the Federal Court, because if removed there would be nothing for the Federal Court to do but to remand it to the State Court for want of jurisdiction. We repeat, therefore, that the crux of the case is whether under the acts of Congress the Federal Court has original jurisdiction of the action presented by the complaint of the plaintiffs; and we submit that the following authorities show beyond a shadow of doubt that the Federal Court has such jurisdiction.

In *Ex parte Lennon,* 166 U. S., 549; 41 L. Ed., 1110, suit was brought by the Toledo, etc., Railway Company against the Ann Arbor Central Railroad Company, and other companies, to enjoin the defendants from discontinuing the interchange of traffic and freight with the plaintiff railway company, as the same had theretofore been interchanged, the defendant companies having threatened to discontinue such interchanging. Upon the question of jurisdiction, the case is on all fours with the case presented upon this appeal. The case cited was to prevent the discontinuance of the interchange of freight and traffic. The case at bar is to prevent the discontinuance of the interchange of electricity.

The question of the original jurisdiction of the Circuit Court over the case was presented to the Supreme Court of the United States upon a petition to relieve Lennon from custody for contempt in disobeying the injunction which the Circuit Court had granted. In sustaining the original jurisdiction of the Circuit Court, the Supreme Court of the United States said: "There could be no doubt of the power of the Court to grant this injunction, which bore solely upon the relations of the railway companies to each other. It was alleged in the bill to have been a part of the regular business of the defendant roads to interchange traffic with the Ann Arbor road, and the injunction was sought to prevent an arbitrary discontinuance of this custom. Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But

it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of a case demand it, citing *Robinson v. Bryon,* 1 Bro. C. C., 587; *Harvey v. Smith,* 1 Kay & J., 389; *Beadel v. Perry,* L. R., 3 Eq., 465; *Witecar v. Mechenor,* 37 N. J. Eq., 60; *Brooms v. New York & N. J. Teleph. Co.,* 42 N. J. Eq., 141."

Hines v. Heneghan (C. C. A., 4th Circuit), recently decided by the Circuit Court of Appeals of this circuit, and reported in the advance sheets of the Federal Reporter for 9 September, 1920, which has become available since the decision of Judge Ray, is also upon the question of jurisdiction, closely analogous to the case at bar. The nature of the case will appear from the following quotation from *Judge Pritchard's* opinion: "This suit was instituted in the District Court of the United States for the Northern District of West Virginia. It arose upon a bill in equity by Henegan & Hanlon, appellees, to restrain the threatened action of Walker D. Hines, Director General of Railroads, and the Baltimore & Ohio Railroad Company, to discontinue service to and from the siding at the plant of Henegan & Hanlon at Cornwallis, West Virginia." The Court held that it clearly had jurisdiction of the suit, and the injunction sought was granted, subject to certain limitations.

In *Coe v. L. & N. Railroad Co.,* 3 Federal Reporter, p. 775, the defendant railroad company had notified the complainant that after a date named it would discontinue the delivery of livestock at the complainant's stockyard in Nashville, and the suit was a bill in equity by complainant to restrain this threatened action on the part of the defendant. The jurisdiction of the Court to grant the injunction was sustained and the opinion of the Court is in part as follows: But defendant, protesting that the proposed discrimination in favor of the Union Stockyard Company, if executed, constitutes no wrong of which complainants ought justly to complain, contends: First, that complainants, even supposing the law to be otherwise, have an adequate remedy at law, and therefore cannot have any relief from a court of chancery; and second, that if a chancery court may entertain jurisdiction, no relief in the nature of a mandatory order to compel defendant to continue accommodations to the complainants ought to be made until the final hearing. If such is the law it must be so administered. But we do not concur in this interpretation of the adjudications. Those cited in argument are not, we think, applicable to the facts of this case. It was there said, in the opinion of the Court, that there was no adequate remedy at law, and to avoid a multiplicity of suits for damage, which might be ruinous to the plaintiff, the Federal Court, on its equity side, would proceed by mandatory injunction to award the proper relief. It also fully

answered the contention that the injunction, in its mandatory form, should not issue until the final hearing by saying: "One other point remains to be noticed. Ought a mandatory order to issue upon this preliminary application? Certainly not, unless the urgency of the case demand it, and the right of the parties are free from reasonable doubt. The duty which the complainants seek by this suit to enforce is one imposed and defined by law—a duty of which the Court has judicial knowledge. The injunction compelling its performance, pending the controversy, can do defendant no harm; whereas a suspension of accommodations would work inevitable and irreparable mischief to complainants. The injunction prayed for will, therefore, be issued." We think the *Coe case* is closely analogous to the one at bar, and seems to be decisive of it.

The *"Express cases,"* 117 U. S., p. 1; 29 L. Ed., 791, which is probably the most famous litigation of the character presented by this action, arose upon a bill in equity by the express companies against the railroad companies, filed in the Federal Court, to restrain the railroad companies from discontinuing service to the express companies. *Chief Justice Waite's* opinion opens with a description of the case, as follows: "These suits present substantially the same questions, and may be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company." The Court disapproved the bills on their merits (or rather their demerits), but never for a moment questioned the jurisdiction of the Court to grant the relief prayed, if it could be founded on any recognized equity. It ruled that without a statute, or a contract to that effect, the express companies could not demand of the railroad companies the facilities for carrying their packages on the latter's cars. Neither the *Chief Justice* nor the dissenting *Justices* (*Miller* and *Field*) ever suggested a want of jurisdiction, and the *Chief Justice,* at page 27, virtually conceded the same.

If, as contended, the real nature of this action is equitable, *i. e.,* one for mandatory injunction instead of a proceeding for a writ of *mandamus,* as the distinction was recognized at common law, in the light of which the terms of the acts of Congress conferring jurisdiction upon the Federal Courts must be construed, then even conceding that the State Court might, under the State practice, disregard the distinction between a *mandamus* and a mandatory injunction and award the plaintiffs the relief sought in an action in the form of, or described as *mandamus,* the Federal Court cannot, for this reason or upon this ground, be deprived of jurisdiction of this action, if in fact jurisdiction exists under the acts

of Congress, because the real issue presented upon this appeal is not what relief the State Court will award in an action in the form of a *mandamus*, since this is merely a matter of State practice over which the State law is supreme; but whether the Federal Court has jurisdiction of the action, as presented in the complaint of the plaintiffs, which is a Federal question, over which the Federal law is supreme, with the result that the State, either through its Legislature or its courts, is powerless to control the determination of such question, or to limit, restrict, or abridge such jurisdiction. We frankly concede, at least for the sake or argument, that in States where the code practice prevails little attention is given to the distinction between proceedings in *mandamus* and mandatory injunction, decisions may be cited in which State Courts are found granting relief in proceedings in the form of *mandamus* in advance of actual default by the defendant, contrary to the distinction and resulting rule, as recognized at common law. It must be borne in mind that our State Courts are not hampered or restricted, as are the Federal Courts, by the Federal Judiciary Act. Thus, in *Tel. Co. v. Tel. Co.*, 159 N. C., 17, *Justice Hoke* says: "As to the form of remedy available where, as in this State, the same court is vested with both legal and equitable jurisdiction there is very little difference in its practical results between proceedings in *mandamus* and mandatory injunction, the former being permissible when the action is to enforce the performance of duties existent for the benefit of the public, and the latter being confined usually to causes of an equitable nature, and in the enforcement of rights which solely concern individuals. But clearly the issue presented on this appeal is not what relief the State Court, under its practice, will grant in a proceeding in the form of *mandamus*. This is merely a matter of State practice, wherein the State Court may follow such course as it deems wise, or as the State law may permit. The question here presented is whether the Federal Court, under the acts of Congress, has original jurisdiction of the case presented by the complaint of the plaintiffs. This is a Federal question, which must be determined upon a consideration of Federal laws, independent of State rules. The distinction between law and equity is still preserved in the Federal Courts, and must be preserved under the Constitution of the United States. That the jurisdiction of the Federal Courts cannot be so affected, as to be impaired by State legislation, is clearly demonstrated by *Chief Justice Tanery* in 11 Howard, 669 (13 L. Ed., 859), and in *Thompson v. Central Ohio Railway Company*, 73 U. S., 134, where it was said, that is, in the latter case: "The Constitution of the United States and the acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of

the State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles. *Robinson v. Chappell,* 3 Wheat., 212. 'And although the forms of proceedings and practice in the State courts shall have been adopted in the Circuit Court of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit,' citing *Bennett v. Butterworth,* 11 How., 674." The Federal Court, in determining its jurisdiction, will disregard the name by which the plaintiffs have undertaken to describe their action, and also disregard the fact that they have undertaken to bring it as a proceeding at law instead of a suit in equity, and be controlled solely by the real nature of the action as disclosed by the pleadings. The acts of Congress of 3 March, 1915, ch. 90, provides: "That in case any of said courts shall find that a suit at law should have been brought in equity, or a suit in equity should have been brought at law, the court shall order an amendment to the pleadings, which may be necessary to conform them to their proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings." The extent to which the Federal Courts have gone in disregarding mere matters of form and description in determining questions of jurisdiction is shown by the several cases cited. The authorities which we have so far considered and cited clearly show that the United States District Court has original jurisdiction of the action presented in the complaint, and this being true, the State is powerless, either by legislation or through the practice prevailing in its courts, to restrict or abridge the jurisdiction of the Federal Court. In *Barrow v. Hunton,* 99 U. S., 80; 25 L. Ed., 407, *Mr. Justice Bradley* said: "If the State Legislature could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizens to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiae,* the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it." In *Mississippi Mills v. Cohn,* 150 U. S., 202; 37 L. Ed., 1052, *Mr. Justice Brewer* said: "It is well settled that the jurisdiction of the Federal Courts, sitting as courts of equity, is neither enlarged nor diminished by State legislation, though by it all difference in form of action be abolished; though all remedies be administered in a single action at law, so far at least as form is concerned,

all distinction between law and equity be ended, yet the jurisdiction of the Federal Courts, sitting as courts of equity, remains unchanged. Thus, in *Payne v. Hook,* 74 U. S., 7; Wall., 425, 430 (19: 260, 261), it was said, citing cases: "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equitable ones. The equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possess; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union.' . . . Without the assent of Congress, that jurisdiction cannot be impaired or diminished by the statutes of the several States regulating the practice of their own courts." In *Smyth v. Ames,* 169 U. S., 466; 42 L. Ed., 819, 838, *Mr. Justice Harlan* said: "One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of the right by reason of his being allowed to sue at law in the State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Court of the United States," citing *Kieley v. McGlynn,* 88 U. S.; 21 Wall., 503, 520; *Holland v. Challen,* 110 U. S., 15, 24; *Dick v. Foraker,* 155 U. S., 404, 415; *Bardon v. Land & River Improv. Co.,* 157 U. S., 327; *Rich v. Braxton,* 158 U. S., 375, 405. "But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction, citing *Payne v. Hook,* 74 U. S. (7 Wall., 425, 430); *McConihay v. Wright,* 121 U. S., 201, 205. If this position (as to the impotency of State legislation to interfere with, or curtail the jurisdiction of the Federal Courts) could be maintained, an important part of the jurisdiction conferred on those courts by the Constitution and the laws of Congress would be abrogated. A citizen of one State has the right to sue a citizen of another State in the courts of the United States, instead of resorting to a State tribunal, but of what value would that right be if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial result. But this objection to the jurisdiction of the Federal tribunals

has been heretofore presented to this Court, and overruled." In *Waterman v. Canal-Louisiana Bank & T. Co.,* 215 U. S., 33; 54 L. Ed., 80, *Mr. Justice Day,* referring to the former decision of the Court, said: "The general rule to be deduced from the cases in this Court is that, inasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that, in so far as controversies between citizens of different States arises which are within the established equity jurisdiction of the Federal Courts, which is like unto the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789 (1 Stat. at L., 73, ch. 20), the jurisdiction may be exercised, and is not subject to limitations or restraint by State legislation establishing other courts and giving them jurisdiction over similar matters. . . . In various forms these principles have been asserted in the following, among other cases, *Suydam v. Broadnax,* 14 Pet., 67; 10 L. Ed., 357; *Hyde v. Stone,* 20 How., 170, 175; 15 L. Ed., 874; *Green v. Creighton* (*Kendall v. Creighton*), 23 How., 90; 16 L. Ed., 419; *Payne v. Hook,* 7 Wall., 425; 19 L. Ed., 260; *Lawrence v. Nelson,* 143 U. S., 215; 36 L. Ed., 130; 12 Sup. Ct. Rep., 440; *Hayes v. Pratt,* 147 U. S., 557, 570; 37 L. Ed., 279, 284; 13 Sup. Ct. Rep., 503; *Byers v. McAuley,* 149 U. S., 608; 37 L. Ed., 867; 13 Supt. Ct. Rep., 906; and *Ingersoll v. Coram,* 211 U. S., 335; 53 L. Ed., 208; 29 Sup. Ct. Rep., 92, citing many other cases to the point."

In *Harrison v. St. Louis & S. F. R. Co.,* 232 U. S., 318, *Chief Justice White* said: "It may not be doubted that the judicial power of the United States, as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of State action, and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it." But nevertheless he cites many cases decided in the United States Supreme Court.

The case which seems to be the most destructive of the plaintiffs' contention, in this part of the discussion, is *Re the Jarnecke Ditch,* 69 Fed. Rep., 161, it being manifestly in line with all the cases in the highest Federal Court. The Court said there: "But the Legislature of the State cannot, by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the Federal Courts of jurisdiction, nor prevent a removal. A State Legislature, if the Constitution of the State does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine

questions of law and fact; and, if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only thing the Legislature of a State would have to do to entirely destroy the jurisdiction of the Federal Courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. *Neither the Legislature nor the courts of a State have the power, by giving new names to legal proceedings, to change their essential character.* Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the courts of the United States. *Railway Company v. Jones,* 29 Fed., 193, 196. From these considerations it follows that the decisions of the Supreme Court of the State are not controlling on the question now before the Court."

We need hardly consider the question as to the amount in controversy being sufficient to authorize the removal of the case to the United States District Court. This was not contested, nor was the sufficiency of the bond, the only matter in controversy being whether the Federal Court had jurisdiction in actions of *mandamus,* and the question as to the amount in controversy cannot be raised in the State Court, but belongs solely to the Federal Court. His Honor did not decline to remove the case upon the ground that the necessary jurisdictional amount was not involved, but, as stated in the order, solely upon the ground that in a proceeding for a *mandamus* the Federal Court has no original jurisdiction of the case. The petition for removal expressly alleges that the amount in controversy exceeds, exclusive of interest and cost, the sum of three thousand dollars ($3,000). If the plaintiffs desire to controvert this allegation, they can of course do so only in the Federal Court, upon a motion to remand. *Hyder v. R. R.,* 167 N. C., 587; *C. & O. Railroad Co. v. McCabe,* 213 U. S., 207 (53 L. Ed., 765).

There can be no doubt that the necessary jurisdictional amount is involved in this action. Montgomery's Manual of Federal Procedure (2 ed., sec. 174); *Bitterman v. L. & N. Railroad Co.,* 207 U. S., 204; *Glenwood L. & W. Co. v. Mutual L. H. & P. Co.,* 239 U. S., 121. It being admitted that this case has been duly docketed in the Federal Court, and is now pending for trial in that Court, comity between the Federal and State Courts strongly suggests that this Court reverse the order made by his Honor, Judge Ray, refusing to remove the case to the Federal Court, and leave the question of jurisdiction here presented to be determined by the Federal Court upon a motion to remand the case to the State Court, especially since the only question presented is the Federal question, as to whether the Federal Court has jurisdiction of this action, which is a question primarily and peculiarly proper to be

determined by the Federal Court, rather than by the State Court. In *Chesapeake & O. H. R. Co. v. McCabe,* 213 U. S., 217; 53 L. Ed., 765, *Justice Day,* after reviewing the former decisions of the Court, said: "From these decisions it is apparent that while the petitioner, in the event of an adverse decision in the State Court, may remain in that Court, and, after a final judgment therein, bring the case here for review, he is not obliged to do so. He may file the record in the Circuit Court of the United States, as was said by *Mr. Chief Justice Waite,* while the case is going on in the State Court. The Federal statutes then gives to the United States Circuit Court jurisdiction to determine the question of removability, and it has the power, not given to the State Court, to protect its Revised Statutes (U. S. Comp. State, 1901, page 581) by an injunction against further proceedings in the State courts. *Madisonville Traction Co. v. St. Bernard Min. Co.,* 196 U. S., 239. In order to prevent unseemly conflict of jurisdiction it would seem that the State Court in such cases should withhold its further exercise of jurisdiction until the decision of the Circuit Court of the United States is reviewed in this Court. If the Federal jurisdiction is not sustained, the case will be remanded with instructions that it be sent back to the State Court as if no removal had been had. *Baltimore & O. R. Co. v. Koontz, supra.*"

In *Hollifield v. Tel. Co.,* 172 N. C., 720, the Court said: "We have uniformly decided in this Court that, when a verified petition contains facts sufficient under the law to entitle the applicant to a removal is filed, and is accompanied by a proper bond, the jurisdiction of the State Court is at an end, and that the issues of fact, if properly raised by the petition and papers in the cause, are to be tried and determined by the Federal Court and not by the State Court in which the action was brought. *Herrick v. R. R.,* 158 N. C., 307; *Lloyd v. R. R.,* 162 N. C., 485; *R. R. v. McCabe,* 213 U. S., 207; *Wecker v. National Enameling Co.,* 204 U. S., 176." In *Hyder v. R. R.,* 167 N. C., 587, the Court said: "The fact that the plaintiff alleged in his complaint that the Southern Railway Company was a domestic corporation, and also alleged the facts out of which he contends such corporate existence arose, makes this a different case from the *Hurst case* or the *Ice and Coal Co. case* above referred to; but even if that were not true, and if plaintiff had alleged directly, without stating the facts, that the Southern Railway Company was a domestic corporation and a citizen and resident of the State of North Carolina, when the defendant appeared, filed its petition to remove, and alleged that it was a citizen and resident of the State of Virginia, then a question arose which was determinable only by the United States Court. *Herrick v. R. R.,* 158 N. C., 310, and also the several cases cited in *Hurst v. R. R.,* 162 N. C., 368." *Justice Allen*

said, in *Cogdill v. Clayton,* 170 N. C., 528: "If the facts alleged in the petition are sufficient to justify a removal, it is the duty of the courts of the State to make the order for the removal, and it is for the Federal Court to inquire into and determine the truth of the facts alleged upon a motion by the plaintiff in the Federal Court to remove to the State Court. *Herrick v. R. R.,* 158 N. C., 307; *Rea v. Mirror Co.,* 158 N. C., 28; *Hyder v. R. R.,* 167 N. C., 588; *R. R. v. Cockrill,* 232 U. S., 146." *Justice Hoke* said, in *Lloyd v. R. R.,* 162 N. C., 494: "It is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and the same contains facts sufficient to require a removal under the law, the jurisdiction of the State Court is at an end. And in such case it is not for the State Court to pass upon or decide the issues of facts so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. R. R.,* 158 N. C., 307; *Chesapeake v. McCabe,* 213 U. S., 207; *Wecker v. National Enameling Co.,* 204 U. S., 176," etc.

We have discussed this case somewhat at length because of the great importance of the question at issue between the parties. We have made our citations to the decisions of the Federal Court of last resort, which must finally decide the matter, and to which we owe submission, under the Constitution of the United States, and under our own. Art I, sec. 5. When an application of removal of his case to the proper Federal Court complies with the formalities required by the act of Congress, he is entitled to have it transferred to that Court for trial, and the jurisdiction of the State Court, when it is pending thereunder, immediately ceases, and it has no right to proceed further in it unless for the purpose of granting the main relief or any ancillary remedy, as it has lost entirely all jurisdiction of it. When the highest Federal Court has decided similar cases and held that they are within the Federal jurisdiction, the State Court should the more readily and agreeably yield its possession of the case. We have shown that cases precisely similar, and nearly the same in legal contemplation, have been so decided. It was, therefore, the duty of the court below to remove the case and give up its control over it.

ALLEN, J., concurring in dissenting opinion.

ELLA HARGROVE v. SARAH COX.

(Filed 17 November, 1920.)

1. Landlord and Tenant—Title—Tenant's Possession—Deeds and Conveyances—Guarantee of Landlord—Wills—Evidence—Appeal and Error.

A tenant is estopped to deny the title of the one under whom he holds possession, without first having surrendered the possession; but this doctrine does not apply when the title of the landlord has terminated, or claimed by descent, or to prevent the tenant from assailing, for fraud, the validity of an alleged transfer from his landlord, in order to protect his possession; as where the niece of the testator, his tenant, in possession, claims title under his will, duly admitted to probate, and attacks for fraud the deed of her landlord under which the plaintiff claims; and the exclusion of the defendant's evidence to this effect is reversible error.

2. Courts—Jurisdiction—Landlord and Tenant—Justices of the Peace—Superior Courts—Appeal.

The courts of a justice of the peace have no jurisdiction when in a possessory action of ejection, the issue of the landlord's title is involved in the disposition of the case, and the jurisdiction of the Superior Court, being derivative, it cannot acquire such jurisdiction on appeal; and the action being without the jurisdiction of the former court, it should be dismissed in the latter one. Const., Art. IV, sec. 27.

3. Courts—Justices' Courts—Jurisdiction—Landlord and Tenant—Title.

Where the plaintiff, in a possessory action of ejection in a justice's court, makes out a *prima facie* case of jurisdiction, it is not ousted merely by reason of an answer setting forth a controversy as to the title to the land or other jurisdictional question; but the court will proceed to hear the testimony and determine whether, in fact, such controversy is presented in the action, and in this case it is held sufficient.

CLARK, C. J., concurring.

SUMMARY PROCEEDINGS in ejectment under the Landlord and Tenant Act, tried on appeal from a justice's court, before *Guion, J.*, and a jury, at May Term, 1920, of NEW HANOVER.

There was evidence for the plaintiff tending to show that defendant rented the house and lot in question, or a portion of it, from Edward Gause, former owner, some time in 1911, and had continued in occupation of the property until the death of Edward Gause in December, 1916; that five or six days before his death, said Edward Gause, uncle of plaintiff, conveyed the property to plaintiff, who instituted the present suit. Defendant, denying the right to maintain the proceedings, offered evidence tending to show that defendant had not rented the house from Edward Gause, who was her uncle also, but had lived in the house to take care of him for six years past; that twelve or eighteen months before his death said Edward Gause had duly made his last will and testament, devising this property to defendant, his son and his brother,

and two grandchildren, "share and share alike," which will had been duly proven and recorded. Defendant produced evidence further tending to show that the devisor and former owner, Edward Gause, who was between 80 and 90 years of age, had suffered a stroke of paralysis three months before his death, and after that time, and at the time of the making of the alleged deed the plaintiff, five or six days before his death, as stated, he had not sufficient mental capacity to execute a valid deed, or to know what he was doing. The court being of the opinion that "defendant" could not attack the deed of Edward Gause to the plaintiff, and could not set up title in herself submitted and restricted the force and effect of the pleadings to the single issue. "Whether defendant had rented the property from Edward Gause prior to his death." The jury having answered the issue, "Yes." There was judgment of ejectment against defendant, and thereupon she excepted and appealed, assigning errors.

W. B. McKoy and S. M. Empie for plaintiff.
Wright & Stevens for defendant.

HOKE, J. It is familiar learning that a tenant is estopped to deny the title of his landlord. As stated, however, in some of the authorities apposite, the estoppel in question "extends merely to a denial of what has already been admitted, that is, the original landlord's title and does not prevent a tenant from assailing the validity of an alleged transfer from the original landlord." The modification suggested is approved by this Court in *Steadman v. Jones,* 65 N. C., 388-391, and generally recognized as the correct position on the subject, *Jackson v. Rowland,* 6 Wendall (N. Y.), 666; *Million v. Riley,* 1 Dana (Ky.), 359; 24 Cyc., p. 745; 16 R. C. L., p. 670; title Landlord and Tenant act, 156. In any event, therefore, there was error to defendant's prejudice in refusing to consider the evidence offered by defendant tending to show that the plaintiff had not succeeded to the right which the defendant had recognized in taking the alleged house. And this cause being a summary proceeding in ejectment instituted before a justice of the peace, we are of opinion further, from the facts of the record as they now appear, that this action should be dismissed for lack of jurisdiction to proceed further with the hearing. Our Constitution, Art. IV, sec. 27, denies to justices of the peace jurisdiction of causes where the title to real estate is in controversy, and it is the accepted position, approved and illustrated in numerous decisions, that where a justice's court is without jurisdiction of a cause of action, the Superior Court, on appeal, cannot proceed with it, the jurisdiction of the latter being derivative only, and dependent on that of the justice of the peace where the cause originated. *McLaurin*

v. McIntyre, 167 N. C., 350; *McIver v. R. R.,* 163 N. C., 544; *Cheese Co. v. Pipkin,* 155 N. C., 394. In the last citation the principle is stated as follows: "The Superior Court has no jurisdiction on appeal from a justice's court of an action erroneously brought in the latter court, and of which the justice's court had no jurisdiction, the jurisdiction of the Superior Court being derivative only." Again, while our Court has been very insistent on the principle that where one has entered under a lease or contract of rental, he may not dispute or question the title of his landlord without first surrendering the possession. The position does not necessarily or usually prevail when the title of the landlord has terminated, and especially when the same has been acquired by or descended upon the tenant. As said in *Lawrence v. Eller,* the loyalty which affords the basis for the position is to the title under which the tenant has entered, and in the case suggested the loyalty in question not infrequently permits and may require that the tenant shall avail himself of the title acquired to protect his possession, and is allowed to assert and insist upon it for the purpose indicated. *Lawrence v. Eller,* 169 N. C., 211-213; *Forsythe v. Bullock,* 74 N. C., 135; *Turner v. Lowe,* 66 N. C., 413. In the *Lawrence case* the general principle, and some of the exceptions, are stated as follows: "It is recognized as the general rule that a tenant is not allowed to controvert the title of his landlord or set up rights adverse to such title without having first surrendered the possession acquired under and by virtue of the agreement between them.

"The position does not usually obtain where, after the renting, the title of the landlord has terminated, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord, and in courts administering principles of equity the estoppel is not recognized when the tenant has been misled into a recognition of his lessor's title by mistake or fraud, and under circumstances which would induce a court of equity to hold the landlord a trustee for the tenant, and there are other exceptions of a restricted nature." And in *Turner v. Lowe, supra,* it was held as follows: "The principle that a tenant cannot dispute his landlord's title is in full force, but a tenant was never prevented from showing an equitable title in himself, any facts which would make it inequitable to use the legal estate to deprive him of the possession." For this purpose formerly a tenant was driven into equity, but under the present system the tenant in such cases can avail himself of such equitable defenses in his answer. And in determining the question of justice jurisdiction, the courts hold that where a *prima facie* case within such jurisdiction is stated and made the basis of plaintiff's claim, such jurisdiction is not ousted merely by reason of an answer setting forth a controversy as to the title of realty or other jurisdictional question, but the court should hear the testimony in the cause and deter-

mine from that whether such controversy is in fact and truth presented. From a perusal of the record and on issue joined, there are facts in evidence on the part of the defendant tending to show that the plaintiff is a niece of Edward Gause, the former owner and alleged landlord, and that the deed from him, under which plaintiff claims the property, was executed five or six days before his death, when he was approaching 90 years of age; that he had suffered an attack of paralysis three or four months before, was utterly helpless and without mental capacity to make the deed or any other similar paper. There was evidence further to the effect that more than a year before this the owner had executed a will in proper form, which had been admitted to probate, according to which he devises the property to defendant and the sons and grandsons of the devisor. And under a proper application of the authorities cited, and the principles they approve and illustrate, we are of opinion that it is open to defendant to raise the issue as to the validity of plaintiff's claim and under the testimony referred to there is a controversy involving the title to real property presented which withdraws the case from a justice's jurisdiction and deprives the Superior Court of the right to proceed further in the matter. *McLaurin v. McIntyre, supra; Hahn v. Guilford,* 87 N. C., 172; *Parker v. Allen,* 84 N. C., 466; *Forsythe v. Bullock,* 74 N. C., 135; *Turner v. Lowe,* 66 N. C., 414. In the *McLaurin case* it was held: "The jurisdiction conferred by the landlord and tenant act upon justices of the peace does not obtain where the title to the land is in dispute; and when, in the course of the trial, it appears that the matters involved do not fall within the jurisdiction conferred in these respects, the justice should dismiss the action; and, upon appeal, the Superior Court, acquiring no further jurisdiction than the court wherein the action was commenced, may not proceed with the trial." In the *Parker case* the ruling of the Court is stated as follows: "In a summary proceeding in ejectment before a justice of the peace, or on appeal, it is the province of the court to determine whether the title to the land is in controversy, and where the testimony shows that such controversy exists or that equities growing out of a contract of purchase are to be adjusted, as in this case, the proceedings should be dismissed for want of jurisdiction."

This will be certified to the end that the proceedings be dismissed, plaintiff being free to seek relief by action in Superior Court, if she is so advised.

Reversed.

CLARK, C. J., concurs that the principle which estops a tenant to deny the title of his landlord does not prevent the tenant from assailing the validity of an alleged transfer from the original landlord. *Steadman v.*

Jones, 65 N. C., 388; 24 Cyc., 745; 16 R. C. L., 670. And, therefore, there is error entitling the defendant to a new trial for refusing to consider the evidence offered by him tending to show that the plaintiff had not succeeded to the rights of the landlord from whom the defendant had rented the house. But does not concur in the proposition that this action, which came up by appeal from a magistrate, ought to have been dismissed in the Superior Court, and the parties invited to come back into the very court from which they had been dismissed.

This would be in accord with the technical ideas formerly prevailing in the administration of the courts. But under our present system, the case having reached the Superior Court, that court should have proceeded to try the case on its merits, without requiring the parties to go out of court, with an invitation to come back again into the same court. An examination of the Constitution will show no basis for the doctrine of "derivative jurisdiction." The Superior Court having acquired jurisdiction by the appeal, retains it for all purposes, and should proceed to decide the cause upon its merits. This has been often before decided by this Court, though there are some cases to the contrary.

As far back as *West v. Kittrell,* 8 N. C., 493, it was held that where a cause was carried to the Superior Court from a lower court, the Superior Court will retain jurisdiction if it were a subject-matter of which it would have had jurisdiction. In *Boring v. R. R.,* 87 N. C., 363, it was held that where the subject-matter of the action was one of which the justice of the peace and the Superior Court had concurrent jurisdiction, on appeal the latter will retain jurisdiction, though the proceeding in a court of a justice of the peace was void for irregularity. The ground given is that the case having gotten into the Superior Court, which had jurisdiction, the notice of appeal had the same efficacy as if the defendant had been brought in by service of summons.

In *McMillan v. Reeves,* 102 N. C., 559, *Smith, C. J.,* applied to appeals in civil actions the same rule as in criminal proceedings, and says: "It is not material to inquire into the question of jurisdiction in initiating the suit, since any objection on this account is obviated by the removal of the cause into the Superior Court"; saying further, "The court assumed to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties, and the cause was, in a strict sense, *coram judice* under the rulings in *West v. Kittrell,* 8 N. C., 493, and *Boring v. R. R.,* 87 N. C., 360, even without the Laws of 1887, ch. 276, now Rev., 614 (C. S., 637), which sustains the jurisdiction thus acquired." The *Chief Justice* further said: "The objection to the jurisdiction has no force unless the proceeding in its entirety is a nullity, and it certainly cannot require argument to combat such contention.

Peoples v. Norwood, 94 N. C., 167." In this last case the Court held that where the parties were before the court, it was sufficient though no summons was served.

In *S. v. Neal,* 120 N. C., 618, it is said: "The case was tried before a justice of the peace, and the defendant appealed. In the Superior Court an indictment was found by the grand jury, and the defendant was tried thereon; therefore, in any aspect, there was jurisdiction. Whether the court acquired it by the appeal, or had original jurisdiction by the indictment, it is immaterial to decide."

When the clerk wrongfully takes jurisdiction, and the cause, by appeal or otherwise, reaches the Superior Court, the court has jurisdiction, and the act of 1887, now C. S., 637, provides that the judge shall "hear and determine all matters in controversy in such action," and shall make any amendments whatever, and this was held to be so though the proceeding before the clerk was a nullity. *In re Anderson,* 132 N. C., 243; *R. R. v. Stroud, ib.,* 416; *Ewbank v. Turner,* 134 N. C., 81.

The above cases are cited in the concurring opinion in *S. v. McAden,* 162 N. C., 577, it being added: "The sole object in serving a summons is to give the defendant notice to come into court. When he has had a trial on a *bona fide* mistake of jurisdiction by the plaintiff, before a justice of the peace, on appeal in the Superior Court, he has really had the most sufficient notice, and is better prepared to try than if he had been served with summons to appear in the Superior Court." There can be no benefit to either party by dismissing the action and requiring the defendant to come back into the same court by service of summons.

In the concurring opinion in *Holmes v. Bullock,* 178 N. C., 380, it is said that there is "no basis for the doctrine of derivative jurisdiction, which is simply a survival of the former idea obtaining by which so many objections were had to jurisdiction." For instance, if an action was brought in the wrong county it was dismissed because the plaintiff had guessed wrong as to venue, and he had to begin over again with loss of time and considerable expense. So, also, when one brought an action for debt when it should have been in covenant or in detinue and it should have been in replevin, or if he guessed erroneously by using another form of action than that which the court might deem the correct one, he was dismissed with costs, and with loss of time to sue again in the same court, and if he guessed wrong again, he was again dismissed until he guessed right; or if he brought a suit in equity when it should have been an action at law, or *vice versa,* he went through the same heart-breaking experience to come back into court before the same judge. Now the court simply permits amendment and proceeds to try the cause.

There are decisions contrary to the above holding that in appeals in civil cases from a justice a different rule applies from that on appeal

from a justice in criminal cases, or on appeal from the clerk. Though in both these cases the trial court was without jurisdiction, the Superior Court proceeds to try them without question. It may be that the Legislature will amend C. S., 637, to apply also to appeals in civil cases from a justice of the peace, for the decisions of the court are irreconcilable.

S. W. CARROLL v. VICTOR MANUFACTURING COMPANY.

(Filed 17 November, 1920.)

1. **Wills—Estates—Devise—Fee—Power of Sale—Remainders.**

A devise to a son in fee of two tracts of land, with power of sale and limitation, "but if he die without heirs possessing the land, or either tract," to the heirs of another of his sons, taken in connection with the will in this case construed as a whole: *Held*, a devise of the land with the power to convey a fee-simple title during the devisee's life, which, in the event of his not conveying either or both tracks, would carry the limitation over, as directed in the will, and the expression "without heirs possessing the land" referred to the ownership of the title of the first taker at the time of his death.

2. **Same—Children—Equal Division—Synonymous Terms.**

In construing the several devises in a will to ascertain whether or not it was the intent of the testator to divide his lands equally among his children, and to give to each the right to convey a fee, otherwise with limitation over: *Held*, under the will in this case, the terms, "if she died without heirs of her body, and owning the land," then over, and "to a son in fee if he die without heirs possessing the lands," etc., then over does not indicate that the testator intended a different meaning by a difference in phraseology, and the terms are synonymous.

APPEAL by plaintiff from *Allen, J.*, at April Term, 1920, of CUMBERLAND.

This was originally a petition for partition, begun before the clerk of Superior Court of Cumberland County, and upon the plea of *sole seizin* transferred to the Superior Court in term time. The matter was heard upon a case agreed as appears in the record, the pertinent facts being: James Carroll, Sr., who owned the land in dispute, devised the same to his son, James A. Carroll, "in fee," with the following limitation: "But if he die without heirs possessing these lands or either tract, with remainder to the heirs of J. W. Carroll." In the first item of the will, he gives certain property to his daughter, under the same condition, but using a different phraseology, to wit: "But in the event of her death without heirs of her body, I devise said lands, if she owns same at her death, to the heirs of my son, J. W. Carroll," etc. During his lifetime James A. Carroll, the devisee, sold and conveyed both tracts

of land, and defendants claim under his grantee by *mesne* conveyances. The devisee died intestate, without issue, and not in possession of the land, and the plaintiff, who is one of the heirs at law of J. W. Carroll, and has purchased the interest of the other heirs in the land which passed by the will now asserts that he owns the same. The court rendered judgment for defendant, and the plaintiff appealed.

A. M. Moore for plaintiff.
Oates & Herring and Rose & Rose for defendant.

WALKER, J., after stating the case: The will in question is the one considered at this term in *Carroll v. Herring, post,* 369, but our opinion was withheld, at the request of counsel for plaintiff in this appeal, so that we might have additional argument before deciding the question raised. We complied with the request, and after considering the briefs of counsel supplemented by an able, learned and most ingenious argument of counsel for the plaintiff, to which we listened with great interest, and also after hearing counsel of defendant in reply, we discover no reason for reversing our former opinion, and the judgment based upon it. It is very plain to us that James Carroll, Sr., intended that his will, with respect to this particular clause, should be considered and read as follows: "I devise the two tracts of land (describing them) to my son, James A. Carroll, in fee; but if he die possessing the two tracts, or either of them, and without heirs, with remainder to the heirs of J. W. Carroll." Counsel for plaintiff contended that the expression, "if he die without heirs possessing the land," means without heirs "to possess" the land, that is, if he die without heirs "capable of possessing" the land. But this construction is wholly inadmissible. All heirs are supposed to be capable of inheriting from their ancestor, and the word "heirs" implies as much. The "heirs of a person" are those who can, or will, inherit his property from him if he die intestate. It is so defined in the dictionaries. So that we cannot adopt the contention of counsel. Such a construction would not only change the language of the will, by interpolating words not to be found therein, but it completely alters the sense or meaning of it, and, therefore, it would be an unnatural and unreasonable interpretation of it. Counsel then fell back upon their second line of attack, and referred to the first item of the will (quoted in our statement of the case), and argued that it showed clearly what was meant by the item now under consideration. In the first item the testator devised land to his daughter in fee, and if she died without heirs of her body, and owning the land, then over. They, therefore, contended that the difference in phraseology indicated that the testator intended a difference in meaning. But we do not think so, and the two items, when read together, plainly show that the testator

intended to devise the land in fee to his children, with the right of disposal by them, but if they failed to dispose of it, then the land should go over as provided by him. He did not wish to handicap them, as his devisees, and the primary objects of his bounty, by giving them practically the bare possession and use of the land during their lives without the power of disposition, which is the most valuable right incident to a fee-simple estate. The provision "if she dies owning the same," and "if he dies without heirs possessing the lands, or either tract," were intended to be synonymous, the word "possessing" referring to the devisee, James A. Carroll. But there are words in that clause of the will which settle this question, and they are "possessing these tracts of land, *or either of them,*" which manifestly mean that James A. Carroll should have the power of disposal of both tracts or either of them. If he disposed of only one, the other should go over, but not the one he had sold, and it follows, of course, that if he disposed of both, there should be no remainder. This view was not met by counsel in argument, because it could not be. It was the testator's intention that the words "possessing the land" should refer to his son, J. A. Carroll, and not to the heirs, so that it would read, "if he should die without heirs and owning the land," the remainder should pass to J. W. Carroll.

In construing a will we must look at the text and context, *Campbell v. Crater,* 95 N. C., 156, and if it is ungrammatical, or not punctuated, it should be read so as to make it consistent and sensible, *Hoyle v. Whitener,* 67 N. C., 252, and words of similar import or meaning should be construed alike, *Lockhart v. Lockhart,* 56 N. C., 205-206, and as the chief object is to ascertain the intention of the testator, words may be supplied, abstracted, and the grammatical arrangement disregarded, and clauses transposed in order to do so. *Taylor v. Johnson,* 63 N. C., 381; *Baker v. Pender,* 50 N. C., 352; *Ward v. Sutton,* 40 N. C., 421; *Turner v. Whitted,* 9 N. C., 613; *Dew v. Barnes,* 54 N. C., 149; *Howerton v. Henderson,* 88 N. C., 597; *Lowe v. Carter,* 55 N. C., 377; *Williams v. McComb,* 38 N. C., 450-453. We should construe the will by its context, where necessary, in order to arrive at the testator's intention, which must prevail, when it can fairly be found within the four corners of the instrument and the language he employed to express it, and provided it is not in contravention of any rule of construction or any principle of the law. *Edens v. Williams,* 7 N. C., 27; *Williams v. Lane,* 4 N. C., 246; *Clement v. Collins,* 2 Term (Eng.), 498-503.

We may compare one clause with another, so that "every string must give its sound" without any discord, but in perfect harmony with the whole.

The Court adheres to its first opinion of the case, and approves the judgment.

Affirmed.

S. W. CARROLL v. MRS. T. D. HERRING ET AL.

(Filed 17 November, 1920.)

1. **Wills—Interpretation— Fee— Powers— Restraint on Alienation— Estates—Executory Devise—Limitations.**

When, by proper interpretation, it may be seen by his will, construed as a whole, that the testator intended an equal distribution of his property among his children, a devise of his two certain tracts of land to his son, in fee, but if he die without heirs possessing the lands, or either tract, then to his brother: *Held*, the conveyance of the fee-simple title left nothing in the testator, to take effect by way of executory devise during the life of the first taker and the expression "but if he die without heirs possessed of said tracts of land then over" to the other son, was to free the devisee from any restraint on alienation, and he could sell and convey a good fee simple title to either, or both of these tracts, failing which, at his death, the lands would go over to his brother.

2. **Wills—Devise—Fee—Less Estate—Repugnancy.**

A devise of lands generally or indefinitely to a person with a power of disposition, or to him and his heirs and assigns forever, conveys a fee, and any limitation over or qualifying expression of less import is void for repugnancy, unless in the case of a contingent fee or substitution of one estate for another.

3. **Wills—Interpretation—Particular Words—Presumption.**

Where it is apparent in the construction of a will, that a particular significance was attached by the testator to his use of a word or phrase, the same meaning will be presumed to be intended in all other instances of his use of the same word or phrase, nothing else appearing.

4. **Wills—Interpretation—Technical Rules— Punctuation— Transposition of Words.**

Technical rules in cases of ambiguity will not prevail in the interpretation of a will over the evident intent of the testator, either expressly or by necessary implication, gathered from the language of the will, as a whole; and to effectuate this intent the court will, in proper instance, disregard punctuation, or transpose words or sentences.

APPEAL by plaintiff from *Allen, J.*, at April Term, 1920, of CUMBERLAND.

Action to remove a cloud upon title and to recover land. Judgment for defendant, and plaintiff appealed.

The case was as follows: James Carroll, Sr., died leaving a will in which he devised, among other things, two tracts of land to his son, James A. Carroll. The item of said will by which this devise was made reads as follows: "I give, bequeath, and devise to my son, James A. Carroll, two hundred dollars ($200), to be paid by my executors, and I devise to him the ten acres of land known as the Pearce land, on which he has built a house where he lives. Also, 37 acres which I bought of

Warren Carver, and lying east of the Holly land, both said tracts to said James A. Carroll in fee, but if he die without heirs possessing these lands, or either tract, with remainder to the heirs of J. W. Carroll."

A. M. Moore for plaintiff.
Nimocks & Nimocks for defendant.

WALKER, J., after stating the case: Plaintiffs admit that, about the year 1902 or 1903, and prior to his death, James A. Carroll conveyed such interest as he had in the 37 acres of land, lying east of the Holly land, and that he was never in possession of this land again. The last clause in the above item, by which this 37 acres of land was devised, shows clearly that it was the intention of the grantor for his son, James A. Carroll, to have a fee-simple estate in the land devised to him, to do with and dispose of as he saw fit. This last clause is susceptible of but one meaning. What words could the testator have used to more clearly express his desire than "Both of said tracts to the said James A. Carroll in fee, but if he died without heirs possessing these lands, *or either tract,* with remainder to the heirs of J. W. Carroll."

It cannot be seriously contended that the testator intended that the heirs of James A. Carroll should be in the possession of the lands at his death. It is true that by inclosing the words "without heirs" in commas, the intent could have been more quickly and surely discovered.

The intention of the testator, as expressed in his will, is not controlled by the punctuation therein, which may be disregarded, where it conflicts with the manifest intention of the testator, and by so doing the meaning of the will is made more obvious. The court may also *supply punctuation* for the purpose of clearing up an ambiguity in the will, except in cases where no real ambiguities exist other than that which the punctuation itself creates. 40 Cyc., 1403 (g).

If the testator had desired or intended to convey a life estate only, with remainder over, he would not have inserted the words "or either tract," for certainly, if the devisee had the power to convey one tract, he had the power to convey both.

"When real estate shall have been devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, or it shall be plainly intended by the will, or some part thereof, that testator intended to convey an estate of less dignity." Pell's Revisal, sec. 3138; *Whitfield v. Garris,* 134 N. C., 24.

Having devised an estate in fee, it is said that there was no estate left in testator to dispose of. If one devise in fee simple he cannot make a limitation over by way of executory devise without cutting down the

first fee, in order to make room for the second; for, after giving a fee simple absolutely, there is no part of the estate or interest left in him. So, if one devise in fee, without an express limitation, and give a general power to dispose of the land, he cannot make a limitation over to a third person in case the first taker dies without disposing of the land, or as to such parts as he does not dispose of, for the general power confers the absolute ownership, and leaves nothing in the devisor. This was said by *Chief Justice Pearson,* in *McDaniel v. McDaniel,* 58 N. C., 353.

"A devise of an estate, generally or indefinitely, with a power of disposition over it carried a fee." *Patrick v. Morehead,* 85 N. C., 62; *Herring v. Williams,* 158 N. C., 1.

"Having annexed a condition after devising a fee, the condition is void." *Lattimer v. Waddell,* 119 N. C., 370.

Where real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that where an estate is given to a person generally or indefinitely with a power of disposition, or to him, his heirs and assigns forever, it carries a fee, *and any limitation over or qualifying expression of less import is void* for repugnancy. The only exception to such a rule is where the testator gives to the first taker an estate for life only, by *certain and express terms,* and annexes to it the power of disposition. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. Schouler on Wills, Executors and Administrators, pp. 703, 594, in which is cited *Mulvane v. Rudd,* 146 Ind., 482 and 483 (45 N. E., 659), and others.

Where the words of the will were, "But should she die without issue and leave any property at her death given by this will," then over, it was held that an implied power was given, and that the devisee acquired a fee in the property. *Gallaway v. Durham* (Ky., 1904), 81 S. W., 659. Cited in Notes, vol. 30, A. and E. Encyclopedia of Law, p. 737.

An inspection of the entire will shows the intention of the testator to make an equal division among his children of all his property, devising his lands to them in fee, and in only one other instance does he attempt to suggest what shall be done with the land after the death of the devisee, and this suggestion is likewise based on her ownership thereof at her death; but in both these instances the devise is in fee, unconditional.

"In construing a will, where there is doubt or ambiguity, the true intent and meaning of the testator should be gathered from the entire instrument, in accordance with the rules of law established for the purpose. . . . The first taker in a will is presumably the favorite of the testator, and in doubtful cases the gift is to be construed so as to

make it as effectual to him as the language of the will, by reasonable construction, will warrant. . . . The law favors the early vesting of estates, to the end that property may be kept in the channels of commerce. Hence, a future or executory limitation under a devise in a will will not be construed as contingent, when construing the will as a whole, it appears that the intent of the testator was that it should be deemed as vested." *Dunn v. Hines,* 164 N. C., 113.

In the fifth item of the will testator devises 77 acres of land to his daughter, Maria Purvis, and provides further: "Also one-fourth of the residue of my estate, and the other three-fourths to be divided equally between Aurelia, John Wesley, and James A. Carroll," further clearly showing that it was his intent and desire to make an exactly equal division of all his property among his children, or as nearly as it could be done.

The law, also, if possible, adopts the just, natural, and reasonable rule of an equal distribution among children (40 Cyc., 1411), and if words are used in one part of a will in a certain sense, the same meaning is to be given them when repeated in other parts of the will, unless a contrary intent appears. It is a well settled rule of testamentary construction that if it is apparent that in one use of a word or phrase a particular significance is attached thereto by the testator, the same meaning will be presumed to be intended in all other instances of the use by him of the same word or phrase. *Taylor v. Taylor,* 174 N. C., 537.

The above principles are stated as illustrating the trend of what this court, and others, have said upon subjects somewhat related to the question we have in hand, and not as approving all that has been thus said in that regard. Though technical doctrines have weight with us in some cases, they will not be allowed to defeat the evident intention of the testator in construing his will.

The primary object in interpreting all wills is to ascertain what testator desired to be done with his estate, and if it can be found in the language of the document, his intention always controls.

It has been said that the cardinal rule of interpretation is that we should seek first and throughout for the testator's intention, as expressed in his will, and in doing so any obscurity or doubt as to the meaning may be cleared up by giving words their primary or ordinary signification, and so moulding the language by repeating, supplying, transferring, or substituting words and sentences, and so arranging them in a reasonable manner and with proper punctuation as will more clearly disclose the true intent and meaning. 40 Cyc., 1386-1405. It will appear, at the pages of the Cyclopedia of Law just noted, that the following may be adopted as a guide to a correct interpretation. The cardinal rule in the construction and interpretation of wills or codicils is that the intention

of the testator must be ascertained, if possible, and, if it is not in contravention of some established rule of law or public policy, must be given effect, and by this is meant the actual, personal, individual intention, and not a mere presumptive intention inferred from the use of a set phrase or a familiar form of words. For this purpose the will should be construed liberally; but it cannot be construed so as to effectuate an intention which is contrary to some rule of law or public policy. The intention which controls in the construction of a will is that which is manifest, either expressly or by necessary implication, from the language of the will, as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it was executed, although technical words are not used; or, as is sometimes said, the testator's intention must be ascertained from the four corners of the will. Hence, a will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expressed in his will that controls, and not that which he may have had in his mind, or which he manifested by some other paper not a part of the will, or by previous declarations. Where the will affords no satisfactory clue to the real intention of the testator, technical rules for the construction of wills are to be followed so far as they aid in determining that intention, but any technical rule, if they would tend to defeat such intention, must yield to a practical construction of the will. The principle applies to cases where there is an intention exhibited to make a certain disposition of the property, but the mode of executing the intention is erroneously, defectively, or illegally prescribed in the will. *Pickering v. Langdon,* 22 Me., 413; *Graham v. Graham,* W. Va., 36. Expressions of doubtful or uncertain meaning or equivocal language cannot defeat a general intent clearly expressed in the will. *Barrett v. Marsh,* 126 Mass., 213; *Behrens v. Baumann,* 66 W. Va., 56. These passages substantially taken from Cyc. are in accord with our own decisions, and it is, therefore, not necessary that we should enumerate them here, as they are cited in the note to the text.

When we consider the simple rules above set forth, and keep them steadily in mind, we find no difficulty whatever in correctly discerning and comprehending the meaning, and the intention of the testator, as expressed in the will now under consideration. He devises the ten acres, known as the Pearce land, to his son, James A. Carroll, and also the thirty-seven acres, in fee, "but if he die without heirs possessing these lands, or either tract, with remainder to the heirs of J. W. Carroll." If properly punctuated, as he designed it should be, and as correct form suggests, the meaning of this clause is clear beyond dispute. It may be rendered into unobscure English in several ways. The first and most simple is by the slightest punctuation, when it will read thus: "I

devise to my son James A. Carroll, the said tract of land in fee, but if he die, without heirs, possessing said land, or either of the tracts, remainder to the heirs of J. W. Carroll." Another way: "I devise to my son James A. Carroll the said tract of land in fee, but if he die possessed of them, or either of them, and without heirs, then over to my son J. W. Carroll." Or still another, which would express the limitation over in this way, after devising the tracts of land in fee to James A. Carroll: "But if he die without heirs and possessed of (or, in other words, owner of) said tracts of land, then over to my son J. W. Carroll." This clause was framed, as we find it in the will, for the evident purpose of relieving his son, James A. Carroll, from any restraint of alienation, and leaving him free to convey the land during his life, so as to render it of more value to him. He could keep it and cultivate it, or otherwise use it for his own profit, or he could sell it and give a good and indisputable title to the purchaser, and take the proceeds of the sale, or keep the land itself, as he saw fit, or otherwise as he might choose in order to advance his own interest. This is perfectly clear upon the face of the will alone, but the very expression "possessing these tracts of land, or either of them," is plainly indicative of this purpose. It meant, if he sold and conveyed, not only both of them, but either of them, as to both, or as to the one sold, the title should be good in the purchaser, but as to the other, that is, the one not conveyed, it should go, at James' death without issue, to J. W. Carroll. Nothing, it seems to us, could be more fuller and clearer indicated than this intention of the testator by the language of his will. The words "possessing these lands" were certainly not intended to qualify, or to stand connected, with the expression "without heirs," so as to read "without heirs possessing these lands," for we cannot see how James A. Carroll's heirs could have been in possession, in their own right, of the land at his death.

It is obvious to us that the meaning of the will must be what we have stated that it is, and that it can only have that meaning.

Mr. A. M. Moore submitted an exceedingly valuable brief, reinforced by a strong oral argument in support of his position, and the case was equally well argued by Mr. Nimocks, but after hearing and considering all that is in the record, and enlightened as we have been by the fine discussion of the question involved, we conclude that the judge decided the case correctly, when he nonsuited the plaintiff.

Affirmed.

MRS. CORA J. HARPER v. MRS. AMANDA LEE BATTLE.

(Filed 17 November, 1920.)

1. **Statute of Frauds—Contracts—Specific Performance—Sufficient Writings—Accepted Checks—Deeds and Conveyances—Equity.**

Under a parol contract to sell a certain house and lot in a city, a check made to the seller in part payment of the purchase price thereof, with sufficient description of the property, and endorsed and collected by him, is a sufficient writing to enforce the performance of the contract within the intent and meaning of the statute of frauds, as is also a formal deed to the land made and executed by the seller and placed by him in the hands of his attorney or agent, to be delivered to the purchaser upon his performing the conditions imposed upon him by his contract of purchase.

2. **Same—Collateral Controversies.**

Where the writing is sufficient to enforce a contract to convey lands within the intent and meaning of the statute of frauds, a controversy between the parties as to which one should pay the taxes for the preceding or current year, relates to the meaning of the contract, and not to its existence or validity.

3. **Statute of Frauds—Contracts—Specific Performance—Equity—Time of Performance—Rents and Profits—Court's Discretion.**

Where the jury has decided with the plaintiff in his suit to enforce specific performance of a contract to convey lands, and as to the time agreed it should be effective, it is not within the discretion of the trial court to disallow the rents and profits to the plaintiff from that date merely on account of some delay in demanding the deed, for he is entitled thereto as a matter of right.

CIVIL ACTION, tried before *Calvert, J.*, and a jury, at March Term, 1920, of DURHAM.

The action is for specific performance of a contract of sale of a house and lot in Durham, N. C., and there was evidence on the part of plaintiff tending to show a definite contract in writing on part of defendant to sell and convey this house and lot on Watts Street in Durham, N. C., at the price of $8,650, the papers to be formally prepared and take effect as of 1 June, 1918, and breach of same by defendant.

There was denial of any valid contract, defendant contending that no sufficient writing had been given, and defendant alleged further and offered evidence tending to show an abandonment by the parties of any contract they may have made concerning the property, before action instituted. On issues submitted there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

McLendon & Hedrick and R. P. Reade for plaintiff.
W. P. Brogden and J. S. Manning for defendant.

HOKE, J. It is chiefly urged for error on the part of the defendant that there was no sufficient evidence of a written contract to convey on her part within the effect and meaning of the statute of frauds; and second, that on the entire evidence, if believed, there was an abandonment of the contract, and the court should have so instructed the jury, but, in our opinion, neither position can be sustained on the record presented. In reference to the first objection, the pertinent facts in evidence tended to show that in early part of 1918 defendant had agreed by parol to sell to plaintiff her house and lot in the city of Durham at the price of $8,650, one thousand dollars to be paid in cash, and the remainder evidenced and secured by notes and deed of trust on the property, the papers to be prepared and to take effect as of 1 June of said year. That on 7 March plaintiff drew a check in favor of defendant for $50 in terms as follows:

DURHAM, N. C., March 7, 1918.

THE FIDELITY BANK.

Pay to the order of Mrs. Lee Battle, $50.00.
Fifty and no/100 dollars.
Payment on Watts Street House.

(Signed) MRS. J. E. HARPER.

That said check was collected by defendant, her written endorsement, "Mrs. Lee Battle," having been made and entered on the check for the purpose. It further appeared by the admissions of defendant's answer, put on evidence that after making the verbal agreement to sell the house and lot in question, "defendant, on or about 1 June, 1918, executed a deed for the property described in the complaint, and delivered the same to her attorney at Durham, N. C., and at the same time defendant had her attorney prepare a deed of trust describing the property, and notes, all bearing date, 1 June, 1918, for plaintiff and her husband to execute," etc. On these facts our decisions are to the effect that either the check given in part payment on the bargain, collected by defendant through her written endorsement made thereon, in which the property is described as the "Watts Street House," or the written deed, describing the property, formally prepared by defendant, and left with her attorney for delivery on receipt of the price as agreed upon, is a sufficient memorandum in writing within the intent and meaning of the statute of frauds, and this exception of defendant must be overruled. *Pope v. McPhail,* 173 N. C., 238; *Vinson v. Pugh,* 173 N. C., 190; *Flowe v. Hartwick,* 167 N. C., 448; *Norton v. Smith,* 179 N. C., 553; *Lewis v. Murray,* 177 N. C., 17; *Bateman v. Hopkins,* 157 N. C., 470. In reference to the deed, it was held in *Vinson v. Pugh, supra,* "That where a vendor of land has executed a deed reciting the consideration and

expressed in conformity with a parol contract of sale theretofore made, and has given the deed to her agent to be delivered on payment of the agreed purchase price, it is a sufficient writing within the meaning of the statute of frauds." And on the sufficiency of the description as contained in the check, the cases of *Norton v. Smith* and *Lewis v. Murray*, and the numerous authorities therein cited, show that the same is a full compliance with the statutory requirements on the subject.

The second objection is without merit. While there is much evidence on the part of the defendant tending to show an abandonment of the contract by the parties, there is evidence for the plaintiff to the contrary, and these opposing views were submitted to the jury on the issue as to abandonment, and they have determined the matter for the plaintiff. The clear and correct charge of his Honor is in full accord with our decisions on the subject, and we find no reason for disturbing the verdict of the jury on the issue. *Robinet v. Hamby*, 132 N. C., 353-356, citing *Miller v. Pierce*, 104 N. C., 389, and *Faw v. Whittington*, 72 N. C., 321. True, that after making the parol contract of sale, the parties seem to have had considerable discussion as to which of them should pay the taxes for 1918. The agreement being silent on that question, the position taken by plaintiff would seem to be correct, as the taxes became a lien on the property on 1 June. Consolidated Statutes, 7987; Rev., 2864. But however that may be, the difference referred to was only as to the effect and meaning of the contract the parties had made, and in no way involved or affected its existence or validity.

We find no error in the record in defendant's appeal, and the judgment for plaintiff is affirmed.

No error.

PLAINTIFF'S APPEAL.

HOKE, J. Plaintiff excepts and appeals for the reason that the court declined to allow plaintiff for the rents of the property from 1 June, 1918, the date when the contract was to take effect, the portion of the judgment which embodies the ruling being as follows: "In making the above calculation as to the amounts due by the respective parties, and in considering the suggestion of the defendant that specific performance should not be decreed in this case, the court took into consideration the testimony in respect to the laches of the plaintiff, the increase in the value of the property, and all the other facts and circumstances testified to, and in passing upon the right to specific performance of the contract, considered in its discretion that if specific performance were granted, the defendant should not be required to account for the rents from 1 June, 1918, until demand was made for the deed in July, 1919, and said rents are not included in the amounts above set forth."

It is the accepted position with us that a vendee is entitled to specific performance of a binding contract to convey land. *Combes v. Adams,* 150 N. C., 64, citing in illustration *Rudisill v. Whitener,* 146 N. C., 403; *Boles v. Caudle,* 133 N. C., 528; *Whitted v. Fuquay,* 127 N. C., 68. And when such right is properly established, it must be enforced as the parties have made it, or as far as practicable under existent circumstances. This is a legal or recognized equitable right, and may not be modified or withheld in the discretion of the court merely because of some delay of the claimant to move in the matter, unless such delay be of a kind and extent as to create an abandonment or some recognized legal or equitable modification of the rights under the contract or the remedy to enforce the same. On the facts presented, the jury have established a breach of defendant's contract to convey her house and lot to plaintiff, the papers to be drawn and take effect as of 1 June, 1918, and in the judgment plaintiff has been held to account for interest from that date on the contract price. On an issue submitted, and under a correct charge, the jury have found that there has been no abandonment of the contract by the parties, and the right to specific performance has been established by the verdict as of 1 June, 1918. In such case and under the rules ordinarily prevailing plaintiff is entitled to the rents from the time when by the term of the contract the deed should have been made. We find nothing on the record to justify a modification of plaintiff's rights in the premises. *Combes v. Adams, supra; Miller v. Jones,* 68 W. Va., p. 526; 36 Cyc., 789; 25 R. C. L., 341; Fry on Specific Performance, Fifth Edition, sec. 1147.

In the citation to Cyc. the principle applicable is stated as follows: "The decree should conform to the contract. It cannot add to the contract a promise not made. The court will not make a contract for the parties, but where exact enforcement is impracticable, plaintiff may sometimes have approximate relief in some other which will secure to him the substantial advantages of his contract."

On the facts presented we are of opinion that the judgment should be reformed so as to allow plaintiff for the rents from 1 June, 1918, the day when the deed should have been made, and plaintiff charged with interest from that date on the contract price.

Defendant's appeal, No error.

Plaintiff's appeal, Modified.

Plaintiff allowed rents from 1 June, 1918.

WILLIAM WADE CHISMAN, MARY CARR WILLIAMSON, AND H. H. WILLIAMSON v. W. M. CHISMAN, PATTIE HAINES, GEORGE A. HAINES, ELIZA HAINES, AND J. L. HAINES.

(Filed 17 November, 1920.)

1. Wills—Estates for Life—Limitations—Tenants in Common—Rents and Profits.

A devise and bequest to testator's wife of all of my property, both personal and real, for life, excepting what I hereafter give, and at her death to "revert" to C. and his wife and their children, followed by a bequest to the wife of half of the bonds and money I may have at the time of my death, and one-half of the profits of my farm on which I live, and other farms rented out: *Held*, the intent of the testator was that his wife, for her life, should receive the full benefit of the rents and profits of the land, and at her death it was to go over to C. and his wife and children as tenants in common.

2. Same.

A devise and bequest to the wife of testator of all of his real and personal property for life except as thereafter disposed of in his will, with limitation over, followed by a bequest to her of one-half of his personalty and a devise of one-half of the rents and profits of his lands: *Held*, the devise of the lands in the first clause, included the rents and profits for her life, which was not affected, or cut down, by the second clause, to one-half, but the second clause evidently referred to the rents and profits accruing during the year preceding the death of the testator.

APPEAL by defendant from *Lane, J.*, at Fall Term, 1920, of STOKES.

This is a special proceeding for partition of land, which partition was agreed to, and the lands have been divided. The matter presented on this appeal comes up upon exceptions to report of referee passing upon the rents and profits.

The referee found that W. M. Chisman is indebted to his children, William Wade Chisman and Mary Carr Williamson, in the sum of $2,500 for rents and profits of land, as appears in the judgment which had been received by him and not accounted for to them. The report of the referee was confirmed by Judge Lane, presiding, in the Superior Court of Stokes County, March, 1920. The defendant, W. M. Chisman, appealed.

E. B. Jones, C. O. McMichael and N. O. Petree for plaintiffs.
J. E. Alexander for defendants.

BROWN, J. L. W. Anderson died, leaving a last will and testament containing the following clauses:

"First. I give to my wife, Martha Anderson, all of my property, both personal and real, excepting what I hereafter give, to hold and

enjoy the same during her life, and at her death to revert to W. M. Chisman, his wife, Augusta Chisman, and to their children.

"I want W. M. Chisman to administer on my estate without giving any security, as I have every confidence in him.

"I give to my wife half of the bonds and money I may have at the time of my death, and one-half of the profits of my farm both which I am now living, and those that are rented to other persons; to explain more fully. I mean the farm on which I live; the farm that Bony Vaughn is cultivating; my Madison property and my farm known as the Hiram Price farm, near Ruffin, on Wolf Island Creek."

There are other provisions in the will unnecessary to set out. The last clause makes W. M. Chisman and wife, Augusta, and their children, residuary legatees, inheriting everything not herein specifically given to any one else.

It is contended by the plaintiffs that under the will of Major Anderson, his widow, Martha, took only one-half of the rents of the land, and that the plaintiffs, as residuary legatees, are entitled to their share of the other half.

It is contended that the defendant, W. M. Chisman, received one-half of the rents and profits from the death of Major Anderson to the death of his widow, Martha, and paid them over to her, and failed to account to the plaintiffs for any part thereof.

We are of opinion that the construction of the will contended for by the plaintiffs is not the true intent and meaning and purpose of the testator. In the first clause of his will he gives to his wife "all of my property, both personal and real," with a few exceptions not necessary to mention. She is to hold this property during her life, and after her death it goes to W. M. Chisman, his wife and their children as tenants in common. It is contended that in a subsequent clause of the will he gave his wife one-half of the profits of his farm upon which he lived, and other lands, and that this devise in law has the effect to reduce her interest in the land one-half. This is upon the theory that where a testator devises the rents and profits of land, it carries with it the land itself. This doctrine has no application here. It is plain that the testator gave to his wife all of his real property, with some unimportant exceptions, for her life. There is no purpose manifest in any subsequent clause of the will to reduce that devise or in any way to limit or to circumscribe it. If she was entitled to the whole of the land for her life, it follows that the widow was entitled to the whole of the rents and profits. The clause devising to her one-half of the profits of the testator's farm and rented lands evidently refers to the rents and profits accruing during the year preceding his death. It cannot be supposed for a moment that the testator intended that his widow should have all

of the lands for her life, and at the same time intended to limit her enjoyment of the same to one-half of the rents and profits. It might well be asked if that was his intention, why give her the whole of the land?

We are of opinion that the plaintiffs are not entitled to recover of the defendant Chisman any of the profits and rents of lands accruing up to the time of the death of the widow.

The judgment of the Superior Court is

Reversed.

LETHA COMBS v. CHAS. W. COMBS.

(Filed 17 November, 1920.)

Judgments—Motion to Set Aside—Divorce—Federal Statutes—Soldiers and Sailors Civil Relief Act.

A judgment in favor of the wife, in an action for divorce against her husband on the ground of his adultery, summons served by publication, will not be set aside as in violation of the Federal Soldiers and Sailors Civil Rights Act, when it appears that the husband had separated himself from his wife, and joined the army without her knowledge thereof or as to where he was, and he has made his motion more than ninety days after his termination of service in the army, and does not make it to appear to the court, by specific averment, that he has a meritorious or legal defense.

MOTION to set aside a decree in a suit for divorce, heard by *McElroy, J.*, at May Term, 1920, of GUILFORD. The motion was denied, and the defendant appealed.

Cooke & Smith for defendant.
No counsel for plaintiff.

BROWN, J. The judge found the following facts:

1. That the plaintiff above named and the defendant were duly married on 10 February, 1907.

2. That on 1 April, 1913, the defendant separated himself from the plaintiff and lived separate and apart from her until the time of the commencement of this action, during which time his whereabouts were unknown to the plaintiff.

3. That this action was commenced on 4 April, 1918, by summons duly issued, returnable at the May term of the Superior Court of Guilford County; that the sheriff of Guilford County returned said summons with the following endorsement: "The within defendant not to be found in Guilford County."

4. That upon affidavit duly made and filed, publication of notice of said summons was ordered, and publication duly made, as provided by law.

5. That on 10 April, 1918, the plaintiff duly filed her complaint, alleging as grounds for divorce that the said defendant, in the spring of 1913, committed fornication and adultery with a woman to her unknown in the city of Salisbury.

6. That said action came on for trial at the August Term, 1918, and all issues, including the issue as to adultery, having been found in favor of the plaintiff, a decree of absolute divorce from the bonds of matrimony was duly entered on said issues.

7. That afterwards, to wit, on 27 November, 1918, the plaintiff intermarried with one J. B. Poore, of which marriage there is no issue.

8. That at May Term, 1920, the defendant comes into court and moves to vacate said judgment for the reasons set forth in his written motion, which is supported by affidavit, said motion and affidavit being hereto attached and made a part of this finding of facts.

9. That the said defendant, upon separation from the plaintiff, enlisted in the United States Army on 29 April, 1913, and was in continuous service in said army from said date until discharged 14 January, 1919.

10. That at the time of the issuing of said summons in said action, and at the time of the trial of said cause said defendant was a soldier in the Army of the United States.

11. That at the trial of said cause at August Term, 1918, the said defendant was not in court either in person or by attorney, and had no knowledge of said action or said judgment.

12. That no affidavit was filed by said plaintiff in said action showing that the said defendant was in the military service of the United States, or that the defendant was not in the military service of the United States, or that the plaintiff was unable to ascertain whether or not the defendant was in the military service of the United States, nor was any order made by the court appointing an attorney for the said defendant in said action.

The basis of this motion is that the judgment rendered was in violation of the Soldiers and Sailors Civil Rights Act approved by Congress on 8 March, 1918. This act provides that: "In any action or proceeding commenced in any court, if there shall be a default of an appearance by the defendant, the plaintiff, before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit, plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether

or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall, on application, make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court, conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this act."

The act further provides: "If any judgment shall be rendered in any action or proceeding governed by this action against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same, and such defendant or his legal representative let in to defend, provided it is made to appear that the defendant has a meritorious or legal defense to the action, or some part thereof."

The above quotations are all taken from sec. 3078½ bb, U. S. Compiled Statutes, 1918.

It appears from the finding of fact that the defendant separated himself from his wife on 1 April, 1913, and has lived separate and apart from her ever since; that he enlisted in the U. S. Army 29 April, 1913, and was in continuous service until discharged on 14 January, 1919.

We are of opinion that the motion to set aside the judgment was properly denied.

First. The defendant failed to make his motion not later than 90 days after the termination of his service in the army.

Second. It is nowhere made to appear that the defendant has a meritorious or legal defense to the action. In his affidavit the defendant fails to set out that he has any defense to the cause of action, as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that

his defense is meritorious or legal, but it must be made to appear so to the judge of the court, for that reason the defendant is required to set out the facts constituting his defense. *Stockton v. Gold Mining Co.*, 144 N. C., 595; *Norton v. McLaurin*, 125 N. C., 185.

In his affidavit the defendant does not deny that he was guilty of adultery, as alleged in the complaint. He is silent on that charge.

Affirmed.

I. F. CAVINESS v. W. H. HUNT, RECEIVER OF THE INTERNATIONAL FURNITURE COMPANY.

(Filed 17 November, 1920.)

Judgments—Motions to Set Aside Judgments—Independent Action—Process—Summons—Service—Equity—Cloud on Title to Lands.

The remedy to set aside a judgment for lack of service on the defendant, which is regular on its face and rendered on process showing service, is by motion in the cause and not by an independent action, whether the action is called one to remove a cloud upon the title to land or to invoke the equity jurisdiction of the court to prevent an injustice.

APPEAL by defendant from *Ray, J.*, at September Term, 1920, of GUILFORD.

This is an action brought in the Superior Court of Guilford County to set aside a judgment rendered in Granville County in favor of the defendant in this action against the plaintiff herein as indorser on a note, on the ground that the summons in the action was not served on the defendant, although the return of the sheriff shows service.

The plaintiff also alleges that the judgment has been docketed in Guilford County, and is a cloud on his title to a tract of land, and facts which would constitute a meritorious defense to the original action.

The defendant demurred to the complaint upon the ground that it does not state a cause of action, contending that the remedy of the plaintiff is by motion to set aside the judgment.

The demurrer was overruled, and the defendant excepted and appealed.

Brooks, Hines & Kelly for plaintiff.

B. S. Royster, C. R. Wharton, and E. P. Hobgood, Jr., for defendant.

ALLEN, J. It makes little difference whether this action is called one to remove a cloud from title or to invoke the aid of a court of equity to prevent an injustice, its purpose is to set aside a judgment, regular

on its face, and rendered on process showing service, and under such conditions the law furnishes a complete and adequate remedy by motion in the original action.

The authorities in support of this principle are numerous, and it is correctly stated in *Stocks v. Stocks,* 179 N. C., 288, as follows: "Where it appears that summons has been served, when in fact it has not been, the remedy is by motion in the cause to set aside the judgment, and not by an independent civil action, but when it appears on the record that it has not been served, the judgment is open to collateral attack. *Doyle v. Brown,* 72 N. C., 393; *Whitehurst v. Transportation Co.,* 109 N. C., 342; *Carter v. Rountree, ibid.,* 29; *Rutherford v. Ray,* 147 N. C., 253; *Rackley v. Roberts,* 147 N. C., 201; *Bailey v. Hopkins,* 152 N. C., 748; *Hargrove v. Wilson,* 148 N. C., 439; *Glisson v. Glisson,* 153 N. C., 185; *Barefoot v. Musselwhite, ibid.,* 208."

Mason v. Miles, 63 N. C., 564, is very much in point. In that case a new action was brought to set aside a judgment for failure to serve the summons, and after holding that the remedy was by motion in the cause, and that the return of the sheriff could not be set aside on a single affidavit, the Court says: "As the courts are now always open, the remedy of the plaintiff, as above indicated, is speedy and complete. Mason has chosen to seek his remedy by another action, which is in the nature of an equitable proceeding; and it is a well settled principle of equity that where a person can have adequate relief by an order in a cause pending in the same court, he shall not be allowed to seek his remedy by a separate suit. *Rogers v. Holt,* 62 N. C., 108. This rule of equity must be enforced in our present system of civil procedure."

And as said by *Pearson, C. J.,* in *Emmons v. McKesson,* 58 N. C., 95: "If it is admitted that the judgment is irregular or void that constitutes no equity. The plaintiff has a plain remedy at law to have the judgment set aside or vacated, and the execution called in, on motion, in the court where it was rendered."

Nor does the difficulty of making proof of the want of service, growing out of the principle that the return of a sheriff cannot be set aside upon a single affidavit, confer jurisdiction on a court of equity as the rule is not confined to courts of law, but is general in its application.

At common law the return was conclusive as between the parties, and it has been held in Georgia that "no averments will lie against the sheriff's return."

"In other States a more liberal rule permits the return to be impeached by affidavit or otherwise in a direct proceeding brought for that purpose, such as an action to set aside the return, or to vacate a judgment by default based thereon, but the proof necessary to overthrow the return *must be clear and unequivocal.* 32 Cyc., 516, 517, and the notes thereto.

"While this is one of the States in which the return on the process is not conclusive, even between the parties and privies to the action, still, under Rev., 1529, and the authorities above cited, such return is *prima facie* correct and cannot be set aside unless the evidence is 'clear and unequivocal.' 32 Cyc., 517. It would work the greatest mischief if after a judgment is taken it could be set aside upon the slippery memory of the defendant, perhaps years thereafter, that he had not been served. This would shake too many titles that rest upon the integrity of judgments, and the faith of purchasers, and others relying thereon. The return of the sheriff is by a disinterested person acting on oath in his official capacity and made at the time.

"The defendant in such case has his remedy by an action against the officer for the penalty of $500 for false return, and also by an action for damages. The defendant, who contends that he has not been duly served, may also proceed by a motion in the cause. *Banks v. Lane,* 170 N. C., 14; *S. c.,* 171 N. C., 505. But his evidence must be more than testimony by one person, which would not be sufficient to overturn the official return of the sheriff, which has a *prima facie* presumption of correctness properly attached thereto." *Comrs. v. Spencer,* 174 N. C., 37.

This principle applies to investigations in courts of equity as well as law.

The order overruling the demurrer must therefore be set aside.

Reversed.

J. E. SHUTE v. J. R. SHUTE.

(Filed 17 November, 1920.)

Injunction— Malice— Probable Cause— Damages—Independent Action— Statutes.

Rev., 817 (C. S., 854), requiring bond in injunction to cover defendant's damages, and Rev., 818 (C. S., 855), providing for the recovery thereof in the same action, does not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to action on the bond when the damages sought are in excess of that amount.

APPEAL by plaintiff from *McElroy, J.,* at August Term, 1920, of UNION.

The defendant in this action heretofore instituted an action against the plaintiff herein to restrain him from the erection of a gin stand by reason of a written agreement which the court held invalid because

in restraint of trade. *Shute v. Shute,* 176 N. C., 462. The restraining order was dissolved. In that case this plaintiff, who was then defendant, set up by way of counterclaim his demand for damages for the wrongful procurement of the restraining order by J. R. Shute, the plaintiff in that action, but as his injunction bond was only $500, and J. E. Shute, a defendant in that action (the plaintiff in this), claimed that the damage he sustained amounted to several times that sum, including expenses, such as attorney's fees and other damages, he took a voluntary nonsuit on the counterclaim, and instituted this independent action to recover damages.

The complaint alleges three causes of action: (1) For abuse of process and wrongful suing out of process; (2) for malicious prosecution; (3) for treble damages for injury to business, as provided in ch. 41, sec. 14, Laws 1913. The defendant demurred to the first cause of action on the ground that there is no allegation of "any facts showing any irregular use of process in the former action," and moved to dismiss. The defendant demurred to the second cause of action because "the institution of the former action and the prosecution of the appeal therein cannot be ground for an action for malicious prosecution," and to the third cause of action on the ground that "any damages occasioned by the suing out of the restraining order could be recovered only in the action wherein the restraining order was granted, and not by a new and independent action," and moved to dismiss.

The judge sustained the demurred and dismissed the action. The plaintiff appealed.

Maness, Armfield & Vann for plaintiff.

W. B. Love and Stack, Parker & Craig for defendant.

CLARK, C. J. The defendant relies upon Rev., 817, C. S., 854, which requires a bond to secure the payment "of such damages as the defendant may sustain by reason of the injunction and Rev., 818, C. S., 855, that upon judgment dissolving an injunction, the plaintiff may recover damages caused by the suing out thereof "without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by reference or otherwise, as the judge shall direct, and the decision of the court shall be conclusive as to the amount of damages upon all persons who have an interest in the undertaking."

The defendant relies upon *Crawford v. Pearson,* 116 N. C., 718, as authority for his contention that the defendant's right to recover damages is restricted to a motion for judgment upon the injunction bond. But that case, and all those that have followed it, merely held that it is no longer necessary to allege want of probable cause in proceedings to recover damages against plaintiff upon the bond, and that under

Code, 341, damages sustained by reason of an injunction shall be ascertained by proceedings in the same action, because more expeditious and less expensive to the parties, and says that it simply provides an "additional security" for the defendant's damages.

The requirement of an injunction bond does not restrict the right of the defendant to recover damages sustained by him above the amount of such bond, nor to the causes of damages by reason of a breach of the provisions of such bonds.

It is still open to the defendant to elect not to avail himself of the remedy of a motion for judgment upon the bond for an amount within the penalty of the bond, "to be ascertained by the judge or referee," but he may bring an independent action where he deems that the damage sustained is greater than the penalty of the bond, and if there are grounds to recover damages not within the contemplation of the bond, such as for malicious prosecution, abuse of process, or for injury to business, and to have such damages assessed by jury.

This Court has often held that "an action will not lie for malicious prosecution in a civil suit *unless* there was an arrest of the person, a seizure of property, as in attachment proceedings at law, or their equivalent in equity or other circumstances of special damage." *Terry v. Davis,* 114 N. C., 32; *Davis v. Gully,* 19 N. C., 360.

In *Coal Co. v. Upson,* 40 Ohio State, 25, it is stated to be "the approved doctrine that an action for malicious prosecution may be maintained whenever by virtue of any order or writ issued in a malicious suit, the defendant in that suit has been deprived of his personal liberty, or the possession, enjoyment, or use of property of value. The name or form of the writ or process is immaterial. It may be an order of arrest, or attachment, or of *injunction.*" This was cited with approval in *R. R. v. Hardware Co.,* 138 N. C., 174.

"The former action (for malicious prosecution) exists when legal process, *civil* or criminal, is used out of malice and without probable cause." *Stanford v. Grocery Co.,* 143 N. C., 422. That actions for malicious prosecution will lie where there has been interference with person or property in civil proceedings where the circumstances justify a charge of malicious prosecution is tacitly recognized in many cases. *Estates v. Bank,* 171 N. C., 579; *Wright v. Harris,* 160 N. C., 543; *Carpenter v. Hanes,* 167 N. C., 555.

The demurrer admits that the plaintiff suffered actual damages of $4,716, and is entitled to punitive damages in three times that amount, but if he were restricted to a motion on the injunction bond for damages, his recovery would be limited to whatever the judge or referee might allow him, not to exceed the penalty of the bond, $500. *Timber Co. v. Rountree,* 122 N. C., 45.

The demurrer also admits that the plaintiff expended $1,000 reasonable attorneys' fees, and costs and expenses of defending the suit, and was forced to do this by the admittedly oppressive conduct of the defendant (the plaintiff in the former case), but this could not have been recovered by motion against the bond in the former suit. *Midgett v. Vann,* 158 N. C., 129.

"Where an injunction has been wrongfully issued, there is no liability for damages except upon the injunction bond, unless the party against whom the injunction was issued can make out his case of malicious prosecution by showing malice or want of probable cause on the part of the party who obtained it." 22 Cyc., 1061, citing *Burnett v. Nicholson,* 79 N. C., 548.

"What is said to be the better rule, however, is that although a party may have his remedy on the bond, yet this is not exclusive, and he may, in a proper case, also have a right to maintain an action at law." 14 R. C. L., p. 481, sec. 183, citing *Howell v. Woodbury,* 85 Vt., 504; Ann. Cas., 1914, D. 606; *Hubble v. Cole,* 88 Va., 236.

"While it is well settled, both in England and in this country, that an action for malicious prosecution will lie against one who has maliciously and without probable cause procured the plaintiff to be indicted or arrested for an offense of which he was not guilty," 18 R. C. L., 13, the authorities differ widely as to the application of such remedy where a civil action has been brought maliciously and without probable cause. In England, before the Statute of Marlbridge (52 Henry III.), such action would lie in a civil case, but that statute gave the defendant, who prevailed in the cause, not merely his costs, but also his damages and subsequent legislation showed that the object was to afford a summary remedy for damages in the action in lieu of an independent action to recover damages for malicious prosecution of a civil action.

In this country, though the institution of a civil action maliciously and without probable cause is generally considered a sufficient basis for malicious prosecution by a defendant who has suffered special damage, the authorities are in hopeless conflict whether in such a case a recovery can be had without seizure of property, arrest of person, or other special circumstances. 18 R. C. L., 13.

In *Hubble v. Cole,* 88 Va., 236, it was held that "a tenant who has been enjoined, without cause, from enjoying the leased premises, upon the dissolution of the injunction, has a common-law right of action to recover damages for having been improperly enjoined in addition to his remedy on the injunction bond." This case appears with many annotations in 29 Am. St., 716; 13 L. R. A., 311.

Our statute, as amended by the act of 1893, ch. 251, is now C. S., 855, and gives the defendant an inexpensive and expeditious remedy by

motion in the cause without requiring proof of malice or want of probable cause, and the "damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages, upon all persons who have an interest in their undertaking." But we do not understand that this deprives the defendant of his common-law right of action, if he does not elect to take the remedy given him to proceed by a motion in the cause, and especially this is so where the damages are sought for malicious prosecution.

In *Gold Co. v. Ore Co.*, 79 N. C., 50, *Bynum, J.*, said that our statute "does not contemplate that a separate action shall be brought on an injunction bond, but the damage sustained by reason of the injunction shall be ascertained by proceedings in the same action, and in a mode most expeditious and least expensive to the parties." This clearly refers to such damages as in contemplation of the terms of the bond. In *Burnett v. Nicholson, supra, Smith, C. J.*, says: "The undertaking required by the statute . . . simply provides an additional security for that which already exists. . . . The right of the defendant to sue does not depend solely upon the result of the action, but upon the want of probable cause and good faith in its prosecution. In this respect, actions in which an injunction may issue stand upon the same footing as others." In that case it was held that the remedy should have been sought by an action for malicious prosecution.

In *Timber Co. v. Rountree*, 122 N. C., 50, the Court quoted *Burnett v. Nicholson, supra*, and held that prior to chapter 51, Laws 1893, a recovery could not be had for damages sustained for wrongfully suing out an injunction except by an independent action alleging malice and want of probable cause, and that while the statute authorizes this to be done, the recovery is limited, if the defendant elects to proceed by motion in the cause, to the amount of the penalty of the injunction bond.

Mahoney v. Tyler, 136 N. C., 43, held that the successful defendant in attachment must seek relief for damages by a separate action on allegation of malicious prosecution and want of probable cause, but that this was not necessary as to claim and delivery, nor arrest and bail, nor an injunction because the statutes in those cases provided that recovery could be had by motion in the cause and without requiring proof of malice, and the lack of probable cause, citing *R. R. v. Hardware Co.*, 135 N. C., 79, where the Court, quoting from Cooley on Torts (2 ed.), 218, said that in an action on the attachment bond, the direct pecuniary loss can always be recovered for such is the contract of the sureties thereto, but that in an action for malicious prosecution, without probable cause, the defendant "may recover damages for injury to his credit, business, or feelings."

In *Tyler v. Mahoney,* 166 N. C., 509, the Court held, approving *S. c.,* 136 N. C., 42, that the damages sustained by reason of seizure of property in an action instituted maliciously and without probable cause, are not decided by the result in the attachment proceeding, and upon proof thereof the defendant is entitled to recover punitive damages which must be assessed by a jury in an independent action. This case is cited and approved in *Tyler v. Mahoney,* 168 N. C., 238.

Reversed.

ALLEN, J., dissenting.

J. S. H. CLARK LUMBER COMPANY v. MRS. MARY E. CURRIE, EXECUTRIX, AND J. L. CURRIE LUMBER COMPANY.

(Filed 17 November, 1920.)

Executors and Administrators—Actions—Venue—Removal of Causes.

Where the personal representative is sued and it does not appear from the complaint whether the action was brought against him as executor or trustee under the will of the deceased, the presumption is that he was sued in his capacity as executor, and the estate is in some way sought to be charged; and when the action is brought outside of the county wherein the defendant had qualified, it is in proper proceedings aptly brought, removable to the county wherein he has duly qualified, provided either he or the surety on his bond lives therein.

WALKER, J., concurs on ground different from that stated in the opinion of the Court, in which opinion ALLEN, J., concurs.

CIVIL ACTION pending in the Superior Court of ANSON, heard by *McElroy, J.,* at October Term, 1920, upon a motion of the defendant to remove the cause to the county of MOORE. The court allowed the motion, and the plaintiff appealed. The judge found the following facts:

That the defendants, after the filing of the complaint, and before the time for answering expired, filed their demand in writing to remove the cause to the Superior Court of Moore County. All the defendants are residents and citizens of the county of Moore; the testator of the defendant, Mary Belle Currie, executrix of J. L. Currie, who died domicile in said county of Moore, and letters testamentary were issued thereon to Mary Belle Currie in said county of Moore. The plaintiff is a foreign corporation, created by the laws of New Jersey on 31 October, 1917, filed in the office of the Secretary of State of North Carolina a duly attested copy of its charter issued by the State of New Jersey, together with a statement pursuant to the laws of the State of North Carolina

required for permitting foreign corporations to do business in this State. The plaintiff has property in the county of Anson, and in the said statement it is made to appear that the location of its principal office is at Wadesboro, county of Anson, North Carolina.

Brock & Henry and McLendon & Covington for plaintiff.
U. L. Spence for defendant.

BROWN, J. There are two grounds upon which the motion for removal is based:

1. That the plaintiff has no right to bring its action in the county of Anson simply because it had property in said county at the time of the commencement of the action, and that the location of its principal office in North Carolina is at Wadesboro in said county, and that the agent upon whom process may be served resides there. It is unnecessary to pass upon this question, as in our opinion the cause was properly removable upon the second ground, namely, that the action must be brought in the county where the executrix took out letters testamentary.

It is well settled in this State that an administrator or executor must be sued in the county in which he took out letters of administration or letters testamentary, provided he, or any one of his sureties, lives in that county, whether he is sued on his bond or simply as administrator or executor. *Stanley v. Mason,* 69 N. C., 1; Clark's Code, sec. 193, and cases cited in the notes. It doesn't appear in the complaint exactly what the cause of action against the executrix is. The presumption is, therefore, that it relates to and seeks to charge the estate of her testator. It nowhere appears that the cause of action of the plaintiff relates exclusively to the execution of a trust committed to the executor by the will. In this latter case the action would be more in the nature of one seeking to charge the executor personally for the conduct and management of the trust. *Roberts v. Connor,* 125 N. C., 45.

Upon the face of the complaint, and the facts found by his Honor, we think the cause was properly removed to the county of Moore.

Affirmed.

WALKER, J., concurs in result, being of opinion that the cause was removable on grounds additional to the one stated in the opinion of the Court.

ALLEN, J., concurs in opinion of WALKER, J.

C. L. HINTON ET AL. v. J. A. VINSON.

(Filed 24 November, 1920.)

1. Trials—Issues—Pleadings—Appeal and Error—Objections and Exceptions.

It is reversible error for the trial judge to submit an issue to the jury not raised by the pleadings, over the objection of a party, when both parties insist upon the submission only of the issue they have raised; as where the issue is as to whether the defendant had breached a condition subsequent in a conveyance of lumber growing upon the plaintiff's land by cutting or sawing timber near his fish pond, and thereby destroying the fish by the sawdust therefrom, and the issue submitted relates to a different cause created by statute applicable to the county alone, and not stated in the pleadings.

2. Estates—Conditions Precedent—Timber Deeds—Deeds and Conveyances.

The law does not favor the construction of a lease as creating a condition, the nonperformance of which will avoid the entire contract, and the language employed will not be strictly construed, but the court will hold it to be merely a covenant unless the intention of the parties clearly appears to be otherwise from the written instrument, taken in connection with the situation of the parties, their relation to the subject of the transaction and the object in view. And the omission of a clause providing for reëntry of the grantor for condition broken, or declaring the deed void, or some equivalent words, will be considered by the court as the usual indication of an intent to create a covenant.

3. Same—Covenants.

An agreement in a deed limiting the use of the premises is a covenant, and not a condition, and its violation of it will not work a forfeiture of the estate granted.

4. Same—Damages—Equity—Specific Performance.

Where the language of a conveyance permits it, under a proper interpretation, the expression of a condition therein will be construed as a covenant, for a breach of which an action for damages will lie, and in proper instances an order of court may be obtained to compel its performance.

5. Estates—Deeds and Conveyances—Conditions Precedent—Contract—Breach—Avoidance—Equity.

Where, in accordance with the expression of a conveyance of standing timber, the party of the second part accepts it "with condition that he, his heirs and assigns, will erect no mill on the streams leading into the fish pond on said land which, with thirty acres adjoining the same, has been leased to L. and others for fishing," etc., and there is no language used therein evidencing the intent that the word "condition" should be construed to be other than a covenant, it will be so interpreted, especially when to declare a forfeiture would cause a loss to the defendant of a sum altogether inequitable, and greatly disproportionate to the benefits he would otherwise receive.

6. Deeds and Conveyances—Ponds—Streams—Words and Phrases—"On" —Fishing—Sawdust.

Where a deed to timber standing on lands is accepted "on condition" that the grantee "will not erect a mill on a stream leading into a fish pond," etc., which, with a certain number of acres of land, the grantor had leased to another, the meaning of the words "on a stream" is not confined to the margin of the stream or the water's edge, but will be construed as within such proximity as to cause injury to the fish or fishing from the sawdust of the mill, and thereby impair the value of the fish pond.

APPEAL by both parties from *Guion, J.*, at October Term, 1919, of WAKE.

The Hintons and Mr. and Mrs. Watson, owners of the land described in their deed, conveyed the timber thereon of a certain kind and size to John Vinson on 23 April, 1907, the same to be cut within eight years from date. There were other provisions in the deed, which may be omitted as not being material. The deed contained this clause: "And the party of the second part accepts this deed with the condition that he, his heirs and assigns, will erect no mill on the streams leading into the fish pond on said land, which, with thirty acres adjoining the same, has been leased to E. H. Lee and others for fishing and hunting, and that he, his heirs and assigns, will not run any road, tramroad or railroads through any growing crop or crops without making full compensation therefor." Plaintiff alleged that in violation of the said provision as to locating a mill set out in paragraph three, the defendant did locate a sawmill on one of the streams leading into the said pond, and did permit large quantities of sawdust and shavings to be piled up at said location within forty feet of said stream, and did clear up land for stacking lumber, and made roadbeds around it. On account of the location of the sawmill on the stream the sawdust has been washed down into the stream and thence into the pond, in large quantities, and on account of the fact of the sawdust, and turpentine therefrom permeating the water of the pond and on account of mud being washed down into the pond from the said clearing and roads, the pond has been seriously and permanently damaged for fishing purposes. The pond was one of the best stocked fish ponds in this section, and before the sawdust contaminated the same, fishing was excellent; but since the piling of sawdust, which washed down into the pond, fishing there has been practically ruined. Plaintiffs are informed and believe, and so allege, that the location of the sawmill on the stream, in violation of said provision of the contract, forfeits all rights of the defendant in and to the said contract and his rights to the timber conveyed therein, whether previously cut by him or now standing. There was on said land over five million feet of merchantable timber, the value of which is now $30,000. The plaintiffs,

after discovering that the mill was located on said stream, notified the defendant that his rights were forfeited under the contract, and demanded that he desist from further cutting of the said timber; but the said defendant has disregarded said demand, and has continued to cut and remove the said timber. Plaintiff prayed for judgment declaring that the condition had been broken, and that the contract and all of defendant's rights thereunder had been forfeited, and that plaintiff recover of the defendant the value of all the timber cut from the land, which is $30,000, and $5,000 additional for damages to the fish pond, and that defendant be enjoined from entering upon the land and from cutting timber thereon. The defendant in his answer denied the allegations of the complaint. The court submitted the issues to the jury, to which defendant objected, and which, with the answers thereto, are as follows:

"1. Did defendant, in locating his sawdust pile near the stream emptying into the plaintiff's millpond suffer and permit sawdust and turpentine and seepage therefrom to be washed into said stream, and emptied into said branch, seriously and permanently injuring said pond, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damages has plaintiff sustained by reason thereof? Answer: '$1.'"

A motion by defendant for a nonsuit was refused, and he excepted. Judgment on the verdict, and both parties appealed.

R. N. Simms and S. Brown Shepherd for plaintiff.
Douglass & Douglass, J. H. Pou, and Murray Allen for defendant.

WALKER, J., after stating the case: When we consider the real question in this case its decision becomes a simple one. We are not, by this record, called upon to decide whether the clause of the deed quoted in our statement of the case is a condition, or merely a covenant, for the complaint only declared upon it as strictly a condition, whereas the court submitted issues, not according to the allegation of the complaint, and the denial of the answer, but substantially and essentially departed from the only issue the parties themselves had made, and submitted an issue as to whether the defendant had violated a local statute, applicable to Wake County alone, which prohibited any person, firm, or corporation from dumping sawdust in or near any stream in that county, declaring the doing of the forbidden act a misdemeanor, punishable by fine or imprisonment (Public-Local Laws of 1915, sec. 1). The defendant duly excepted to this ruling of the court, though the plaintiff did not formally, but insisted that the court should confine the case to the breach of the clause in the deed, treating it as one of condition and not

of covenant, and that upon the finding of the jury that there had been a breach, the court should declare that defendant had forfeited the contract, and all his rights and interests thereunder, and for the breach, that plaintiff should recover of him the sum of $35,000. It was error in the judge to submit an issue not raised by the pleadings, and against the objections of the defendant, as well as the apparent opposition of the plaintiff, and because of this material error there must be a new trial.

But it may be well to consider whether the stipulation of the deed is a condition or a mere covenant of the defendant not to do the forbidden act, implying a promise on his part to pay damages if he broke the covenant. This question fairly arises in the case, and will have to be determined at the next trial. It should be settled now to prevent further litigation and delay. The language of the deed is, that "the party of the second part accepts this deed with the condition that he, his heirs and assigns will erect no mill on the streams leading into the mill-pond," etc. There is no clause of forfeiture or reëntry, or any words declaring the deed void if the condition is broken. If this should be construed as a condition at all, it is not one precedent, but subsequent, which is strictly construed, for the law always leans against forfeiture. *Chancellor Kent* said that "conditions subsequent are not favored in law, and are construed strictly, because they tend to destroy estates, and the rigid execution of them is a species *summum jus*, and, in many cases, hardly reconcilable with conscience." 4 Kent's Comm. (12 ed.), star pages 129 and 130, citing Coke's Litt., 205-b, 219-b; 2 Bl. Comm., 156; *Mitchell v. Reynolds*, 1 P. Wms., 189; *Cary v. Bertie*, 2 Vern., 339; *Martin v. Ballon*, 13 Barb., 119, and other cases. He also says that if it be doubtful whether a clause in a deed is a condition or covenant, the courts will incline against the former construction, for a covenant is far preferable to the tenant. Kent's Comm. (13 ed.), star page 132. A clause in a deed will be construed as a covenant, unless apt words of condition are used, and even then it will not be held to create a condition unless it is apparent from the whole instrument and the circumstances that a strict condition was intended. Jones on Conveyances, p. 534, sec. 646. In deciding whether the language of the deed creates a condition or is merely to be regarded as a covenant, the omission of a clause providing for reëntry of the grantor for condition broken or declaring the deed void, or some equivalent words, is to be considered by the court, for some such expression is the usual indication of an intent to create a condition subsequent. *Gallam v. Herbert*, 117 Ill., 160. And *Chief Justice Bigelow*, in *Ayers v. Emery*, 14 Allen (96 Mass.), 67, held it to be perfectly well settled that a stipulation in a deed will not be construed as a condition, except when the terms of the grant will admit of

no other reasonable interpretation. The same doctrine was approved in *Stoddard v. Wells,* 120 Mo., 25. The law favors the early and absolute vesting of estates and leans favorably towards the idea of a covenant rather than one of condition. *Allen v. Allen,* 121 N. C., 328. This question is fully discussed in *Helms v. Helms,* 135 N. C., 164, and *Brittain v. Taylor,* 168 N. C., 271. In the last case it was said that, if something is required by the deed to be done, such as services to be performed, rent to be paid, or divers other undertakings by the grantee, and there be added a clause of reëntry or, without such clause, if it is declared that, if the *feofee* does or does not do the acts forbidden or required of him to be done, "his estate shall cease or be void," it creates a good condition subsequent, citing Washburn on Real Property (5 ed.), pp. 4 and 5; Sheppard's Touchstone, 125; *Moore v. Pitts,* 53 N. Y., 85; *Schulenburg v. Hairman,* 21 Wall. (U. S.), 144; *Jackson v. Crysler,* 1 Johns. Cases (N. Y.), 125. "Conditions subsequent, especially when relied on to work a forfeiture, must be created by express terms, or clear implication, and are construed strictly." 2 Washburn on Real Property (5 ed.), pp. 7 and 8, paragraph 5, and cases in note. An estate on condition expressed in the grant or devise itself is where the estate granted has a qualification annexed, whereby it shall commence, be enlarged, or defeated upon performance or breach of such qualification or condition, and estates on condition subsequent are defeasible, if the condition be not performed. 2 Blackstone Comm., 154; Co. Litt., 201. The words which constitute a condition may be various, for in particular words there is no weight, as their operation and effect depend on the sense which they carry. 1 Ves., 147; *Wheeler v. Walker,* 2 Conn., 196. See *Brittain v. Taylor, supra; Harwood v. Shoe,* 141 N. C., 161. But in our case there is no language providing for a defeasance or forfeiture or reëntry, but simply the words "with the condition," which may just as well mean "with the promise, or covenant, or undertaking" that he will not erect a mill at the place designated. Where a deed provided that the land conveyed shall not be used for a certain designated purpose, it was held by this Court that the clause should not be construed as a condition subsequent, but rather as a covenant or a restrictive clause, observance of which may be compelled by a court of equity. While conditions subsequent may be created without the use of technical words, they must be clearly expressed, as they are not favored in law, and, if it is doubtful whether a clause is a covenant or a condition, the Courts will so construe it, if possible, as to avoid a forfeiture. *St. Peter's Church v. Bragaw,* 144 N. C., 126, citing *Graves v. Deterling,* 120 N. Y., at p. 455; *Woodruff v. Woodruff,* 44 N. J. Eq., 349. But we think the case of *R. R. v. Carpenter,* 165 N. C., 465, is directly in point. There the restriction was as follows: *"Provided* said railway company locates

or causes to be located within twelve months from this date, or within three months after it begins to operate, trains over said strip or track, a sidetrack, flag station, or other convenience given other mill companies, at some suitable point on said manufacturing company's lands." With respect to this clause of the deed, it being contended by the defendant that it created a condition, and by the plaintiff that it was merely a covenant, this Court, by *Justice Brown,* said: "We do not agree with the defendants that the proviso in the descriptive part of the deed is a condition subsequent, a failure to perform which devests the plaintiff's title and revests it in the defendant. We must interpret the deed as a whole, and endeavor to ascertain the true intent of the parties. *Gudger v. White,* 141 N. C., 508. The extent of the rights acquired must, therefore, depend upon the construction placed upon the terms of the grant, and in construing such instruments the Court will look to the circumstances attending the transaction, the situation of the parties, and the State of the thing granted, to ascertain the intention of the parties. In cases of doubt, the grant must be taken most strongly against the grantor. Conditions subsequent working a forfeiture of the estate conveyed should be strictly construed, as such conditions are not favored in law, and are to be taken most strongly against the grantor to prevent forfeiture. 14 Cyc., 1201. Courts in such cases will look to the good sense and sound equity—to the object and spirit—of the contract. Courts of equity will not aid in divesting an estate for a breach of a covenant—a contract—when a just compensation can be made in money or other valuable thing, but will relieve against forfeitures claimed by strict construction of any common-law rule." And particularly to the same effect is the rule stated in Thompson on Titles of Real Property, sec. 277, as follows: Restrictions upon the use and enjoyment of the land conveyed are generally regarded as covenants, and not conditions. But if there is doubt whether a provision is a restrictive covenant or a condition, it will be held to be the former. A restriction may, of course, if such be the intention of the parties, be so expressed as to make it a condition; but where the restriction is a covenant and not a condition, its breach occasions no forfeiture. Whether or not the recitals in a deed create an estate upon condition or constitute a mere covenant must be ascertained from the language employed, the situation of the parties, their relation to the subject of the transaction, and the object in view.

An agreement in the deed limiting the use of the premises is a covenant, not a condition, and its violation will not work a forfeiture of the estate granted. *Graves v. Deterling,* 3 N. Y. St., 128. A construction holding the language of a deed to create a condition subsequent is not favored, and will not be adopted where it will admit of any other reasonable interpretation. 18 Corpus Juris, 355. The absence or presence of

a clause of reverter or reëntry has a most important, although not controlling influence in determining whether the language in the deed should be construed as a covenant or a condition, 18 Corpus Juris, 359. Courts are inclined to construe clauses in a deed as covenants rather than conditions when the language employed is capable of its construction as a covenant. In all cases of doubt whether a clause is intended as a condition or covenant, the doubt should be resolved in favor of holding the clause to be a covenant and not a condition. 2 Delvin on Deeds, sec. 970-b. Where the clause is a covenant, the legal responsibility for its violation is liability to respond in damages, while a breach of a condition forfeits the title, 2 Delvin on Deeds, sec. 970. These authorities will lead us to a correct conclusion, if we consider the facts and circumstances of the case at bar in the light of what they hold. According to the plaintiffs' own contention, and their demand for damages, should we adjudge that the clause in question created a strict condition with the right of reëntry for a breach thereof, the estate granted would not only be devested, but they would recover of the defendant $35,000 for timber cut and removed, and other alleged damages, and, of course, the land itself, which recovery would be enormous in amount, and so vastly out of proportion to what, in good conscience, they should receive or to what would be a perfectly adequate compensation, that the law will not hesitate, in view of the language of the parties, as it appears in the deed, to deny any such relief, and to hold, on the contrary, that the clause of the deed creates a covenant rather than a strict condition subsequent, such as would forfeit the land to the plaintiffs, and also mulct the defendant in such heavy damages. It is a breach, if breach at all, which can be fairly and adequately atoned for, if we award such damages, as will be a full satisfaction to the plaintiffs for the alleged wrong, and this consideration, coupled with the fact that there is no clause of reverter and reëntry, or other equivalent expression, in the deed, has great weight with the Court in holding it to be a covenant and not a condition. If the language of the Carpenter deed was insufficient to create a condition, but the clause in that deed must be construed as containing words of covenant only, we are forced to concede, and to hold, that the proviso in the deed of the Hintons to Vinson does no more.

But it is useless to pursue this discussion, for when the meaning of an instrument—will, deed, or contract—is perfectly clear, there is left no room for construction. We enforce it as it is plainly written, and that is the case here, as the clause itself makes the meaning manifest. The words are that "he will not erect a mill on a stream leading into the fish pond, nor will he run any road, tramroad, or railroad through any growing crop, or crops, without making full compensation therefor." This expressly stipulates that the only remedy for a breach shall be the recovery of damages.

But there is one other question of very material importance which will surely arise at the next trial of the case. One of the stipulations in the deed is that Vinson "will erect no mill on the streams leading into the fish pond," which, with thirty acres of the land, had been leased to E. H. Lee and others. The words "on the streams," in that clause, does not mean necessarily at the margin of the streams, or the waters' edge, and is not to be taken literally. The preposition "on" has, it has been said, an inexhaustible variety of meanings; it may signify near to and along or parallel with a certain line or border of something else. *Burnham v. Police Jury of Claiborne Parish,* 107 La., 513. Where a deed, which described certain land as lying "on the Louisville and Nashville Railroad," without giving the description of it by boundaries, was attacked as bad for misdescription, and the proof showed that the land was near to, but not bordering upon the road, it was held that the word "on," as denoting contiguity or neighborhood, may mean as well "near to," as "at"; and in this sense the land was not misdescribed. *Burnham v. Banks,* 45 Mo., 349.

The case of *Card v. McCabel,* 69 Ill., 314, closely resembles this one, as there it was held that where all parties, described as "resident upon the line of a canal," should be allowed to cut and remove ice from the same, any person living so near the canal as to desire the enjoyment of the privilege thus given, will be deemed as resident thereon, within the meaning which the law attaches to the word "on" or "upon." And the same Court has said that it is common usage to speak of the boundary of a State or county as a river, though the legal boundary may be the middle of the river; and particularly when anything is to be constructed on such a boundary, which from its nature must be constructed on dry land, would no one understand the place of construction as any other than the shore of the river, and that is perfectly legitimate and in accordance with everyday usage to say that a house built in Illinois on the eastern shore of the Mississippi stands on the western boundary of the State, though the legal boundary of the State is the mid-channel of the river, and in common understanding, therefore, a point on the western boundary of Iowa would be a point in Iowa on the eastern shore of the Missouri, precisely as a point on the eastern boundary of Nebraska would be understood to be in Nebraska, on the western shore of the river, and therefore the words "on the boundary of Iowa" are not technical words; and are to be taken as having been used by Congress in their ordinary signification. *Union Pac. R. Co. v. Hall,* 91 U. S., 343, at p. 347. The expression "on the line of" is defined in 29 Cyc., 1493, as "along, or parallel to; the general direction of; near the line of; but not necessarily touching or bounded by." See, also, *Coffin v. Left Hand Ditch Co.,* 6 Colo., 443; 29 Cyc., 375; *U. S. v. Bushington and Mo. R.*

Co., 4 Dillon, 297 (*S. c.*, 24 Federal Cases, No. 14, 688). The words "on," "near," "at," and "along" are of relative meaning, and the precise import of these words, when used as descriptive of a place or location, can be determined by surrounding facts and circumstances. 29 Cyc., 375, and note 12. The object in the minds of the parties to be accomplished by the insertion of the phrase in this deed was to prevent the destruction, or any impairment of the fish pond, by filling it up with sawdust from the mill, as it may be thrown or washed into the stream, and also to guard against the contamination of its waters so that fish could not live in it. The words "on the streams" meant, therefore, at the margin of the water or so near thereto as to cause the injuries intended to be avoided.

As the issue, which was foreign to the pleadings, and a clear departure therefrom, was submitted by the court without the request, or assent of the parties, the judge should order a repleader, so that the plaintiff may sue upon the clause as one of covenant, and the defendant may proceed, on his side, as he may be advised, with the right, of course, to amend his answer, or to withdraw it, and plead anew. An issue, or issues, corresponding with the pleadings will be submitted to the jury and the plaintiff can then recover damages if they have sustained any.

There must be another jury called, because of the error in the court's ruling.

The costs of this Court will be divided equally between the parties, plaintiffs and defendant.

New trial.

BROWN, J., concurring: I concur in the judgment of the Court ordering a new trial and a repleader in this case, but I differ from my brethren in the view that they take of the instrument under consideration. The language used in the timber deed is as follows: "And said party of the second part accepts this deed with the condition that he, his heirs and assigns, will erect no mill on the streams leading into the fish pond on said land, which, with thirty acres adjoining the same, had been leased to E. H. Lee and others for fishing and hunting."

I am of opinion that the language used shows clearly that a condition subsequent was annexed to the grant at the time of its execution, forfeiture of which entitled the plaintiffs to a restoration of the property granted and for damages for such of it as has been destroyed since the breach of the condition. The language contained in the deed is peculiarly clear and expressive, and leaves no doubt in my mind as to the intent of the parties. The grantee is made to accept the deed upon the condition and terms embodied in the grant.

It is well settled that the intention of the parties to the instrument is to govern, and that such intention is to be gathered from a reasonable and natural interpretation of the words used. The parties to this instrument have not used the words ordinarily employed to express a covenant or an agreement to do or not to do a particular thing. They have used the only words in the English language that will express their meaning without resort to the context. They have said that the timber is granted "with condition," and the grantee, upon the face of the deed, is made to accept the deed with the condition expressed. There is nothing in this condition that is unreasonable or contrary to the policy of the law. There is no reason for misinterpreting this language or perverting its real meaning. The words are such that they speak for themselves. In such case the manifest intention of the party is always given effect. 8 R. C. L., III.

The owners of this property had a right to impose such conditions as they saw fit when they conveyed it.

It is well settled that owners of land may annex any condition to a conveyance of it as he sees fit, provided it is not against public policy. *Cowell v. Springs,* 100 U. S., 55; *Plumber v. Tuggs,* 41 N. Y., 442.

In *R. R. Co. v. Singer,* 49 Minn., 301, the language creating the condition is very similar to the language employed in this instrument. In that case it appears on the face of the instrument that it was accepted on condition that intoxicating liquors should not be sold on the premises. The Court held that the words created a condition subsequent, a breach of which forfeited the estate.

In *Firth v. Morovich,* 116 Pac., 729, the Court upheld a forfeiture on account of breach of building requirements.

Thomas v. Record, 47 Me., 500. A forfeiture was held in case of failure to support.

In *Sperry v. Pond* (Ohio), 24 Am. Dec., forfeiture was had for failure to maintain a grist mill.

Taylor v. Sutton, 15 Ga., 103, holds that any reasonable condition is good as a condition when not against public policy.

There are many cases upholding forfeiture for conditions broken as to maintaining liquor place. *Cowell v. Colonnade Springs Co.,* 100 U. S., 61.

I differ with my learned brother as to his construction of the case of *R. R. v. Carpenter,* 165 N. C., 465. That was a grant of leave to the railroad company for purpose of building railroad tracks and other structures incident to the operation of a railroad. The word *condition* is not used in the deed, and it is not specified that the grantee "accepts the deed upon condition." The language used is that the conveyance is made upon consideration. There is a proviso in the deed as follows:

"*Provided* said railroad locates or causes to be located within 12 months from this date—a sidetrack, flag station, and other conveniences given other mill companies at some suitable point on said manufacturing company's lands." This proviso, it was contended, was a condition subsequent, and that the failure to locate the station within the 12 months forfeited the grant. The Court held that the failure to locate the grant within the 12 months did not forfeit the estate granted.

A perusal of that case will show that taking the deed as a whole, there is no intention to create a forfeiture, as I think is clearly manifested in the deed from the plaintiffs in this case to the defendant.

I do not think it is necessary that the common-law ceremony of a reentry should be performed, as a condition precedent to the prosecution of this action, whatever necessity there may have anciently been for such a proceeding, the reason for it ceased with the disappearance of the fictions and devices resorted to to maintain the old action of ejectment. *Plumb v. Tuggs, supra; Cornelius v. Ivins,* 26 N. J. Law, 376; *Ruch v. Rock Island,* 97 U. S., 693; *Brittain v. Taylor,* 168 N. C., 275. In the latter case the condition expressed in the deed was decided to be a condition subsequent, and the Court based its decision upon the fact that the intention of the parties was plainly expressed in the instrument itself.

In the case at bar I fail to see what apter words could be used to express the intention of the parties than those which they have employed.

The Chief Justice concurs in this opinion.

F. W. DICKSON v. JOHN W. BREWER ET AL.

(Filed 24 November, 1920.)

Constitutional Law—Municipal Corporations—Corporations—Special Acts—Bonds—Taxation—Trustees.

The establishing a school district relates to public municipal corporations, which may be done by special legislative enactment under Art. VII of our Constitution, entitled "Municipal Corporations," and it is not prohibited by Art. VIII thereof, relating to "corporations other than municipal"; and a special act creating a school district or amending an existing one, providing for the election of trustees to manage its affairs, and for bonds and taxation relating thereto, is not in contravention of our Constitution, when properly passed upon an "aye" or "no" vote.

CONTROVERSY submitted without action, from WAKE. Appeal by plaintiff from *Brewer, J.,* 23 September, 1920.

This is an action to prevent the collection of a tax, alleged to be invalid, heard on the following agreed statement of facts:

"1. That the Legislature, at its Session of 1913, passed an act entitled 'An act to incorporate Wake Forest Graded School District.'

"2. That at its Session in 1919 the Legislature, by an act, being chapter 3, Private Laws of 1919, attempted to amend the said chapter 376 of Private Laws of 1919, same being the charter of the Wake Forest School District, by striking out sections 3, 4, and 5 of said act, and inserting in lieu thereof certain other sections, which are set forth in section 1 of the said chapter 3, Private Laws of 1919, as sections 3 to 16, both inclusive.

"3. The said chapter 3, Private Laws of 1919, provided that the management and control of the public schools in said district should be vested in a board of trustees, who should have exclusive control of the schools, prescribe rules and regulations for their conduct, elect teachers, etc., and should have the power and authority to issue bonds of said school district in an amount not exceeding $25,000 for the purpose of providing such school buildings as may be required, and in furnishing and equipping same. The said act further provided that the provisions therein should be submitted to the qualified voters of the said district for their approval at an election to be held on 5 May, 1919; that at said election those favoring the approval of the act, the issuing of $25,000 of bonds, and the levying of a special tax for the payment of principal and interest on said bonds, and for the purpose of defraying the expenses of the said district, which tax was not to exceed fifty cents on the one hundred dollars assessed valuation, and one dollar and fifty cents on the poll, should vote 'For graded schools,' and those opposed should vote 'Against graded schools,' and at said election five trustees should be elected.

"4. That the said chapter 3, Private Laws of 1919, provided further that in the event the said act is approved by the voters of said district, and the issuing of the bonds is approved, the board of county commissioners of Wake County should annually levy and collect the said tax as authorized by the said act, and should pay same over to the said trustees for disbursements.

"5. That pursuant to the provision of the said chapter 3, Private Laws of 1919, an election was duly held in the said school district on 5 May, 1919, for which said election the total number of registered voters was ninety-seven (97), and ballots were cast as follows: For graded school, 75; against graded school, 1. On the same day and at the same election the following votes were cast for members of the board of trustees of the said school district: For John M. Brewer, 76 votes; for W. W. Holding, 76 votes; for I. O. Jones, 76 votes; for W. R. Powell,

76 votes, and for R. B. White, 76 votes; that pursuant to section 10 of chapter 3, Private Laws of 1919, the registrar and pollholders of said election duly filed their report of same with the board of commissioners of Wake County, which report was duly canvassed by the commissioners, and the election found to have carried.

"6. That the defendants, as will appear from the report of the said registrar and pollholders, were declared to have been elected trustees of the said school district; and have proceeded to take charge of the management and conduct of the schools within said district, and are now planning and attempting under the authority contained in the said chapter 3, Private Laws of 1919, to issue and sell $25,000 of bonds for the said school district, and attempting to secure the levy of a tax by the board of county commissioners of Wake County sufficient to pay the interest and principal on said bonds.

"7. That plaintiff contends that the trustees of the said Wake Forest School District, the defendants herein named, have no authority to issue the said bonds, nor to secure the levy of a tax to pay the interest of said bonds and the principal thereof as same falls due, for that chapter 3, Private Laws of 1919, which special act purports to grant the authority and power for such bond issue and tax levy, although read three several times, and the yeas and nays on the second and third readings duly entered on the Journal of each House of the General Assembly and ratified 7 March, 1919, is an invalid act, being unconstitutional, and in violation of section 1 of Article VIII of the Constitution, in that it is a special act extending, altering, and amending the charter of a corporation, to wit, the Wake Forest School District; defendants contend that section 1 of Article VIII of the Constitution does not apply to municipal, public, *quasi*-public, or *quasi*-municipal corporations, including school districts and other special-tax districts, acting as governmental agencies, in that the said section 1 of Article VIII refers only to corporations other than municipal corporations such as private or business corporations; and that the said act confers full authority and power on the trustees to issue the said bonds as approved by the voters, and to require the levy of a tax for the payment of the principal and interest thereof."

Judgment was rendered as follows:

"This cause coming on to be heard upon the agreed statement of facts and the affidavit of plaintiff and defendant, it is, after hearing argument of counsel, now, therefore, found and determined.

"1. That the act, chapter 3, Private Laws of 1919, is a valid and constitutional act, not having been passed in violation of section 1 of Article VIII of the Constitution of North Carolina, for that the prohibition contained in said section 1 of Article VIII, against the extension, alteration, or amendment by special act of the charter of a corporation

applies only to corporations other than municipal, and does not apply to municipal, *quasi*-municipal, public, or *quasi*-public corporations.

"2. That the said act is full authority, with the approval of the voters of the district, for the issuance of the bonds and the levying of the tax.

"3. Plaintiff will pay the costs of this action.

JOHN H. KERR,
Judge Presiding."

The plaintiff excepted and appealed.

E. W. Timberlake, Jr., for plaintiff.
J. L. Morehead for defendant.

ALLEN, J. School districts, incorporated by act of the General Assembly, are public municipal corporations, and as such come under the provisions of Article VII of the Constitution, entitled "Municipal corporations" (see *Smith v. School Trustees,* 141 N. C., 150, where the question is fully discussed. Also *Williams v. Comrs.,* 176 N. C., 557), and not under Article VIII, which "Is entitled 'Corporations other than municipal,' and section 1 would seem clearly to have reference to private or business corporations, and does not refer to public or *quasi*-public corporations acting as governmental agencies." *Mills v. Comrs.,* 175 N. C., 218.

There is therefore no error in holding that the act of 1919, amending the act incorporating the school district, a municipal corporation, is not in conflict with Article VIII, section 1, of the Constitution, which applies to private corporations.

Affirmed.

MATTIE LANIER v. THE PULLMAN COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 24 November, 1920.)

1. Verdict—Motions—Verdict Set Aside—Court's Discretion.

Motions to set aside a verdict as being against the weight of the evidence are addressed to the discretion of the trial judge, and not reviewable on appeal unless it is grossly abused.

2. Parties—Misjoinder—Pleadings—Motions—Arrest of Judgments.

Objection to a defect or misjoinder of parties to the action must be made by demurrer when such appears on the face of the pleadings, or they will be deemed as waived; and when such defect does not so appear, by petition or answer, and a motion in arrest of judgment on these grounds will be overruled.

3. Constitutional Law—Defenses—Judgments.

The defense of a constitutional right comes too late, for the first time after judgment rendered, and especially so when it has not been properly presented either by the request for the submission of an issue, or for an instruction.

4. Railroads—Federal Control—Director General—Parties.

The Federal act for the Government control of the railroads during the war specifically gives a right of action against the carrier without joining the Director General of Railroads (sec. 10); and objection that an action sounding in tort against a railroad company is fatally defective in not making the Director General a necessary party, is untenable. *Semble*, the question as to whether he should be made a formal party is not a practical one in this case.

5. Appeal and Error—Objections and Exceptions—Evidence—Pleadings—Several Causes of Action.

Where, in an action to recover damages of a pullman company, the plaintiff alleges two causes of action, though in one section of the complaint, one as to the defendant's ticket agent wrongfully refusing to sell her a lower reservation when he had it for sale at the time, and the other, that his conduct towards her then was wantonly rude and insulting, and there was evidence to sustain either one, a general motion to nonsuit directed to both causes of action, is properly denied.

6. Carriers of Passengers—Contracts—Principal and Agent—Tort of Agent—Pullman Companies.

The act of a ticket agent of a Pullman company in tossing a railroad ticket back in the face of a woman endeavoring to get a reservation on its car, in a rude and insolent manner, renders the company liable for an assault by its agent sufficient to sustain an action for damages against it, under implication from the contract of carriage that the passenger will receive proper treatment by the carrier's employees, and reasonable protection from insult or injury.

7. Appeal and Error—Objections and Exceptions—Instructions.

Where the charge of the court, generally objected to, requires the application of more than one principle of law, it will not be held for reversible error, on appeal, that one of them was erroneous if the other was not so.

8. Appeal and Error—Assignments of Error—Instructions—Objections and Exceptions.

Assignments of error must be based upon an exception duly taken, and an exception to the charge, not appearing in the record on appeal, will not be considered.

APPEAL by defendant from *McElroy, J.*, at May Term, 1920, of GUILFORD.

The plaintiff alleged in her complaint that she had gone from her home in Greensboro, N. C., to Rochester, Minn., to place herself under the care and medical treatment of the Mayo Brothers, celebrated physi-

cians and surgeons of that place, and that after receiving treatment and leaving the hospital, she started on her return to her home by way of Cincinnati, Ohio, where she applied to the Pullman Company's agent, at its ticket office there, for the reservation of a lower berth to Greensboro, N. C., and that the said agent, instead of selling a ticket to her, and in willfull disregard of his duty, "wantonly, rudely, and insultingly, without any just cause or excuse for his conduct, refused to sell the same to the plaintiff, who was then and there ready and willing to pay for the same, although he had the same then on hand for sale, and although plaintiff explained and stated to him that she was ill and nervous, and that her condition of mind and body was such that such accommodations were necessary for her comfort and the preservation of her health. That by reason of the said wrongful conduct on the part of the defendants by their said agent, plaintiff was forced and compelled to board the train of the defendants leaving Cincinnati at nine or ten o'clock at night without any sleeping-car accommodation or reservation, and in an ordinary day coach, which was full of noisy, intoxicated, rude, and boisterous people, and to ride in the same till between eleven and twelve o'clock that night; that plaintiff was sick, ill and nervous, and that she was injured and suffered physical pain and mental anguish, she was humiliated, and her health was injured and damaged, all as the direct result of said wrongful, rude, insulting, and wanton conduct of defendant's agent, all to her damage in the sum of twenty-five hundred dollars."

The testimony was heard, and under the charge of the court the jury returned a verdict in favor of the plaintiff, awarding her damages in the sum of fifteen hundred dollars, and further finding that she was not injured by any wrong of the Southern Railway Company. Judgment was entered upon the verdict in favor of the railway company, and against the defendant, the Pullman Company, for the amount of the verdict, whereupon the latter appealed to this Court.

Defendant, the Pullman Company, submitted the following motion and assigned the following errors:

"The Pullman Company, through its attorneys, moved the court to set aside the verdict rendered in the above entitled matter at this term of the court, and in arrest of judgment for that:

"1. Said judgment was rendered contrary to the evidence.

"2. Because of improper parties in that the Director General of Railroads was not made a party to the action, who, at the time of the trial, was the real party in interest.

"3. That said judgment was rendered in violation of the Constitution of the United States in that it would deprive the defendant Pullman Company of its property without due process of law and deny the de-

fendant the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States."

The Pullman Company assigns the following errors:

"1. The refusal of his Honor to dismiss the action, and for judgment, as in the case of nonsuit; after the plaintiff had produced her evidence and rested her case.

"2. For that his Honor erred in overruling defendant's motion for judgment of nonsuit after all the evidence on both sides was in.

"3. Because the court charged the jury as set forth in defendant's third assignment.

"4. Because the Court charged the jury as set forth in defendant's fourth assignment.

"5. Because the court refused to charge the jury as prayed by defendant as follows: (prayer for special instructions by defendant Pullman Company), but not set out in the assignment or otherwise appearing therein.

"6. The refusal of his Honor to grant the motion of defendant to set aside the verdict.

"7. The refusal of his Honor to grant the motion of defendant in arrest of judgment.

"8. That his Honor rendered judgment in favor of the plaintiff, as set out in the record."

W. P. Bynum and R. C. Strudwick for plaintiff.
Justice & Broadhurst and E. C. Gregory for defendant.

WALKER, J., after stating the case: We will consider this appeal by taking up the exceptions and assignments of error *seriatim* and according to the order in which they are presented in the record.

1. The motion to set aside the verdict because against the weight of the evidence or contrary thereto should have been addressed to the court below. We do not review its decision upon such a motion, as it is discretionary, unless there is gross abuse of the discretion, which does not appear in this instance. The cases on this subject are too numerous to be cited, and we refer only to the last one. *Harris v. Turner,* 179 N. C., 322.

2. An objection that there are improper parties, as here alleged, cannot be made by motion in arrest of judgment. Where there is a defect of parties, the objection can be taken by demurrer, if the defect appears on the face of the pleadings, and when it does not so appear, the proper pleading is an answer. 1 Pell's Revisal of 1905, sec. 474, subdivision 4; Consol. Statutes, sec. 511, and subdivisions. An objection to a misjoinder of parties may be taken in the same way. The objection

here is that there is a misjoinder and not a defect of parties. Neither can be availed of by a motion in arrest of judgment. Pell's Revisal, sec. 474, and notes. "A defect of parties will be deemed to have been waived, unless taken advantage of by demurrer when such defect appears on the face of complaint, or petition, or by answer when it does not so appear." *Silver Valley Min. Co. v. Baltimore Smelting Co.*, 99 N. C., 445; *S. c.*, 101 N. C., 679; *Lewis v. McNatt*, 65 N. C., 63; *Lunn v. Shermer*, 93 N. C., 164; *Howe v. Harper*, 127 N. C., 356; *Bridgers v. Staton*, 150 N. C., 216; *Smoak v. Sockwell*, 152 N. C., 503. A misjoinder of parties is waived by failing to demur. *Cooper v. Express Co.*, 165 N. C., 538. "If the defendant deemed the trustee a necessary party," it was said in *Watkins v. Kaolin Mfg. Co.*, 131 N. C., 536, 538, "he should have demurred, and his failure to do so was a waiver." Revisal of 1905, sec. 478. *Watkins' case* is like this one. There was no misjoinder here. There was no demurrer filed in this case, nor was the objection taken by the answer. There is some reference in the answer to the order of the President, purporting to have been issued by virtue of the power vested in him by the act of Congress, but there is no specific objection, by demurrer or answer, that the Director General was not made a party to the suit, or that he was a necessary party. The validity of the President's order, to which we have referred, is discussed very fully in the case of *Hill v. R. R., post*, 428, which was decided at this term, and to which we refer without adding anything to what is there so well stated.

3. The constitutional question raised for the first time after the rendition of the judgment in the cause comes too late, nor is it attempted to be presented in the proper way. There was no issue requested and no instruction concerning it. But if it had been properly raised, and in due time, the defendant could be sued by the very terms of this act of Congress (section 10), approved 21 March, 1918, entitled "An act to provide for the operation of transportation systems while under Federal control," etc. Section 10 provides: "That carriers, while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so trans-

ferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be transferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control." Whether the Court of last resort, in the Federal jurisdiction, will decide the question, which is attempted to be raised by appellant, in his favor, we know not. This Court has held in several cases that the railroad company can be sued, and judgment recovered, under and subject to the provision of the act of Congress of 21 March, 1918, sec. 10 (U. S. Statutes at Large, part 1, page 457). It was said in *Hill v. R. R.*, 178 N. C., 609, 612, that "the Director General must be considered a party only as being in the management and control of the defendant railroad. Service of process upon his agents, who were formerly the agents of the carrier, is sufficient to bring him into court and to bind him by the proceedings therein." *Owens v. Hines*, 178 N. C., 325. The question as to whether his not being a party defendant by his official title has been properly raised and has been considered, and we held that it had not been under our procedure, and this renders it unnecessary to consider Order No. 50 of Director General McAdoo, issue 28 October, 1918. The general question was somewhat discussed in *Hill v. R. R., supra,* and in *Clements v. R. R.*, 179 N. C., 225, and in other recent cases. In the *Clements case, supra,* at p. 229, the Court said, citing and approving *Johnson v. McAdoo, Director General,* 257 Fed. Rep., 757: "Under act 21 March, 1918, litigants can sue railroad companies under Federal direction just as they were previously able to do, and in such courts as had jurisdiction under the general law," and further: "It is incumbent on the Director General to defend a suit against a road and make payment in the event of recovery out of his receipts; the question of adjustment as between the Government and the railroad will come up for settlement when the roads shall be returned to their owners or otherwise disposed of." Whether the Director General should be formally a party may not become a practical question, as if the present judgment is allowed to stand, it will no doubt be satisfied by him, or defendant will be fully indemnified, as in the case of other judgments, where he has been such a party.

We now proceed to consider the assignments of error:

1 and 2. These refer to the motions for a nonsuit. They were properly disallowed, as there was evidence for the jury. Plaintiff alleges two causes of action, though in one section of the complaint. The first is that defendants' ticket agent wrongfully refused to sell her a lower reservation, when he had one for sale; and second, that he treated her

with wanton rudeness and insult when he did so refuse. There was ample evidence to sustain at least one of these causes of action, and, therefore, the motion was properly denied. The motion extended to all the causes, and therefore, if bad as to one, it is bad as to both, not that defendant could not move to nonsuit or dismiss as to one, so as to eliminate it from the case, but he is confined to that one. It depends upon the scope of the demurrer. Where the motion is general, embracing all causes of action, if any one is good, it should not be granted. Plaintiff testified that the agent "tossed the ticket back in her face" in a very rude and insolent manner. This was an assault, and would sustain an action. It is held in *White v. R. R.,* 115 N. C., 631, at pp. 636-637, that the liability of the defendant railroad company rests upon the obligation on the carrier not only to carry its passengers safely, but to protect them from ill treatment from other passengers, intruders, or employees. "Kindness and decency of demeanor is a duty not limited to the officers, but extends to the crew," said *Judge Story* in *Chamberlain v. Chandler,* 3 Mason, 242. Passengers do not contract merely for accommodation and transportation from one point to another; the contract includes assurance of good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the railroad train or other conveyance. In respect to such treatment of passengers, not merely officers, but the crew, are agents of the carriers. It is among the implied provisions of the contract between passengers and a railroad company that the latter has employed suitable servants to run its trains, who will accord proper treatment to them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, although the act of the servant was willful and malicious, as in the case of a malicious assault upon a passenger, committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and, among other implied obligations, is that of protecting a passenger from insults or assaults by other passengers or by their own servants. Many authorities are said, in *White's case, supra,* to sustain this doctrine. See, also, 2 Wood on Railways, sec. 315; *Seawell v. R. R.,* 132 N. C., 856 (*S. c.,* 133 N. C., 515); *Britton v. R. R.,* 88 N. C., 536; *Manning v. R. R.,* 122 N. C., 824; *Williams v. Gill, ibid.,* 967. This Court held in *Strother v. R. R.,* 123 N. C., 197, that a carrier is liable for an insulting proposition by one of its conductors to a female passenger, although induced by her immodest remark and behavior.

3 and 4. The objections to the instructions of the Court cannot be sustained, as each of them contained more than one proposition, and at least one of them, if not all, was correct. The objection must be

valid as to all of them. *Harris v. Harris,* 178 N. C., 7, at p. 9, citing *S. v. Ledford,* 133 N. C., 714, and other cases. The exception should have pointed out the alleged error. But though they are, therefore, not before us, we are of the opinion that there was no error in the instructions as given. Again, the charge is not in the record and no exceptions to it appear. Every assignment of error must be based upon an exception duly taken. *Harrison v. Dill,* 169 N. C., 542.

5. This assignment is radically defective, as the prayers, which are alleged to have been requested, are not set out, nor is the substance of them stated. But if this assignment refers to the defendant's prayer, appearing in another part of the case, as to the failure of the judge to charge the jury that, if they believed the evidence, to answer the issue "No," we have already substantially and we think fully considered the same question before in this opinion on the motion to nonsuit.

6. The refusal of the court to set aside the verdict because against the weight of the evidence is not reviewable here, unless the discretion of the judge was grossly abused, which is not suggested by appellant.

7. Motion in arrest of judgment does not lie in this case. We have discovered nothing to which it can apply. There is a good cause of action stated, as we have shown.

The other exception is merely formal.

Having carefully reviewed the case, no reversible error can be found.

No error.

RAYMOND LEE v. THE SOUTHERN RAILROAD COMPANY.

(Filed 24 November, 1920.)

1. Instructions—Negligence—Contributory Negligence.

Only in rare and exceptional instances does the negligence or contributory negligence, in an action for damages, depend on a single fact, but it is usually determined from all the relevant and surrounding circumstances; and the practice of making single instances the basis of instructions thereon, to the jury, is disapproved, although sometimes permissible.

2. Railroads—Negligence—Contributory Negligence—Obstructed View—Smoke—Matters of Law—Courts—Trials.

Upon the evidence of plaintiff, a boy 15 or 16 years of age, in his action against a railroad company, that after waiting at the end of a string of box-cars on a lateral spur track to two main-line tracks of the defendant, for the passage of a freight train on one of the main lines, which threw out great quantities of smoke and cinders in passing, and while enveloped in smoke so he could not see, he attempted to cross the tracks and was immediately struck and injured by another train going in an opposite

direction from the train throwing out the smoke, on the other main-line track, when he knew that defendant's trains were constantly running there: *Held*, the plaintiff, in going, as if blindfolded, upon the track, under the circumstances, was guilty of contributory negligence, the proximate cause of the injury, irrespective of whether the defendant's engineer, on the train which caused the injury, rang the bell or sounded the whistle as his train approached.

CLARK, C. J., dissenting.

APPEAL by plaintiff from *Ray, J.*, at the June Term, 1920, of ROCKINGHAM.

This is an action to recover damages by the plaintiff for injuries sustained by him in consequence of the alleged negligence of the defendant. The defendant denies negligence, and pleads contributory negligence.

In the southern part of the town of Reidsville the defendant had and maintained, at the date in question, three tracks only a few feet apart, all of which are parallel and run practically north and south. The easternmost track is the main line going north. The one just west of and next to that is the main line going south, and the third one on the west is an industrial or sidetrack. The injury complained of was sustained practically in front of the office of the Edna Cotton Mill. At this point, and some distance north and south, there is a public highway just west of and adjacent to the roadbed of the defendant, and another public highway just east of and adjacent to the defendant's roadbed, both highways paralleling the defendant's tracks. In front of the office of the Edna Cotton Mill, which is on the west side of the defendant's tracks, the defendant's tracks are on an embankment some three feet high; on the east the defendant's road is practically level with the public highway. Some seventy-five yards north of the place of the collision between defendant's train and plaintiff, a public highway crosses the defendant's tracks, and some one hundred yards south of the point of injury there is another highway crossing defendant's tracks. In front of the office of the Edna Cotton Mills there are wooden steps, leading from the public highway to and upon defendant's roadbed. These steps had been maintained for more than ten years, and they had been renewed in the meantime one or more times, and over these steps and across defendant's three tracks, many persons were accustomed to go every twenty-four hours, east and west as occasion offered. On the day in question, to wit, 11 August, 1917, the plaintiff, being on the west side of the defendant's tracks near the point of the injury, had occasion to go across said tracks to a store on the east side; that he approached the defendant's roadbed and tracks at a point some distance north of the steps above referred to; that on the defendant's roadbed or embankment there was a path running north and south; that there was a string of freight cars standing on the

sidetrack above referred to, and in consequence of the presence of these cars, the plaintiff, after getting on the embankment of the defendant's road, had to and did walk south along the side of these freight cars to or about the steps above referred to, as the presence of these cars, according to plaintiff's evidence, prevented him from crossing at the point where he got on defendant's embankment or roadbed, until he passed the end of the boxcars, and when he got to the south end of the string of cars or a few feet north of the steps above referred to, there was a long freight train going north over the easternmost track; that at this point and for some distance in either direction the grade going north was heavy, and as a result the engine pulling the freight train going north was exhausting heavily and throwing out great clouds of very dense smoke, which settled down between the train going north and the string of boxcars above referred to, and over and around where the plaintiff had stopped, at or near the south end of the string of boxcars, to await the passing of the northbound freight train. After the caboose of the northbound freight train had passed, the plaintiff, who had been standing very near the steps for some time, waiting for the said train to pass, passed in an easterly direction beyond the end of the string of boxcars; that there he looked in both directions, that is to say, south and north, to see if there was any approaching train; that he saw none; that the smoke at this particular time and place surrounding him was quite dense; that he heard no signal, such as the whistle or bell, or other signal of like character, and he was near enough to have heard such had any been given for the approach of a train to the public crossing above referred to as being seventy-five yards north of where the plaintiff was standing, nor for the approach to the crossing in front of the mills, nor for the approach to the public crossing some one hundred yards south of where plaintiff was standing, and seeing no train approaching, and hearing no signal, plaintiff started to cross the tracks of the defendant in an eastern direction, and as he approached the tracks, next to the side or industrial track, the front of the engine of the freight train proceeding from the north struck the plaintiff and seriously injured him, from which he has never recovered. The plaintiff at the time of the injury was some fifteen or sixteen years of age. Both the plaintiff and the witness, Cheshire, stated that they heard no signal given, nor did they hear the approach of the train.

There was a space of a little more than eight feet between the sidetrack and the main line track.

The plaintiff, among other things, testified as follows: "I had passed over the sidetrack and stepped upon the southbound track, and that's where it hit me; I couldn't see it for the smoke and dust and the boxcars. There was lots of smoke and dust that the train had raised. I could

not see the train for these boxcars; and after passing them, I looked to the north and couldn't see the train, and I did not hear it. I waited until the northbound train had passed before I started to go across, and still the smoke was settled around there so I could not see. If the boxcars were taken away, I could not have seen the train; I might have seen it before I got up there. It was the smoke and the boxcars, too, that kept me from seeing the train. There was a lot of smoke there and that kept me from seeing the train when I stepped from behind the boxcars. I walked across slow; I looked down the track as soon as I stepped out from behind the boxcars; I walked straight across; the train was so close to me it hit me by the time I walked the distance between the sidetrack and the southbound main-line track. I could not see it for the smoke. I had been boarding by the side of the railroad for a week, and freight and passenger trains pass up and down those main-line tracks all during the day and night; I never counted them, they pass there often. Yes, sir; I stepped right up there and couldn't see the train for the smoke; I could have heard it if they had rung the bell; I was trusting entirely to hearing the bell. I looked for a train. Sure I trusted to the whistle; I didn't trust altogether to hearing the whistle; I trusted some to my eyes, but I couldn't see anything. I could not see the engine on the track in front of me for the smoke. I had not started across over there to jump on there and ride that train to the depot. It was a clear day."

His Honor, among other things, charged the jury as follows:

"1. If the jury find as a fact from the evidence that the boxcars referred to were from fifty to seventy feet north from the steps, then I charge you that the presence of the boxcars is not material upon any aspect of this case; that is, that the presence of the boxcars does not tend to show negligence on the part of the defendant, nor is the plaintiff thereby in any degree relieved of the duty to exercise the usual care on account of the presence of the said boxcars.

"2. Unless you shall find as a fact from the evidence that the smoke was so thick and heavy that the train that struck the plaintiff could not be seen by him, then I charge you to answer the second issue 'Yes,' even though you may find as a fact that there was no signal given of the approach of the train.

"3. Unless you find as a fact from the evidence that the boxcars were so close to the steps as to interfere with the sight of the approaching train, or that the smoke was so thick and heavy that the train could not be seen by the plaintiff, then I direct you to answer the second issue 'Yes,' even though there was no signal or warning given of the approach of the train.

"4. It was the duty of the plaintiff to use both his sense of sight and sense of hearing, and the law does not permit him to rely altogether upon the expectation that the train would give a warning of its approach by bell or whistle."

The plaintiff excepted to each instruction.

The jury answered the first issue as to negligence in favor of the plaintiff, and the second as to contributory negligence in favor of the defendant.

There was a judgment for the defendant, and the plaintiff appealed.

P. T. Stiers and King, Sapp & King for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. It is rare that negligence or contributory negligence is dependent on a single fact, and, on the contrary, it is to be determined by a consideration of all the relevant surrounding circumstances.

One fact, separated from others, may have little or no bearing, and by the process of elimination, all ground for the contention that negligence exists on the part of the plaintiff or defendant may be removed, when, if all the circumstances are considered together, the inference of negligence is manifest.

We do not, therefore, approve the practice of making single instances the basis of instructions, although sometimes permissible, but if there is error in the instructions given by the court, and the subject of exception, it is immaterial, because, in our opinion, the plaintiff is guilty of contributory negligence on his own evidence, as he admits that he left a place of safety at the end of the boxcars and walked a distance of eight feet, on a clear day, on to a track, where he knew trains were constantly passing, when he was enveloped with smoke, an obstruction that would be removed in a moment, and when he says "I waited until the northbound train had passed before I started across, and still the smoke was settled around there so I could not see," and again: "I walked across slow; I looked down the track as soon as I stepped out from behind the boxcars; I walked straight across; the train was so close to me it hit me by the time I walked the distance between the sidetrack and the southbound main-line track. I could not see it for the smoke."

One who voluntarily goes on a railroad track, where the view is unobstructed, and fails to look and listen, cannot recover damages for an injury, which would have been avoided if he had done so.

The duty to look and listen may be qualified by obstructions and other circumstances, and when these appear the question of contributory negligence is ordinarily for the jury.

He is not required to look continuously when he has been misled by the failure of the company to give notice of the approach of its train,

or where his attention is rightly directed elsewhere, and he cannot be expected to look in both directions at the same time.

These principles are established by *Cooper v. R. R.*, 140 N. C., 209; *Inman v. R. R.*, 149 N. C., 123; *Farris v. R. R.*, 151 N. C., 483; *Fann v. R. R.*, 155 N. C., 136; *Johnson v. R. R.*, 163 N. C., 431; *Penninger v. R. R.*, 170 N. C., 475; *Perry v. R. R.*, at this term, and in other cases, but they are not determinative of the present appeal, because in all of them, where obstructions were present, they were not temporary and fleeting, while in this case the plaintiff was prevented from seeing the approaching train by the smoke of another train, which would have been lifted or removed in a moment of time.

If the plaintiff had a bandage across his eyes the law would not permit him to walk on a track, where he might reasonably expect a train, without removing it, and the smoke was as effective as the bandage would be in obscuring or blotting out the vision, for the time, and almost as easily and speedily gotten rid of.

As said in *Oleson v. R. R.*, 32 L. R. A. (Ind.), 152: "Under the circumstances, it was his duty to wait in a place of safety until he could see and hear, and thus, with reasonable certainty, ascertain that no westbound train was approaching on the south track. If the obstruction had been of a permanent character, the question would be a different one, but here the smoke was, as he knew, but a temporary obstruction; and, if he had but waited a few moments, he could have seen the approaching train, and avoided the injury."

In *West Keresy Railroad Co. v. Ewan*, 55 N. J. L., 574, the plaintiff was held to have been negligent in going upon a railroad track while the noise and smoke of a train that had just passed deprived him temporarily of the power to see clearly and hear distinctly. The plaintiff traveling along the street on foot in the day time came to the defendant's intersecting railroad, which consisted of three tracks. He stopped upon the first track, which was not in use, for a freight train going towards his left on the furthest track to pass the crossing. This train made a "tremendous noise," and emitted smoke which settled down upon the tracks. When the freight train had passed, then, knowing that the middle track was used for train coming from his left, he looked towards the left, and seeing nothing but smoke upon the track, and hearing no whistle or bell, he proceeded to walk across at his usual gait, and was struck by train coming from the left on the middle track. After a recitation of these facts, the Court said: "From these circumstances it is apparent that the plaintiff, without any reason for haste, went upon the track when it was evident to him that he would neither see nor hear any train which he was aware might be approaching, and when the causes of his inability to see and hear were so fleeting that in a few

seconds they would have gone. It seems indisputable that such conduct was negligent. In the exercise of reasonable prudence, a man could not expose his life to a peril which he knew might be imminent, if a delay of a few minutes would assure him of safety, unless impelled by some motive of extreme urgency."

The same principle is stated by the editor and annotator in the note to *Wallenburg v. Mo. P. R. Co.*, 37 L. R. A. (N. S.), 144, as follows: "It is negligence *per se* to attempt to cross a track hidden by the smoke from a passing train without waiting for a clear view. *Heaney v. Railroad Company,* 122 N. Y., 122; *West Keresy Railroad v. Ewan,* 55 N. J. L., 574; *Lortz v. Railroad Company,* 83 Hun., 271; *Hovenden v. Railroad,* 180 Pa., 244."

The same doctrine is laid down in 22 R. C. L., 1033, and in numerous other authorities, some of which are referred to in the cases cited, and being in our opinion just and based upon reason, we must apply it.

We have come to this conclusion on the facts of this case, and after considering the different cases in our reports in which recoveries were sustained in behalf of plaintiffs, which we have no disposition to disturb.

No error.

CLARK, C. J., dissenting: The defendant was maintaining three tracks in the street of Reidsville. The injury of the plaintiff was caused by the defendant, and at a much-used crossing of the street from the office of the Edna Cotton Mill. On the western track there was a string of freight cars, reaching to a considerable distance north of the crossing, impeding observation of any train coming from the north down the middle track. When the plaintiff reached this much-used crossing, he found a long freight train passing on the easternmost track going north. He waited until that train had passed. He testified that then he looked in both directions, *i. e.*, north and south, "to see if there was any approaching train; that he saw none; that he heard no signal by whistle or bell or any other signal; that he was near enough to have heard such had any been given of the approach of a train; that seeing no train approaching, and hearing no signal, he started to cross the track when an engine on a train approaching from the north, without giving any signal, struck and seriously injured him." He says his view of the approaching engine was obscured by the long line of cars on the western or industrial track, and that it was further somewhat obscured by the dense smoke emitted by the train going north.

If it were conceded that the plaintiff was negligent in going upon the middle track to cross until the smoke had entirely cleared away, still it has been the uniform rulings of this Court heretofore that when there is negligence on the part of the defendant, as the jury has found in this

case, and contributory negligence by the plaintiff, it is error not to submit to the jury the question as which was the proximate cause of the injury.

In this case the defendant was using three tracks upon the street. The plaintiff was crossing at a much-used crossing from the cotton mill, the knowledge of which required of the defendant extra care in giving signals. This caution was more than usually required in this case, because the western track was occupied by a long string of freight cars standing thereon, and the train passing on the eastern track had cast a dense volume of smoke calculated to obscure the approach of the train from the north on the middle track. Both of these facts were apparent to the engineer of the train coming from the north on the middle track, and made it incumbent upon him to sound the whistle, or ring the bell, or both. Furthermore, it was the grossest negligence of the company itself that at such much-used crossing it did not have an automatic gong, operated by the wheels of the train, nor any bars to be let down by a guard, placed at that point to protect the public in using such crossing.

The plaintiff testified that he looked both ways before attempting to cross the middle track, and seeing nothing, and hearing nothing, he was on his way across the track and was struck by the southbound train, which approached unseen and unheard. How far the plaintiff was guilty of negligence by proceeding without waiting until the string of cars on the track were moved or until the smoke had entirely lifted, was for the jury to decide, and not the court. And even if he was negligent, it was for the jury to say whether the proximate cause was not the failure of the defendant to give signal by whistle and bell or gong which would have prevented the plaintiff attempting to cross the track when after looking both ways he neither saw nor heard any approaching train.

This was the last cause, and therefore the proximate cause, of the injury. Besides, under the principle laid down, in *Troxler v. R. R.*, 124 N. C., 191, and *Greenlee v. R. R.*, 122 N. C., 977, the failure of the railroad to have automatic gongs and bars, at much-used crossings across a public street, was "negligence *per se* continuing up to the time of the injury, and therefore the *causa causans*," because if used up to the very last moment, even when the plaintiff was about to step upon the track, this would have caused him to draw back and save himself. And hence the negligence of the defendant, as a matter of law, was irrebutable.

Long ago the Corporation Commission was empowered, Laws 1907, ch. 469, now C. S., 1049, to require the abolition of grade crossings. This has not been done in this case, but none the less it was incumbent upon the defendant at this much-used crossing of a public street (where the defendant was operating three tracks) to at least install automatic

gongs or to have a guard and bars for the protection of the public. And when, in addition to the omission to do these things, the defendant has obscured the view by a string of empty cars on the western track, and by a cloud of smoke from the passing train on the eastern track, and the engineer of the southbound train on the middle track failed to give signal of that approach by whistle or bell, it was clearly error not to leave to the jury the question as to whether such accumulation of negligent acts by the defendant or the act by the plaintiff was the proximate cause.

Furthermore, it was error to charge the jury that the presence of the empty cars on the western track, 75 feet from the crossing in the direction of the oncoming train was "not material upon any aspect of the case, and did not tend to show negligence on the part of the defendant." The plaintiff testified that the presence of the cars on the sidetrack impeded his view of the oncoming train. Whether it did so or delayed the passing away of the smoke left by the other train, the presence of the said cars there and the smoke both tended to prove negligence on the part of the engineer of the southbound train in failing to give signal by whistle or bell, and hence were material circumstances for the consideration of the jury on the question of proximate cause.

The judge charged the jury that "*unless* the smoke was so thick and heavy that the train that struck the plaintiff could not be seen by him, that they should find that the plaintiff was guilty of contributory negligence though there was no signal or warning given of the approaching train." Without leaving it to the jury to say what was the proximate cause of the injury, whether this contributory negligence, or the multiplied acts of negligence, above enumerated on the part of the defendant, he entered judgment on such defective verdict.

Singularly enough, while the charge of the court instructed the jury to find the plaintiff guilty of contributory negligence, "*unless* the smoke was so thick and so heavy that the train was obscured and *could not* be seen by him," the opinion of this Court affirms the judgment below upon the directly opposite ground that the plaintiff was guilty of contributory negligence "if he went upon the track when the smoke *was* so thick and heavy that he could not see the train."

The plaintiff lost the case below by the view of the trial judge that unless the smoke was so thick and dense that he could not see the train the plaintiff caused his own injury; and he loses in this Court because the majority think that if the smoke was so thick and dense that he could not see the train he was guilty of contributory negligence, which makes the charge erroneous.

In neither view has the jury had any chance to find the facts; and all consideration of multiplied instances of negligence of the defendant

have been put out of sight, and in both courts it has been held as a matter of law (but for directly opposite reasons) that the plaintiff was guilty of contributory negligence, and that this was the proximate cause of his injury.

SALISBURY AND SPENCER RAILWAY COMPANY AND NORTH CAROLINA PUBLIC SERVICE COMPANY v. SOUTHERN POWER COMPANY.

(Filed 24 November, 1920.)

1. Evidence—Motions—Inspection Before Trial—Writings—Corporations—Public-service Corporations—Statutes—Constitutional Law.

Where the issue in an action involves the question as to whether a public-service corporation, furnishing electric power to other such companies for distribution and resale, discriminates in its charges against the plaintiff, a motion in this cause, under the provisions of Pell's Revisal, 1656, with affidavits, etc., asking that the defendant furnish plaintiff copies of certain specified contracts which the defendant has made with other consumers under the same or substantially similar conditions, is the proper remedy, and the allegations are not objectionable upon the ground that the matters alleged are insufficient to warrant the order, for that the contracts are immaterial to the proper determination of the issues involved.

2. Same—Court's Discretion—Appeal and Error.

A motion under Pell's Revisal, 1656, that defendant, a public-service corporation, furnish plaintiff copies of certain contracts in order to show an alleged discrimination against the plaintiff, in rates charged other consumers or distributors of electricity, etc., is addressed to the sound legal discretion of the trial judge, and in the absence of evidence of his abuse of such powers, not reviewable on appeal.

3. Corporations—Public-service Corporations—Discrimination—Courts—Inherent Powers—Corporation Commission—Electricity.

The courts have inherent power to enforce, by *mandamus*, a public-service corporation to perform its public duty to furnish electricity among its customers without discrimination as to rates or charges, independent of the powers conferred on the corporation commissioners, whose authority is to fix indiscriminative rates; and the objection that this commission has not established the rates on the subject is without force when the public-service corporation has contracts with other like customers, for the lowest rate of charges therein will automatically take effect as the proper charges to be made.

4. Corporation Commission—Courts—Discrimination—Public-service Corporations—Rates and Charges.

The Corporation Commission has no power or authority to fix rates of charges for a public-service corporation discriminative among its customers for the same or substantially similar service, and in the event of such

discrimination, relief will be afforded by the court in the exercise of their inherent jurisdictional powers over the subject.

5. Same—Public Service—Evidence—Statutes—Motions.

Where public-service corporations have dedicated property to the public for the resale of its electric current to the public-service corporations, a motion (Pell's Revisal, 1656) for it to furnish copies of contracts it is alleged to have made with others for a discriminating rate of charges against the plaintiff for the same or similar services, is material to the issue, not only upon the question of unlawful discrimination, but also upon the question as to whether, in fact, the defendant had so dedicated its property to the public use.

APPEAL by defendant from an order of *Ray, J.*, made at September Term, 1920, of GUILFORD.

A. L. Brooks, Lynn & Lynn, and Roberson & Dalton for plaintiffs.

Cansler & Cansler, Broadhurst & Cox, W. P. Bynum, and W. S. O'B. Robinson, Jr., for defendant.

BROWN, J. This is an appeal from an order made in the cause reported 179 N. C., 19, rehearing p. 331. It was decided in that case that the defendant is a public-service corporation, enjoying the right of eminent domain in North Carolina, and that it may be compelled to furnish the electric current to the plaintiff and other customers without unjust discrimination. It has been further held that a *mandamus* lies to compel the defendant to continue furnishing current to the plaintiffs at the same rate that the defendant furnishes it to other customers who are similarly situated with the plaintiffs. The motion of the plaintiffs to require the defendant to furnish them copies of certain specified contracts which it is claimed the defendant has made with other customers under substantially similar conditions, and is based upon section 1656 of Pell's Revisal, and is founded upon an affidavit, the verified complaint, and the two previous opinions rendered by this Court in this case. Plaintiffs aver that these contracts, if produced, will show an unjust discrimination as to rates, and will enable plaintiffs to establish their allegation that the defendant is unlawfully discriminating against them.

That the plaintiffs are proceeding properly by petition in the cause to obtain the order is well settled. *Justice v. Bank,* 83 N. C., 11; in *Evans v. R. R.,* 167 N. C., 416, the Court, construing this statute, said: "The power of the Court to order the production of a paper under this statute is indisputable, but it must be a paper which contains evidence pertinent to the issue. . . . If it is a paper-writing which is pertinent to the issue, then the matter of ordering its production is confided by the statute to the sound discretion of the judge of the Superior Court, and his ruling will not be reviewed here."

The defendant insists that the judge below erred in requiring copies of these contracts to be furnished plaintiffs, upon the ground, (1) that the affidavit and motion does not set forth sufficient facts to warrant the order; and, (2) that even if the affidavit be sufficient, the contracts are not material to the proper determination of the issues involved.

The learned counsel for defendant contends that these contracts relate to the question of rates which it is charging other consumers; that the courts have no authority to fix rates; that the question of discrimination in rates is one solely for the Corporation Commission; and that the courts cannot afford relief in this case. To these contentions plaintiffs reply that they are not seeking to have the court fix rates, but are willing to accept the rates which the defendant has already fixed by its own written contracts with other consumers of current similarly situated.

The plaintiffs further contend that the defendant has filed a statement with the Corporation Commission denying that it has any right or authority to fix the rates between it and consumers of current, such as the plaintiffs', and that the Corporation Commission has failed to prescribe any rates, leaving the defendant free to charge every consumer whatever it pleases for current, and that these contracts now in existence, when produced, will demonstrate that the defendant is unjustly discriminating against the plaintiffs.

The complaint in this case avers that the defendant is operating unrestrained by governmental control, and denies the right of both the Corporation Commission and the court to prevent its making and enforcing its own contracts for current, and that it is charging first one customer and then another different rates for the same or substantially similar service. No public-service corporation engaged in public employment can successfully sustain such a position. The court possesses ample power to prevent discrimination in rates by all public-service companies, and it cannot be doubted that *mandamus* will lie to compel the defendant to furnish its service to the consuming public without discrimination. This power is inherent in the courts, and exists independent of the Corporation Commission, or even statutory law. It is derived from the common law.

This conclusion is forcibly stated by *Mr. Justice Brewer* in his opinion in *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 53 U. S. Law Ed., 359. That was likewise a case of *mandamus* instituted in the State courts. It is there said: "While no one can be compelled to engage in the business of a common carrier, yet, when he does so, certain duties are imposed which can be enforced by *mandamus* or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Sante Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in

such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. *No legislative enactment, no special mandate from any commission or other administrative board, was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers.* Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Neither is there any significance in the absence of a special contract between the Missouri Pacific and the mill company."

Justice Connor, speaking for the Court in *Garrison v. R. R.,* 150 N. C., 585, quotes with approval the foregoing opinion, and adds: "In no possible form can this fundamental truth be evaded. It is a 'thing fixed' in the common law, enforced by both common law and statutory remedies, its violation denounced as criminal, and subjected to severe punishment. We cannot permit any departure from it, however persuasive the reasons assigned may be for doing so."

The fact that the Corporation Commission has the power and authority to fix the rates at which the defendant shall sell its current and electric energy to all consumers connecting with its lines in no wise precludes the courts from preventing the defendant from making unlawful discriminations in rates charged for the same, or substantially similar service. The Corporation Commission itself has no power to authorize such a discrimination, and if it appears to the court that an unlawful discrimination exists, it can be corrected by *mandamus* without regard to whether it results from a contract imposed by the defendant directly or otherwise. While the court will not fix rates, it will review the Corporation Commission itself if it should unjustly discriminate.

The contention of the defendant that such matters are for the Corporation Commission was expressly denied by this Court in *Walls v. Strickland,* 174 N. C., 299. That was likewise an action for *mandamus,* and the sole question presented to the Court was: "The defendants excepted and appealed, upon the ground that telephone companies being subject to the control and regulation of the Corporation Commission, the courts have no jurisdiction of the action."

Mr. Justice Allen, delivering the opinion of the Court, says: "The error in the position of the defendants is in failing to distinguish between the regulation and control of telephone companies, which, as to individuals and corporations, are committed by statute to the Corporation Commission (Rev., 1096; ch. 966, Laws 1907), whether exclusively so or not we need not say, and the refusal to perform a duty to the plaintiff, arising upon facts that are established."

It thus appears that this Court has declined to abdicate its jurisdiction and authority in such cases to deal with "the refusal to perform a duty to the plaintiff arising upon facts that are established."

The plaintiffs, both in their verified complaint and in their affidavit in support of this motion, aver that these contracts will establish the fact that the defendant is now selling current to other consumers under the same, or substantially similar conditions, at a less price than it is charging the plaintiffs. If this be so, the evidence is very material, and the plaintiffs are entitled to have copies of same. A number of the contracts appear to be between defendant and other utility companies and municipalities purchasing current for resale, as are the plaintiffs. Aside from the issue as to discrimination in rates, these contracts are material as tending to support plaintiffs' allegation that the defendant has dedicated its property to the use of other public-service corporations, which are reselling current to the consuming public. To illustrate: The parties have put directly in issue a contract between the defendant and the Southern Utility Company, the plaintiffs alleging that not only does this contract show an unlawful discrimination in rates, but that it also establishes that the defendant has dedicated its property to the service of that utility, which in turn is serving the cities of Charlotte, Winston-Salem, Reidsville, and other towns and cities in South Carolina. If such a contract as plaintiffs allege exists, there can be no question of its materiality upon the issues arising in this case.

The law governing the powers and duties of the court with relation to granting relief against unjust discrimination in rates was very fully discussed and determined by this Court in *Lumber Co. v. R. R.*, 141 N. C., 175. In that case the plaintiff sought to recover the difference between $2.50 per thousand charged for hauling logs and $2.10 charged other shippers for the same service, under substantially similar conditions. The Court there adopted the lowest rate as the governing rate, and plaintiff was allowed to recover the difference.

Plaintiffs in the present case aver that a similar practice is engaged in by the defendant, and it seeks by a *mandamus* to prevent the discrimination by requiring the defendant to charge it the same rate which it has already established for other consumers taking current under substantially similar circumstances. Such practices are unlawful, and the remedy is at the election of the party injured. In *R. R. case, supra,* the shipper elected to wait and sue for the difference paid, while here the plaintiff has elected to seek a *mandamus* to prevent the unlawful discrimination, and thus avoid a multiplicity of suits. A learned English judge has recently very aptly said that the modern business world has a right to expect the courts "to be service stations and not repair shops."

Justice Connor, in delivering the opinion of the Court in the *R. R. case, supra,* quotes with approval an editorial note in the Harvard Law Review, Vol. XIX, No. 6, page 453, as follows: "It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. So dependent are all commercial activities upon adequate service by the great companies which conduct these public employments, that the general situation demands the stern code that all who apply shall be served with adequate facilities for reasonable compensation, and without discrimination. Enforcement of all branches of this law is necessary at all times; but the commercial community is most interested today in the prevention of personal discrimination. It is established now, past all qualification, that it is the duty of the common carrier to serve all alike who may ask the same service, so that all shippers from a given point may compete with each other in distant markets upon equal terms. For it is now recognized that the slightest differences in the rate may result in the long run in building up one concern and in ruining its rival."

This Court, in the same case, in discussing the procedure by which the Court would determine what was an unjust discrimination, and what rate the complaining party should pay, quotes with approval the language of *Lord Hatherly* in *Directors, etc., v. Evershed,* 3 App. Cas., 1029, as follows: "According to the strict meaning of the acts of Parliament as interpreted by the decisions, from the very moment that the company charges A. a given sum when B., another person, comes to the company to have the same service rendered under the same circumstances, he cannot be charged one farthing more than has been charged A.; he can only be charged precisely what the act authorizes the company to charge, namely, that which has been charged others, *and the moment the directors take on themselves to charge less to another person, they must charge less to him, too.*"

This well recognized principle of law has already been correctly stated by this Court in this case, by the *Chief Justice,* 179 N. C., 34, where it is said: "It will not be difficult for the Court, upon the hearing, to determine the lowest rate charged by the defendant for current and power furnished cotton mills, factories, municipalities, or other public-service companies, under the same or substantially similar conditions. The lowest rate thus established will automatically become the proper

rate to be charged the plaintiffs for such service; otherwise the defendant will still be unlawfully discriminating against the plaintiffs."

By the application of this doctrine, the Court does not fix defendant's rates, but simply adopts the lowest rates which the defendant power company itself has fixed for the same, or substantially similar service. Plaintiffs are not asking a lower or different rate from that now given other consumers under similar conditions. This does not interfere with defendant's applying to the Corporation Commission at any time to fix the rates it shall be permitted to charge these plaintiffs and other consumers of current receiving such service, but neither the commission nor the defendant can fix rates that unjustly favor one consumer over another. The courts are always open to prevent this kind of discrimination, and manifestly, the only way to prevent discrimination is to require the defendant to furnish current to these plaintiffs at exactly the same price it has fixed by contract to other consumers under substantially the same circumstances.

As to the number of contracts to be furnished, the plaintiff should not demand more than is reasonably sufficient to establish their allegations. It is not for us to say what copies shall be furnished, for that is a matter which, under the statute as well as under the general principles of law, is left to the sound legal discretion of the presiding judge. *Bank v. Newton*, 165 N. C., 363.

We fail to find any abuse of such discretion in the exercise of this power by the learned judge of the Superior Court, as the contracts called for are all apparently pertinent to the issues raised by the pleadings.

The order of the Superior Court is

Affirmed.

J. L. HILL, ADMINISTRATOR OF R. B. HILL, DECEASED, v. SEABOARD AIR LINE RAILWAY COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS.

(Filed 24 November, 1920.)

1. War—Railroads—Powers—State Government—National Government.

The authority, where war exists, to exercise all those extreme sovereign powers under the rule of war, recognized by the civilized world, is vested in Congress by the Constitution of the United States, with all means, not prohibited, that are appropriate to that end; and where it, legally exercised, comes in conflict with a State regulation, the power of the National Government is paramount.

2. Same—Courts—Conflict of Powers.

It is within the peculiar province of the courts to see that the Federal and State Governments, in their original dual form, each exercise the

powers and duties solely apportioned to it, so that the one will not interfere with the other where it is supreme, and the courts, wherever possible, will adopt a rule of construction which will prevent conflict between National and State authority.

3. War—Railroads—Powers—Federal Government—State Government—Statutes—Venue—Orders of Director General.

The act of Congress placing common carriers under the control of the United States Government as a war measure, by providing that "actions at law or suits in equity may be brought by and against such carrier and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," does not conflict with our State statute as to venue in a civil action against the carrier, Rev., 424; and if the orders of the Director General, Nos. 18 and 18a, requiring all suits or actions against carriers to be brought in the county or district of the plaintiff's residence are not authorized by the act of Congress, they are void as in contravention of the State law.

APPEAL by defendants from *Finley, J.*, at January, 1920, Criminal Term, of UNION, by consent.

This is an action to recover damages for wrongful death caused, as alleged, by the negligence of the defendants, the Seaboard Air Line Railway Company, and Hines, Director General.

The plaintiff was appointed administrator in Richmond County, where the intestate lived; the death occurred in Anson County, and this action was instituted in Union County.

The defendants moved that the action be removed to Richmond or Anson for trial, relying principally on the following order of the Director General, known as Order 18, as amended by Order 18-a:

"It is, therefore, ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, at the time of the accrual of the cause of action, or in the county or district wherein the cause of action arose."

The motion was denied, and the defendants excepted and appealed.

Stack, Parker & Craig for plaintiff.
Cansler & Cansler and Armfield & Vann for defendant.

ALLEN, J. It is conceded that this action is properly instituted in the county of Union under section 424 of the Revisal, which permits actions against railroads to be brought in "some county adjoining the county in which the cause of action arose," a statute enacted at the instance of the railroads and for their convenience, unless the statute is superseded by Order 18, as amended by Order 18-a of the Director General, above set out.

As said in *North Pac. Ry. Co. v. North Dakota,* 250 U. S., 135: "The complete and undivided character of the war power of the United States is not disputable," and "When war exists the Government possesses and may exercise all those extreme powers which any sovereignty can wield under the rules of war recognized by the civilized world." Cooley Constitutional Law, 89.

The power is, however, vested in Congress by the Constitution, which alone has power to declare war and to provide for its prosecution; all agencies act under its authority, and if there is a conflict between a State regulation and congressional authority, legally exercised, the power of the National Government is paramount. *North Pac. Ry. Co. v. North Dakota, supra.*

It is also true that what was said by *Chief Justice Marshall,* in *McCullough v. Maryland,* 4 Wheat., 316, is applicable to the different powers of government.

"Let the end be legitimate. Let it be within the scope of the Constitution, and all means which are appropriate which are adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

These principles must, however, be considered in connection with our form of government.

"We have in this republic a dual system of government—National and State—each operating within the same territory and upon the same persons, and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control, and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments, and hold each in its separate sphere, is the peculiar duty of all courts. . . . In other words, the two governments—National and State—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers." *South Carolina v. U. S.,* 199 U. S., 110.

Let us then consider the order of the Director General, remembering that it is the duty of the courts to adopt a rule of construction which will prevent conflict between National and State authority, if possible, and that the Director General derives his power from the acts of Congress.

The order requires actions to be brought "in the county or district where the plaintiff resides at the time of the accrual of the action, or in the county or district where the cause of action arose," and while the Director General probably had in mind Federal Districts, it does no violence to the spirit and purpose of the order, which was to avoid

expense and the annoyance and inconvenience of having witnesses and parties carried to distant places, to hold that judicial districts are included, and if so, the counties of Richmond, Anson, and Union, being in the same judicial district, the action has been brought in the "district where the plaintiff resides," and in the "district wherein the cause of action arose."

But, however this may be, the act of Congress, after placing carriers under Federal Control, expressly provides that "Actions at law on suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," and the action has been brought as was provided by law when the act of Congress was adopted, and the statute of the State cannot be set aside by the order of the Director General not in accord with congressional action.

There are very few authorities dealing with the question, but two of those relied on by the plaintiff are directly in point, *Friesen v. R. R.*, 254 F., 875; *R. R. v. Lovick*, 210 (Tex.) S. W., 283.

In the first it was held that "Under act of 21 March, 1918, paragraphs 8, 10, and despite section 9, held that orders of the Director General of Railroads, through whom the President assumed control of the railroads pursuant to act 29 August, 1916 (Comp. St., 1916, paragraph 197-a), that suits against carriers while under Federal control should be brought in the county or district where the plaintiff resided at the time of the accrual of the action, were not effective to so limit that right, and where authorized by State law, a plaintiff might sue in a district other than that in which he resided at the time of accrual of the action, upon a cause of action not arising out of the railway company's duties as a common carrier," and in the other: "Orders No. 18 and 18-a of the Director General of Railroads, dated 9 and 18 April, 1918, in so far as they require all suits against carriers under Federal control to be brought in county or district where plaintiff resides or resided at the time of the accrual of the cause or in the county or district where the cause arose, is inconsistent with and contrary to this section, providing 'actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law.'"

In *Wainright v. R. R.*, 153 F., 461, on which the defendant relies, the Court declines to pass on the power to regulate actions in the State courts, which is the question before us.

In our opinion there is no error.

Affirmed.

HENRY NEWELL v. C. B. BARLEY.

(Filed 24 November, 1920.)

1. Courts—Jurisdiction—Justices' Courts—Contract—Breach—Torts.

Rev., 1419, passed in conformity with our State Constitution, Art. IV, sec. 27, confers jurisdiction on the justice's court over an action to recover unliquidated damages for breach of contract when the principal sum demanded does not exceed two hundred dollars; and such is not disturbed by elements of false warranty and deceit being also involved, on the ground that over an action sounding in tort such jurisdiction is limited to a recovery of not exceeding fifty dollars.

2. Same—Summons—Amount Involved.

The amount demanded in the summons controls the jurisdiction in an action upon contract in a justice's court, and, when the debt is claimed in a larger sum, the creditor may remit the excess, over two hundred dollars, in which event the jurisdiction as to the amount involved will be upheld.

CIVIL ACTION, tried on appeal from a justice's court before *Lane, J.*, and a jury, at May Term, 1920, of MECKLENBURG.

The action is to recover the sum of $200 for breach of contract of an alleged express warranty in sale of mule by defendant to plaintiff. The summons returnable to the justice stated $200 as the sum demanded for the alleged breach of contract. On denial of liability there was judgment of $200 damages in the justice's court, and on the trial in the Superior Court, the jury rendered the following verdict:

"1. Did the defendant guarantee the mule described in the complaint to be sound and all right; that he would make good any loss to the plaintiff by reason of any defect in the mule? Answer: 'Yes.'

"2. Did the defendant fail to carry out the terms of said agreement? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover? Answer: '$200.' "

Judgment on the verdict for plaintiff, and the defendant excepted and appealed, assigning for error that the justice had no jurisdiction of the action.

T. L. Kirkpatrick and W. L. Marshall for plaintiff.

J. D. McCall for defendant.

HOKE, J. Our Constitution, Art. IV, sec. 27, in express terms confers upon justices of the peace jurisdiction, "under such regulations as the General Assembly shall prescribe," of civil action founded on contract, "wherein the sum demanded shall not exceed $200," etc. The statutes applicable, Rev., 1419, *et seq.*, establish the regulations for the trial of

such actions before a justice and others specified in the constitutional provision. In construing these regulations, our Court has uniformly held that in action for breach of contract involving a claim for unliquidated damages, the jurisdiction and the amount demanded is determined as stated by the sum named on the summons. And in other cases, though the sum demanded or really involved in the issue should be in excess of $200, the justice's jurisdiction may be upheld when a remitter has been entered in apt time, as provided in Rev., 1421. *Teal v. Templeton,* 149 N. C., 32, and cases cited.

The objection insisted on for defendant that this is an action for deceit and false warranty, constituting a tort, and which the jurisdictional amount for a justice's court is restricted by the Constitution to $50, cannot be sustained. A perusal of the record showing that the suit is for breach of an express contract of warranty, instituted and maintained throughout as such by plaintiff, in which the amount demanded in the summons is $200. And though the elements of false warranty and deceit are also presented, this would not interfere with the prosecution of the present action, where the facts show that suit for breach of contract is maintainable. *Stroud v. Ins. Co.,* 148 N. C., 54; *Manning v. Fountain,* 147 N. C., 18; *Parker v. Express Co.,* 132 N. C., 128.

We find no error in the record, and the judgment for the plaintiff is affirmed.

No error.

FRANCES CAMPBELL BROWN AND LAURA MORRISON BROWN, BY THEIR NEXT FRIEND, MRS. ELLEN C. BROWN, v. MORRISON BROWN, ADMINISTRATOR C. T. A. OF LAURA M. BROWN AND BEDFORD BROWN.

(Filed 24 November, 1920.)

1. Wills—Devise—Power of Sale—Words and Phrases—Synonymous Terms.

Where the testator "advises" his executors to sell all of his houses to make an equal division among his children, excepting his home place, which he "wishes" a certain son "to own": *Held,* by the use of the word "advise," a discretionary power was given the executors to sell the houses, excepting the "home" place, which was to go to the son, under the terms employed, "wishes" him "to own," the intent of the testator being to use these terms, "advise" as a discretionary power to sell, and "wishes" the son "to own" as synonymous with the word devise.

2. Wills—Interpretation—Intent—Equity—Election—Devise—Equal Distribution.

A devise of the testator's "home" place to a son, expressing that there should be an equal division of all of his other lots among his children, and that the son so designated had been liberal in aiding him with money

in "considerable" amounts: *Held*, the son may elect to cancel the indebtedness and take the fee to the "home" place under the will, it appearing that this construction would practically or more nearly carry out the testator's intent to equally divide his property among his children.

CIVIL ACTION, tried before *Bryson, J.*, at October Term, 1920, of MECKLENBURG.

The jury trial was waived and the matter submitted to the court. The question presented arises upon a construction of the will of Laura M. Brown. From the judgment rendered the plaintiffs and the defendant Bedford J. Brown appealed to the Supreme Court.

E. R Preston for plaintiffs.
Walter Clark, Jr., for defendants.

BROWN, J. The part of the will of the testatrix under discussion is as follows:

"1. If Morrison and Edmunds are living in distant States, I appoint Alfred and Bedford executors of my estate.

"2. For equal division, I advise them to sell all the houses I own (14 in number), except my home, 807 E. Ave., which I wish Bedford to own, as he has always spent his money liberally helping me to improve it, and I owe him two considerable debts, one on the addition to the house, also the additional cost of the furnace, and the debt on the brick building on W. Fourth Street. The Fourth Street property, also McDowell Street property, is rising in value so that I trust that an equal division can be made. Before Alfred's marriage he advanced money to me to meet the interest on the debt of the old home, and also helped me settle taxes, and advanced money to his brothers in the Sem., also kept up Morrison's life insurance (which was subsequently lost), and to compensate him, I made him a deed to one of the houses on W. Fourth Street."

His Honor adjudged upon the foregoing facts:

"Upon the foregoing facts, it is ordered, adjudged, and decreed that Bedford J. Brown is the sole owner in fee simple of that certain lot No. 807 E. Avenue, Charlotte, N. C., known and described in the will as 'my home' by Mrs. Laura Morrison Brown, testatrix, and that said 'home place' was devised to Bedford J. Brown in full settlement of his share of the estate of Laura M. Brown, testatrix, and in full settlement of all indebtedness of Laura M. Brown, testatrix, to Bedford J. Brown, up to the time of the making of said will, to wit, 11 August, 1916, the said debts being as follows: A note for $825.75, less a credit of $84, which note is dated 2 September, 1914, and a certain note for $219.46, dated 1 October, 1914; and a debt of $401.46 on Fourth St. property, making a total of $1,362.67."

The will is inartificially drawn, but we think the intention of the testatrix is manifest that her son Bedford should take the home place. It is true the word "devise" is not used, but the words "I wish Bedford to own" are tantamount to saying, "I give and devise" to him. Where the intention is manifest to confer an estate in property upon a devisee any word may be construed to have that effect which in common parlance would not appear to do so.

Thus the word "lend" is construed to mean "give" or "devise," where the meaning is apparent. *Jarman v. Day,* 179 N. C., 318.

We think it is apparent that the testatrix intended to give her son Bedford the home place in full discharge of her indebtedness to him, and he is put to his election as to whether he will take the property or not on those terms. The total indebtedness to the defendant Bedford is found to be about $1,900. It would be impossible to make anywhere near an equal distribution of the property unless this construction was put upon the will.

According to the findings of fact, if Bedford should receive the home place valued at $10,000, and the payment of the indebtedness of the testatrix to him, Bedford would receive some $12,000, while each of the other heirs would receive only some $5,000.

But if Bedford receives the home place, and the indebtedness of testatrix is canceled, he will receive approximately $8,000, and the each of the other heirs approximately $6,000.

His Honor adjudged that the will does not confer the power of sale upon the executors. In this we think the court erred. The language of the will is, "I appoint Alfred and Bedford executors of my estate. For equal division I advise them to sell all the houses I own (14 in number), except my home," etc.

We think it was the plain intention of the testatrix to confer upon her executors the power to sell the property in order to make an equal division upon her children. It would be impossible for the executors to sell the property at all, there being no indebtedness, unless the words of the will are given some effect.

We are of opinion, however, that the word "advise" does not convey a positive direction to sell. It leaves discretionary with the executors as to whether they will sell and divide proceeds in accordance with the terms of the will or leave the property for actual partition among the devisees.

Affirmed.

CLARK, C. J., did not sit on the hearing of this case.

T. M. BARNHARDT v. EAST AVENUE DRUG COMPANY ET AL.

(Filed 24 November, 1920.)

1. Motions—Special Appearance—Merits.

A defendant entering a special appearance for the purpose of dismissing the action must confine himself to jurisdictional grounds, and to obtain the protection of his special appearance he must not plead to the merits of the cause or waive the court's jurisdiction by asking any favor, such as a continuance, or the like.

2. Courts—Amendments—Parties—Justices' Courts—Superior Courts.

The court may allow an amendment to process and pleadings, within its statutory power, either before or after judgment, to correct a misnomer of parties or a mistake in any other respect, by inserting other material allegations when they do not substantially change the claim or defense; or to make the pleading or proceeding conform to the facts proved, Pell's Revisal, sec. 507; and especially so in the Superior Court on appeal from a justice of the peace. Rev., 1467 (Rule II).

3. Appeal and Error—Evidence—Superior Court—Discretion.

The Supreme Court, on appeal, may not pass upon the weight or credibility of the evidence introduced on the trial of an action, and will not disturb the judgment appealed from where there is evidence to support it, except for errors of law under exceptions properly taken and presented.

4. Actions—Stay Bonds—Principal and Surety.

The plaintiff may recover against the principal and surety on defendant's bond given to stay execution, in accordance with the express covenant required by the statute.

APPEAL from *Lane, J.*, at March Term, 1920, of MECKLENBURG.

Clarkson, Taliaferro & Clarkson for plaintiff.
J. T. Sanders for defendant.

WALKER, J. This is a summary proceeding in ejectment to recover land held by defendant under a lease, which was commenced in the court of a justice of the peace and taken by appeal of the defendant to the Superior Court, where a judgment was rendered in favor of the plaintiff for the possession of the premises, rent, and costs. Defendant appealed.

1. The defendant lost the benefit of his special appearance by moving for a continuance and pleading to the merits. This changed his special appearance into a general one. We said in *Scott v. Life Asso.*, 137 N. C., 515: "The Court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits, and appearance for any other purpose than to ques-

tion the jurisdiction of the court is general." And again: "If the defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general," citing *Gilbert v. Hall,* 115 Ind., 549. The *Scott case, supra,* has been cited and approved in a number of late cases, and among them, *S. v. White,* 164 N. C., 408; *School v. Peirce,* 163 N. C., 424. The following state substantially, but in somewhat different language, the same principle: "A general appearance is entered in a cause by the making of a motion which involves the merits. The same is true of a motion for a change of venue, for a continuance, or for an adjournment." 4 C. J., sec. 32, page 1340. "Making a motion for a continuance is a step in the regular prosecution of the cause, and therefore constitutes a general appearance. This is so, although at the same time a motion to quash the summons or process was made"; 2 R. C. L., 329. "The making, by a person in a cause, of any motion which involves the merits, a motion for a change of venue, for a continuance—constitutes a general appearance." 3 Cyc., 508. But it is immaterial what kind of appearance was entered, as defendant was properly served with process, under the statute, so far as the ejectment feature of the action is concerned, and he clearly waived the protection of his special appearance, as to the money judgment, when he elected to ask of the court a favor upon the merits. He should have kept himself strictly within the limits of the special appearance. This is the settled law, as the authorities are united in its favor.

2. The court was well within its statutory power when it allowed the amendment of the process and pleadings so as to show the true names of the parties, there being nothing more than a misnomer, as they originally stood. The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. 1 Pell's Revisal, p. 236, sec. 507. The court, or judge thereof, shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. 1 Pell's Revisal, p. 241, sec. 509, and notes. And a liberal policy is pursued in cases appealed from the court of a justice of the peace, as will be seen by reference to the cases in 1 Pell's Revisal, cited under sec. 507. It was provided by Rev., 1467 (Rule XI), that no process or other proceeding begun before a justice of the peace,

whether in a civil or a criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action is pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment. *Laney v. Mackey,* 144 N. C., 632. The Superior Courts, in cases appealed from a justice's court, are especially required to be liberal in allowing amendments, so that cases may be tried upon their merits and no longer upon the technicalities of procedure. See the cases in the note to that section collected by Judge Pell.

3. The motion for nonsuit was properly overruled, as there was evidence to justify the verdict of the jury. We have no jurisdiction to pass upon the merits of the evidence or to review the findings of the jury, but only decide upon the law. The judge below may set aside the verdict if he considers it against the weight of the testimony, but we possess no such power.

4. The plaintiffs were entitled to judgment upon the stay bond against the principal and his sureties, for that is in accordance with their covenant as expressed in it.

We can find no error in the case on appeal or the record.

No error.

GEORGE E. PENNINGTON v. TOWN OF TARBORO.

(Filed 1 December, 1920.)

(For digest, see *Kornegay v. Goldsboro, post,* 441.)

CLARK, C. J., dissenting.

APPEAL by plaintiffs from *Connor, J.,* heard at chambers, 9 October, 1920, on case agreed, from EDGECOMBE.

This is an action to restrain the sale of bonds at less than par, as the defendant was authorized to do by an act of the General Assembly enacted at the Special Session, 1920.

There was a judgment in favor of the defendant, and the plaintiff appealed.

Allsbrook & Philips for plaintiff.

Don Gilliam and J. L. Morehead for defendant.

ALLEN, J. This appeal is controlled by the decision in *Kornegay v. Goldsboro,* at this term, and upon that authority the judgment is

Affirmed.

CLARK, C. J., dissenting: In this case the plaintiffs were taxpayers of Tarboro, who seek to restrain the commissioners of that municipality from selling at 94 the bonds of that municipality in violation of the general act, ch. 138, Laws 1917, which was passed, as recited in its preamble, as required by the amendment, sec. 4, Art. VIII, of the Constitution, adopted in November, 1916. Section 30 of said chapter 138 required that "All bonds of municipalities shall be sold by the governing body at not less than par."

The governing body of Tarboro were endeavoring to sell these bonds at 94 by virtue of a special act passed at the special session in August, 1920, notwithstanding the amendment to the Constitution required that all laws regulating the issuing of bonds, and the contracting of debts, should be enacted by *general laws.* The injunction against the sale of these bonds at less than par should have been granted.

The question presented is identical with that discussed in *Kornegay v. Goldsboro,* and I cannot add to what I said in an opinion in that case, which I adopt in this.

However, it is well to recall, as stated by *Judge Brown* in his opinion in *Kornegay v. Goldsboro, post,* 441, that the policy of this State was clearly expressed in sec. 4, Art. V, of the Constitution, which provided that, "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract new debts or pecuniary obligations in behalf of the State, except to supply a casual deficit, or for suppressing invasions or insurrections, unless it shall in the same bill levy a special tax to pay the interest annually." This was a very clear intimation that it will be contrary to public policy to sell the bonds of this State at less than par.

The above amendment of 1916, sec. 4, Art. VIII, and the legislation enacted by the Legislature of 1917 in pursuance thereof, as above cited, were intended to protect the taxpayers of all the municipalities of this State by forbidding the sale of their bonds at less than par. It is much to be deprecated that just now when we are on the eve of the issue of a flood of bonds for roads, schools, and other purposes (many, but not all, of which will be necessary) by the State, counties, and municipalities the protection intended and afforded by the above constitutional provision, and the legislation thereunder, shall be held for naught by the bare majority of one vote in this Court. The amendment was long debated, and its purport as a protection to the taxpayers against financial com-

binations, which would force the sale of these bonds at less than par was well understood when it was adopted by the people at the polls.

The effect of this decision will be very great, for the taxpayers of our municipalities will now be left "to the uncovenanted mercies" of great combinations of capital which can at will make money tight when these bonds are to be sold by the municipalities, and will retail them at far enhanced prices. The promoters of every cause who desire the issue of these bonds will be ready to yield to any demand for sales at far less than par. For one, I cannot look upon the prospect without the gravest fear for the future consequences.

If the 6 per cent bonds of such wealthy and prosperous towns as Goldsboro and Tarboro can thus already be forced down to 96 and 94, what will the bonds of less fortunate towns bring when the oncoming flood of bonds are issued?

There is much credit due to Mr. Phillips for the very able and thoughtful argument which he made in behalf of the observance of the constitutional amendment which has been so recently adopted for the protection of the taxpayers in the municipalities of our State.

BROWN, J., concurs in this opinion.

B. T. STARLING AND WIFE v. JAMES H. NEWSOM.

(Filed 1 December, 1920.)

Deeds and Conveyances—Rule in Shelley's Case—Heirs of the Body—Estates.

An estate to S. "for life, and after her death to the heirs of her body in fee, to their only use and behoof," in the *habendum* clause of the deed, conveys to S. a fee-simple estate, under the rule in *Shelley's case*, and the fact that this same language appears in the introductory part does not bring the case without the rule, there being no expression elsewhere in the deed to affect this interpretation.

CONTROVERSY without action, heard by *Cranmer, J.*, at Fall Term, 1920, of WILSON.

From the judgment rendered defendant appealed.

H. G. Connor, Jr., and Bryce Little for plaintiff.
W. A. Finch for defendant.

BROWN, J. It appears that on 9 February, 1917, John A. Scott and wife executed to Susan Ida Starling a deed for certain lands to said

Susan Ida Starling "for life, and after her death to the heirs of her body in fee, to their only use and behoof."

The question presented is, Does the grantee take a fee simple under the rule in *Shelley's case?* This language appears in the introductory or titular part of the deed, and it also appears in the *habendum* clause.

It is clear that under the *habendum* clause the rule in *Shelley's case* applies, and Susan Ida Starling takes the fee simple, and having such, she, with the jointure of her husband, can convey a good and indefeasible title. *Leathers v. Gray,* 101 N. C., 162; *Starnes v. Hill,* 112 N. C., 1.

The fact that the same language appears in the introductory clause can certainly make no difference. The learned counsel for the defendant admits that "looking at the *habendum* clause alone it would seem that the rule in *Shelley's case* applies, and that a fee is conveyed." But the defendant contends that as it appears in the introductory clause, "to Susan Ida Starling, of the second part, for life, and after her death to the heirs of her body in fee," and looking at the deed from its "four corners," that it takes this case out of the rule in *Shelley's case,* and that it comes under the exceptions to the rule.

As the language is the same in both the introductory clause and the *habendum,* we fail to see the force of this contention.

Affirmed.

GEORGE C. KORNEGAY v. CITY OF GOLDSBORO ET AL.

(Filed 1 December, 1920.)

1. Constitutional Law—Amendments— Municipal Corporations— General Laws.

Sec 1, Art. VIII, of our State Constitution, requiring that the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending their charters, except charitable, etc., corporations, refers to private or business corporations, and not to public or *quasi*-public corporations acting as governmental agencies, such as cities, counties, towns, and the like.

2. Same—Statutes.

In the interpretation that sec. 1, Art. VIII, of our Constitution refers to private or business corporations, and not to municipal corporations as governmental agencies, the section should be construed in connection with sec. 2, dealing with "dues from corporations"; sec. 3, defining corporations as including "associations and joint stock companies," and it should be noted that if sec. 4 (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless.

3. Same—Special Acts—Counties.

An act which relates to all municipal corporations of a county, including cities, towns, townships, and school districts, is not a "special act" within the intent and meaning of sec. 1, Art. VIII, of our State Constitution.

4. Same—Local and Private Acts.

Construing sec. 1, Art. VIII, of our Constitution, in connection with the amendments of 1916, and the related subject-matters in sec. 2, dues from corporations, sec. 3, defining corporations as joint stock companies, and sec. 4, that its subject-matter shall be legislated upon by general laws, excluding municipal corporations from such positive inhibition, except changing the names of cities, incorporated towns, etc.: *Held*, the legislative intent was to leave it to the discretion of the Legislature to enact special acts as the needs of municipal corporations may require, with the reservation as to changing the names; and the positive restriction as to "local, private, or special acts," applies to business corporations.

5. Constitutional Laws—Statutes—Repealing Acts—Legislative Opinion.

While the preamble to the Municipal Finance Act of 1917 evidences the opinion that the provisions of the amendments to the Constitution adopted at the election of 1916 was mandatory as to a general law affecting municipal corporations or governmental agencies, this preamble was repealed by the act of 1919, showing that the later Legislature construed the amendment as applying only to private or business corporations, with the exception stated, and the opinion of the Legislature may be considered by the courts in passing upon the meaning of the Constitution.

6. Statutes— Subsequent Statutes — Legislative Powers — Constitutional Law.

A legislative enactment cannot control subsequent Legislatures upon the same subject when within the powers conferred by the Constitution.

7. Statutes—Related Statutes— General Statutes— Repugnancy— Exceptions.

Legislative acts on the same subject are construed so as to be reconcilable when this can be done by fair and reasonable intendment, and a special act will control in its intent a general law, and held to be an exception when necessarily repugnant thereto.

8. Constitutional Law—Local Statutes—Counties—Bonds—Special Privileges.

A special enactment applying to the municipal or governmental agencies within a county allowing them to sell their bonds at less than par, in an emergency, is not in conflict with sec. 7, Art. I, as allowing special privileges under a general statute requiring such corporations not to sell their bonds at less than par.

9. Constitutional Law—Statutes—Courts.

The courts may not declare an act void except upon constitutional grounds.

10. Usury—Municipal Corporations—Bonds—Sales—Chattels.

Usury laws may be changed at the will of the Legislature, and an act authorizing municipalities in a certain county to sell bonds for less than

par is not objectionable as being in conflict with a general law applicable to the State; and especially so when the bonds in question have been sold to the best advantage to a purchaser, thus being dealt with as a sale of a chattel.

11. Constitutional Law—Discrimination—Municipal Corporations—Bonds—Local Laws—General Laws.

It is not objectionable, or in contravention of our State Constitution as discriminatory, for the Legislature, owing to unusual or compelling local conditions, to permit municipalities within the limits of a certain county to sell their bonds for less than par when the same privilege is not granted in other counties.

12. Municipal Corporations— Bonds— Sales— Notice— Advertisement— "Financial Paper."

A newspaper of general circulation regularly publishing news relating to financial matters, and notices of proposed sales of municipal bonds, is within the intent and meaning of a statute requiring that a certain notice of the sales of such bonds be published "in a financial paper or trade journal."

13. Municipal Corporations—Bonds—Private Sale—Public Sale—Sales.

Where an issuance of municipal bonds has met the constitutional and statutory requirements, a sale thereof is not void for the reason they were sold at a higher price at a private sale than was obtained at previous offers to sell at public sales.

CLARK, C. J., and BROWN, J., dissenting.

APPEAL by plaintiff from *Daniels, J.*, on a controversy submitted by action, from WAYNE, heard 7 October, 1920.

This is an action to restrain the sale of certain municipal bonds, the plaintiff alleging that the act of the General Assembly authorizing the sale of the bonds is unconstitutional and void.

The important and material facts involved in this controversy are:

1. That the city of Goldsboro, being indebted for public improvements, prepared to issue bonds under the Municipal Finance Act for sale in order that the proceeds might be used to pay said indebtedness, which consists of $150,000 in favor of the Equitable Trust Company of New York, by notes dated 2 June, 1920, and due 2 December, 1920; $75,000 in favor of the Equitable Trust Company of New York, by notes dated 1 September, 1920, and due 1 February, 1921; $75,000 in favor of J. S. Bache & Company of New York, by notes dated 14 September, 1920, and due 14 September, 1921; $41,661 in favor of Peoples Bank and Trust Company of Goldsboro, now due; $42,500 in favor of Wayne National Bank of Goldsboro, now due; $25,000 in favor of the West Construction Company, due within two months, all of which debts were contracted for the purpose of securing money with which to pay outstanding contracts entered into by the city prior to August, 1920.

2. That the provisions of the finance act were complied with, and the bonds were ready for sale and delivery to the purchaser.

3. That the sale of the bonds was advertised twice, but no sale was made, because no bidder offered to pay par for the bonds.

4. That these conditions existed when the General Assembly met in Special Session in 1920, when an act was passed authorizing the cities, towns, townships and school districts in Wayne County to sell bonds at less than par, "Within four months after the ratification of this act, for the purpose of paying indebtedness heretofore incurred and now due or to become due within six months, or for the purpose of paying the cost of public works, improvements, or properties for the making or acquisition of which an outstanding contract has heretofore been entered into by the city, town, township, or school district, as the case may be."

5. That the indebtedness of the city for which bonds are offered for sale comes within the description in said act.

6. That pursuant to said act said bonds have again been offered for sale, and they will be sold at less than par if no better bid is offered, the right to reject all bids being however reserved.

That on 14 October, 1920, and since the institution of this suit, after advertising in the *Goldsboro Daily Argus, The Raleigh News & Observer, The Bond Buyer of New York,* the city opened bids for said bonds, the best bid received for said bonds pursuant to said advertisement being less than ninety-six. That the board of aldermen rejected all of said bids, and on the following day sold said bonds to the Wayne National Bank of Goldsboro at ninety-six and accrued interest, the Wayne National Bank acting as agent in said purchase for New York and Toledo bond buyers.

That said bonds were duly executed, and were in New York City at the time of the sale; that delivery of the bonds was to be made in New York City; that payment of both principal and interest of the bonds are to be made in New York City.

That there is no intent to evade the usury laws of this State, but in good faith to meet the urgent, necessary, and immediate needs of the city in the sale of said bonds.

That unless the city can legally deliver and receive payment for said bonds there is an immediate and eminent danger that the city will have to default in the payment of its obligations.

His Honor refused to restrain the sale of the bonds, and the plaintiff excepted and appealed.

Dickinson & Freeman for plaintiff.

D. C. Humphrey for defendant.

ALLEN, J. The plaintiff raises several constitutional questions, which we will consider in their order, first laying down the rules formulated by the experience of the past as safe guides when an act of the legislative branch of the Government is attacked upon the ground that it violates some provision of the Constitution.

"The power of the General Assembly to pass all needful laws, except when barred by constitutional restrictions, is plenary." *Shelby v. Power Co.*, 155 N. C., 196.

"Every presumption is in favor of the validity of an act of the Legislature, and all doubts are resolved in support of the act. In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution." *Lowery v. School Trustees,* 140 N. C., 40.

The right to declare an act unconstitutional "Should be exercised sparingly, and the conflict between the fundamental law and the legislation should be manifest, and clear beyond any reasonable doubt. We should endeavor, by the use of all reasonable logic, to harmonize the two, and only resort to the power as a last expedient, where our plain duty requires us to exercise it in order to preserve the supremacy of the Constitution." *Johnson v. Board of Education,* 166 N. C., 472.

"It is a well recognized principle of statutory construction that 'A court will not adjudge an act of the Legislature invalid unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable.' Black Court Law, p. 61. And that as between two permissible interpretations, 'That construction of a statute be adopted which will uphold the law.' " *Bonitz v. School Trustees,* 154 N. C., 379.

The courts have no power to declare an act unconstitutional because "it is opposed to the spirit supposed to pervade the Constitution," or "is against the nature and spirit of the Government," or "is contrary to the general principles of liberty," or "because they may be harsh and may create hardships or inconvenience," or "upon the grounds of inexpediency, injustice, or impropriety," or "because not wise or against public policy."

"The courts are not the guardians of the rights of the people against oppressive legislation which does not violate the provisions of the Constitution. . . . The propriety, wisdom, and expediency of legislation is exclusively a legislative question and the courts will not declare a statute invalid because in their judgment it may be unwise or detrimental to the best interests of the State. . . . The only question for the courts to decide is one of power, not of expediency, and statutes will not be declared void simply because, in the opinion of the Court, they are unwise." 6 R. C. L., 104, *et seq.*

"The Legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactment, the mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of this legislation in question, affords no ground for judicial interference, unless the act is unmistakably in excess of legislative power." *McLean v. Arkansas,* 211 U. S., 539.

The legislative construction of a statute, while not binding on the courts, "is entitled to great weight." *Sash Co. v. Parker,* 153 N. C., 134.

Let us then see not whether the statute passed at the Special Session of 1920 authorizing the sale of these bonds at less than par is wise, or in accordance with the best public policy, but is its unconstitutionality "clear, complete, and unmistakable," the rule approved by *Hoke, J.,* in the *Bonitz case,* or is it "manifest and clear beyond any reasonable doubt," which is stated as the correct guide by *Walker, J.,* in the *Johnson case,* because this is the test, and unless we can so say, resolving doubts in favor of the statute, we are required to uphold and sustain it.

The plaintiff contends:

1. That the act passed at the Special Session 1920, authorizing a sale of the bonds at less than par, is in conflict with Art. VIII, sec. 1, of the Constitution, which provides: "No corporation shall be created, nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations, and for amending, extending, and forfeiture of all charters, except those above permitted by special act."

The answer is that the defendant is a public corporation, and sec. 1 of Art. VIII "would seem clearly to have reference to private or business corporations, and does not refer to public or *quasi*-public corporations acting as governmental agencies." *Mills v. Comrs.,* 175 N. C., 219, approved on this point at this term in *Dickson v. Brewer, ante,* 403.

If argument was needed in support of this authority it is found in the fact that the section is in an article, entitled "Corporations other than municipal," section 2 deals with "dues from corporations," section 3 defines corporations as including "associations and joint-stock companies," circumstances referable naturally to private corporations, and if section 1 includes public corporations, section 4, which properly belongs in Article VII, serves no purpose.

Again, section 1 only prohibits the enactment of a "special act," and an act applicable to all the municipal corporations of Wayne County, including cities, towns, townships and school districts, is not special.

In *Williams v. Comrs.*, 119 N. C., 520, approved in *Herring v. Dixon*, 122 N. C., 423, and in *R. R. v. Cherokee County*, 177 N. C., 92, it was held that a statute authorizing a special county tax for the purpose of maintaining public ferries, public roads, and meeting other current expenses of Craven County, was not for a special purpose within the meaning of sec. 6, Art. V, of the Constitution. In *Brown v. Comrs.*, 173 N. C., 598, that "The amendment of 1916 to our Constitution, Art. II, sec. 29, prohibiting the passage by the General Assembly of local, private, or special acts 'authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys,' does not include within its meaning an act authorizing a county to issue bonds for the highways of a township," and the same conclusion was reached in *Mills v. Comrs.*, 175 N. C., 216, in which an act authorizing an issue of bonds to build bridges across the Catawba River was sustained, and in *Parvin v. Comrs.*, 177 N. C., 508, sustaining an act allowing Beaufort County to issue bonds for roads, and none of the acts considered in these cases were broader in scope, or more comprehensive as to subject-matter than the one before us.

2. That the act is in conflict with Art. VIII, sec. 4, of the Constitution, which is as follows: "It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

The position of the plaintiff is that the duty imposed on the General Assembly to pass general laws operates to prevent the enactment of all special laws relating to municipal corporations, and if this can be maintained the General Assembly has no power to incorporate a city or town, or to amend its charter or to authorize it to issue bonds or to confer any other power, whatever may be the needs of the particular locality, and the special acts of 1917 authorizing fifteen bond issues and granting or amending thirty-eight charters, and of 1919 having the same effect as to twenty-five bond issues and forty-one charters, are void.

Evidently the General Assembly has not put this construction on the amendments to the Constitution.

Judge Dillon, one of the ablest and most learned of American lawyers, discusses at some length express prohibitions in Constitutions against special legislation (Dillon Munic. Corp. (5 ed.), vol. 1, sec. 141), and concludes: "Thirty years experience with these general constitutional interdicts against local and special legislation have impressed the author with the conviction that they have failed to produce the beneficial results anticipated, and that this has been brought about because the prohibi-

tions of special legislation are too broad and sweeping. Special legislation in some form is often necessary, and it should be allowed, but carefully safeguarded. . . . Municipal administration is essentially local in its nature, and local features, peculiar to a single municipality, naturally call for special legislation. . . . The constitutional provisions were generally adopted about thirty years ago, and thirty years experience of legislation under their provisions gives grave reason to fear that, so far from being effective, they have not prevented legislation intended to have a special and local operation, and have caused endless uncertainty and confusion. . . . The application of constitutional provisions prohibiting special legislation has proved to be fraught with so many difficulties and to have resulted in so many inconsistencies that it may be doubted whether any lasting benefit has been derived from their adoption. . . . Special legislation to meet the wants, requirements, and special needs of each municipality, rather than general laws exclusively, is consonant with the fundamental principle and policy of local self-government and home rule, and in our judgment the true remedy is not absolutely and sweepingly to prohibit such legislation, but to safeguard it from legislative abuse. Such is the plain lesson taught by thirty years experience."

This section (Art. VIII, sec. 4), as said in *French v. Comrs.*, 74 N. C., 692, imposes on the Legislature "a moral obligation." It contains no prohibition on the exercise of legislative power, and has in it no declaration that private, local, or special acts shall not be passed relating to the organization of cities and towns, and conferring particular powers, and this omission, when considered in connection with the history of the recent amendments to the Constitution, is fatal to the claim that local or special acts may not be legally enacted, conferring special authority on municipal corporations.

The sessions of the General Assembly are practically limited to sixty days, and so much of its time was consumed in dealing with private and local bills that legislation of State-wide importance could not receive proper and deliberate consideration.

The General Assembly of 1915 undertook to remedy this evil by submitting several amendments to the Constitution, which were adopted at the election in 1916.

The first amendment requires the General Assembly to pass general laws on fourteen subjects, and declares "the General Assembly shall not pass any local, private, or special act or resolution" relating to them.

Among these subjects is "changing the names of cities, towns, and townships."

The second amendment authorizes the appointment of emergency judges, under certain conditions, and is not material.

The third strikes out the first section of Article VIII, and substitutes the section quoted above, and it will be noted that the old section provided for the organization of private corporations under general law, without prohibiting special legislation, while the new section prohibits a special act.

The fourth submits section 4 of Article VIII as it now stands, instead of section 4 as it was before it was amended, the only change being the insertion of the words "by general laws."

It is thus seen that the General Assembly had in mind and fully realized the evils of special, local, and private acts, and that it adopted a complete and comprehensive scheme by constitutional amendment as a remedy; that in doing so such legislation was expressly prohibited on fourteen subjects, including "changing the names of cities, towns, and townships"; that granting a charter to a private corporation or amending the same by special act was prohibited, but when it came to the municipal corporation the Legislature is left free and without express restraint, although since 1868 more than a thousand special acts have been enacted in reference to municipal corporations. Why should there be prohibitions on legislative action in amendments one and three and none in four, if the same restraint was to operate on all?

Why should it be said in amendment one, "The General Assembly shall not pass any local, private, or special act relating to 'changing the names of cities, towns, or townships,'" if section 4 prohibits special legislation relating to municipal corporations, which would include legislation changing the name?

When it is remembered that the amendments were submitted at the same time as parts of one scheme to get rid of special legislation as far as practicable; that special acts relating to municipal corporations were more numerous than any one other subject; that cities and towns are referred to in amendment one, but only in reference to changing the name; that there is positive restraint on legislative action as to all subjects except those embraced in section 4, and no restraint in that one, is it not clear that the true intent of the last section is to impose the duty of passing general laws relating to cities and towns, leaving it to the discretion of the Legislature to enact special acts as the needs of the municipalities may require?

The reason for making this distinction is that the needs of the different communities are so diverse that no Legislature could foresee the emergencies that would arise in different localities, or the necessity for additional powers dependent on changing conditions, and could not provide for them by general legislation, and the present case is an apt illustration of the wisdom of this course.

When the finance act was passed, declaring that municipal bonds should not be sold at less than par, there was a ready market for bonds, while now it is impossible to find a purchaser except at a discount, and already not only Wayne County towns, but also Tarboro, Plymouth, Roanoke Rapids School District, and Guilford County have applied for authority to sell for a less price as is shown by the acts of the special session, and the authority has been granted.

It may well be said of the failure to prohibit special legislation in Article VIII, section 4, as was said by *Rodman, J.*, in *French v. Comrs., supra,* of the refusal to limit the rate of taxation of cities and towns in the Constitution, "The omission was of purpose. It was unwise to establish in a law, which was expected to be comparatively permanent, the same maximum rate of taxation for all the cities and towns in the State, with population and other conditions so different."

However this may be, there is no prohibition in section 4, and "in the absence of an express constitutional provision to the contrary, the Legislature may enact special and local laws with respect to the establishment and government of municipal corporations. There is no constitutional objection to a law which is in fact applicable to but a single city or town." 19 R. C. L., 739.

The case of *Stuart v. Kirley,* 12 South Dakota, 245, is directly in point, as it was held in that case that the Legislature could enact a special act changing the boundaries of a particular county, although the State Constitution declared that "The Legislature shall provide by general law for changing county lines."

The case principally relied on by the plaintiff, 4 Kansas, 124, approved in 5 Kansas, 603, has language in it which sustains the position of the plaintiff, but it was not necessary to the decision of the case beause the Court had already held that the statute then under consideration was void under an express prohibition in the Constitution, and if the case is authority at all on this point, and should be followed, it would prohibit all acts of the Legislature in regard to municipal corporations, including the granting of charters, their amendment, extension of boundaries, etc.

The preamble to the finance act furnishes an argument that the Legislature of 1917 was of opinion that the amendment of 1916 is mandatory, to the extent that it imposes the duty to pass a general law, but not that it prohibits a special act, and in any event the Legislature of 1919 was of a different opinion, as it repealed the preamble (ch. 178, Laws 1919), and it is now no part of the finance act.

3. That the act confers special privileges, and is therefore in conflict with section 7, Article I, of the Constitution, which declares: "No man

or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Answering a similar objection in *Reid v. R. R.*, 162 N. C., 359, the Court says: "Nor will the second objection avail plaintiff, that the act violates the section of the Constitution which prohibits the granting of special privileges and emoluments. The very section relied on by the appellant closes with the exception, 'but in consideration of public services,' and under our decisions these franchises granted to public-service corporations come directly within the words and meaning of the exception. *In re Spease Ferry,* 138 N. C., pp. 219-222."

In *Power Co. v. Power Co.,* 175 N. C., 677, it was objected that the right of eminent domain could not be conferred on one electric company, and the Court says: "Such a right has been conferred in many instances, especially in the case of railroad companies and other like corporations which serve the public. It is not forbidden to be done by our Constitution, Art. I, sec. 7 (Bill of Rights), which declares that 'no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services,' because in this case the power to condemn is based upon the obligation to render that kind of service."

Surely if this principle avails the railroad and electric company, it will be applied in behalf of the municipal corporation, an agency of the State, created for the benefit of the public.

These are the constitutional objections, and no other can justify setting aside an act of the General Assembly, but there are others growing out of certain legislation, which may well be considered, although it should be sufficient to say that no Legislature can by general or special act bind its successor.

4. It is urged that the General Assembly, acting under the authority of Article VIII, section 4, of the Constitution, adopted the finance act, which requires bonds to be sold at par, and that the Wayne County act is in conflict with the general law, and should be set aside.

All acts of the Legislature are passed under constitutional authority, and if the position of the plaintiff can be maintained, it would withdraw from subsequent Legislatures the power of amendment or repeal.

The finance act is simply a legislative act, not a constitutional provision, and like other acts is subject to change at the will of the Legislature. *Bramham v. Durham,* 171 N. C., 197, is very much in point.

In 1915 (ch. 56) an act relating to local improvements, applicable to all municipalities, was adopted, acting under this section of the Constitution, and authorizing issues of bonds without a vote of the people. At the same session there was another act, confined in its operation to Durham, authorizing an issue of bonds for street improve-

ments, but requiring a vote of the people, and it was held that the two acts must be construed together, that the latter was in effect an exception from the first, and must be followed.

The Court, speaking through *Hoke, J.,* says: "It is a well recognized principle of statutory construction that when there are two acts of the Legislature applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment, but, to the extent that they are necessarily repugnant, the latter shall prevail. The position is stated in substantially these terms by *Associate Justice Field* in *U. S. v. Tynen,* 78 U. S., 92, as follows: 'Where there are two acts on the same subject, the rule is to give effect to both, if possible; but if the two are repugnant in any of their provisions, the latter act, and without any repealing clause, operates to the extent of the repugnancy as a repeal of the first'; and in Sedgwick on Statutory Construction, p. 127, quoting from *Ely v. Bliss,* 5 Beavan, it is said: 'If two inconsistent acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed, without derogation from the first, it is the first that must give way.'

"Again, it is established that where a general and a special statute are passed on the same subject, and the two are necessarily inconsistent, it is the special statute that will prevail, this last being regarded usually as in the nature of an exception to the former. *Cecil v. High Point,* 165 N. C., pp. 431-435; *Comrs. v. Alderman,* 158 N. C., pp. 197-198; *Dahnke v. The People,* 168 Ill., 102; *Stockett v. Bird,* 18 Md., 484, a position that obtains though the special law precedes the general, unless the provisions of the general statute necessarily excludes such a construction. *Rodgers v. U. S.,* 185 U. S., 83; Black on Interpretation of Laws, p. 117."

This case was approved in *Power Co. v. Power Co.,* 171 N. C., 255, in an opinion by *Walker, J.,* who adds: "Where a later special law, local or restricted in its operation, is positively repugnant to the former law, and not merely affirmative, cumulative, or auxiliary, it repeals the older law by implication *pro tante,* to the extent of such repugnancy within the limits to which the latter applies. *McGavick v. State,* 30 N. J. L., 510; *Township of Harrison v. Supervisors,* 117 Mich., 215; *R. R. v. Ely,* 95 N. C., 77. 'The well settled rule of construction, where contradictory laws come in question, is that the law general must yield to the law special.' Moy's Maxims, 19. *S. v. Clark,* 25 N. J. L., 54."

There is no conflict between the two acts, and the latter should be read as an exception to the former.

5. It is further contended that the sale of the bonds at less than par is usurious and in conflict with the general law fixing the rate of interest in the State. If this was true it would furnish no reason for refusing

to give effect to the Wayne County act, because usury laws may be changed at will, but the transaction is not usurious, the sale of bonds being dealt with as a sale of chattels.

In 39 Cyc., 936, after stating that the delivery of a note by the maker to a purchaser at less than its face value is usurious, the author, Prof. Vance of the Yale Law School, says: "In some jurisdictions the principle just stated is applied to issues of municipal and other bonds purchased directly from the corporation at a discount greater than legal interest. But by the weight of authority such bonds are regarded as having a valid existence and transferable quality in the hands of the issuing corporation, and thus subject to sale at their market value, which may be at a discount much greater than legal interest, without making them subject to the taint of usury in the hands of an immediate purchaser."

In *Bank v. Mfg. Co.*, 96 N. C., 298, it was held that a sale of bonds of the face value of $45,000 for $30,000 was not usurious, and the same conclusion reached in *R. R. v. Ashland*, 79 U. S., 226, upon the ground that a sale of bonds was as the sale of any other chattel, where the bonds bore ten per cent interest on their face, and were sold to a corporation limited by its charter to taking more than seven per cent.

The following authorities also sustain this fully: *Orchard v. School District*, 14 Neb., 379; *Griffith v. Burden*, 35 Iowa, 143; *Gamble v. 2 C. W. Co.*, 123 N. Y., 93; *Memphis v. Bethel* (Tenn.), 17 S. W., 193; *Coe v. Railroad* (Ohio), 75 A. D., 518; *Memphis v. Brown*, 16 Fed. Cases, No. 9415.

The most interesting and instructive of these is the *Iowa case*, which says: "Under the more modern rule respecting municipal and corporation bonded indebtedness, whether the power to issue the bonds is derived from authority to 'borrow money,' to 'negotiate a loan,' to 'fund its indebtedness,' to 'contract a debt and issue its bonds therefor,' to 'issue and sell its bonds not exceeding,' etc., or, generally, to do any act or accomplish any work requiring, or which may properly be effectuated by the issuance of bonds, the power to sell the bonds in the market directly by the officers and agents of the municipality or corporation issuing them is well established. In other words, the authority to sell the bonds in the market is an incident attendant upon and growing out of the power to issue them. And it follows, hence, that the right and title of the first purchaser, directly from the municipality or corporation, is as perfectly and fully enforced and protected as if he were a third person buying the bonds in a subsequent market sale. The character of a chattel attaches to them under such circumstances, and the title passes as effectually as if they were chattels fairly sold at their market value, and no equities, such as might attach under like circumstances

to ordinary commercial paper, can be interposed as a defense, total or partial, in an action upon them. As was decided by a very able Court, in one of the many cases we have carefully examined: 'The obvious interest of the companies is that these bonds should be saleable, free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds, upon every transfer of them, would be to strike a blow at the credit of the great mass of these securities now in the market, the consequence of which it would be impossible to predict.' *The Morris Canal & Bank Co. v. Fisher,* 1 Stock., ch. 667 (*i. e.,* 700).

"This character of chattels, which by the modern rule it attached to these securities, must also, upon principle, exempt them from the defense of usury (as has been done by express statute in several of the States). For, if they are regarded as chattels, and this character is accorded to them in order to promote their sale and enhance their value as investments, then, since usury cannot be predicated upon a sale of chattels merely, neither can it be predicated upon a sale of bonds having the recognized character of chattels."

6. It is also urged that the act is not general in its application, and that it permits the municipal corporations of Wayne County to sell bonds at less than par when the same privilege is not granted in other localities.

In *Power Co. v. Power Co., supra,* this objection is met and the rule approved which is stated by *Judge Cooley,* as follows: " 'The authority which legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation and a different application of the public moneys. The Legislature may, therefore, prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases, and through different agencies, and prescribe peculiar restrictions upon taxation in each district or municipality, provided the State Constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle.'

"And in the same work, at p. 554, note 2, it is said: 'To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial

limits described in the act,' citing *S. v. County Commissioners of Baltimore,* 29 Md., 516; *Pollock v. McClurken,* 42 Ill., 370; *Haskel v. Burlington,* 30 Iowa, 232; *Unity v. Burrage,* 103 U. S., 447."

In *S. v. Moore,* 104 N. C., 720; *S. v. Blake,* 157 N. C., 608, and in *Newell v. Green,* 169 N. C., 462, numerous instances are given of valid laws applicable to particular localities, the rule being as stated in the *Moore case,* and approved in the *Blake case:* "If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and that they are public in their character, and of their propriety and policy the Legislature must judge."

We have in this State two well recognized exceptions to the usury statute, one allowing banks to take interest in advance (Rev., 228), which in the private individual would be usury, and the other, which is a part of the usury statute, permitting the bonds of private corporations to be sold at less than par, and it was held in *Bank v. Mfg. Co.,* 96 N. C., 298, that a sale of bonds of the par value of $45,000 for $30,000 by a private corporation was not usurious.

7. The last objection is that the *News and Observer* is not a financial paper within the meaning of the amendment to the finance act at the special session, requiring a certain notice to be published "in a financial paper or trade journal," but it is agreed that this paper, in addition to publishing general news, "also regularly publishes news relating to financial matters, and also publishes from time to time notices of proposed sales of municipal bonds of municipalities in North Carolina," which is a sufficient compliance with the statute.

The fact that the bonds were sold privately for a higher price than could be obtained at public sale, and after three efforts to sell after due advertisement, does not invalidate the sale.

The statute of 1920 has been passed to meet a pressing emergency, and is of limited duration, and as we find no constitutional objection to its enactment, it must be sustained.

Affirmed.

CLARK, C. J., dissenting: Up to the second Wednesday in January, 1917, the Constitution of North Carolina, Art. VIII, sec. 4, read as follows:

"SEC. 4. It shall be the duty of the Legislature to provide for the organization of cities, towns, incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations."

The General Assembly of 1915, ch. 99, submitted sundry amendments to the Constitution to the people for approval, and among them, section 4 of said act provided that the Constitution should be amended "by striking out section 4 of Article VIII and substituting therefor the following:

"It shall be the duty of the Legislature to provide *by general laws* for the organization of cities, towns, and incorporated villages, and to restrict their powers of taxation, assessment, borrowing money, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations."

Said act provided for the manner of voting upon the amendments, and the return of the votes and the declaration of the results, and section 8 of the said act provided that "any amendment so adopted shall take effect on the second Wednesday after the first Monday in January, 1917. Any provision of these amendments passed by the General Assembly, and so adopted by the qualified voters, inconsistent with, or in conflict with, any provisions of the present Constitution shall be held to prevail."

The amendment in question, striking out the former section 4, Article VIII, and substituting the new section 4 of that article, was declared duly adopted by the people at the ballot box, and has been a part of the Constitution since the prescribed date, 10 January, 1917.

It will be seen by comparison that the new section 4, Article VIII, differs from the old section of that article only by the insertion of the words *"by general laws"* in lines 1 and 2 thereof, so that, whereas, prior to the enactment of the substituted section, the Legislature was left free to discharge the duties placed upon it by said section, either by special laws or general acts, as it saw fit, by the substituted section the Legislature was empowered to exercise those duties *"by general laws"* only. Those who are conversant with the history of the State at that time, and with the discussion of this amendment in the press, in the General Assembly, and to the public before the election, will recall the purpose of such substitution was for the sole purpose of forbidding the Legislature to discharge the duties of that section by special legislation, and to restrict it to general laws on those subjects.

If this was not the intention in *substituting* the new section 4, Article VIII, for what purpose was it solemnly enacted by the General Assembly, and for what purpose did the people ratify it at the polls?

That the next succeeding General Assembly, whose members were elected on the same day this was ratified, so understood the object of this amendment is shown by the fact that the General Assembly of 1917 enacted chapter 136, which was a general act, very full and elaborate, "to provide for the organization and government of cities, towns, and incorporated villages," and also enacted chapter 140 (ratified 7 March, 1917), a general act entitled, "An act relating to general municipal

finance." The preamble to this act specifies that it is required by the constitutional amendment, and reads as follows:

"Whereas, the people of North Carolina, in November, 1916, adopted amendments to the State Constitution which prohibited the enactment of special legislation amending the charter of municipal and other corporations, and made it the duty of the Legislature to provide *by general laws* for the organization of cities, towns, and incorporated villages, and *to restrict their power* of taxation, assessment, borrowing money, contracting debts, and loaning their credit so as to prevent abuses in assessment and in *contracting debts* by such municipal corporation; and whereas, many of the municipalities of this State require the powers hereinafter mentioned; now, therefore"—

After this recital there follows a most careful and comprehensive act of 28 pages, covering every phase of the powers and duties conferred upon and "restricting municipal corporations as to taxation, assessment, borrowing money, contracting debts, and loaning their credits."

Section 5 of this act (ch. 140) provides: "All bonds of the municipality shall be sold by the governing body at not less than par." This section then goes on to prescribe in great detail the methods for advertising the bonds for sale, deposits by bidders, the award, right to reject bids, private sales, sales of bonds from sinking fund, which bonds only it is directed "may be sold at less than par."

The amendment strikes out the former section 4, Article VIII, which did not state the manner in which the Legislature should regulate the organization, government, and financial control of municipalities, but left it to that body to do these things, either by special acts or general laws, and substituted therefor the requirement that "it shall be the duty of the Legislature, by *general laws,*" to do these things. In 8 Cyc., 762 (c), it is said: "All constitutional provisions that *designate* in *express* terms the time or *manner of doing particular acts* and *are silent as to their performance in any other manner are mandatory,* and must be followed."

The same doctrine is well set out, 6 R. C. L., sec. 50, 51 (pp. 55, 56): "It is the general rule to regard constitutional provisions as mandatory, and not to leave it to the will of the Legislature to obey or to disregard them. This presumption as to mandatory quality is usually followed unless it is unmistakably manifest that the provisions were intended to be directory only. . . . So strong is the inclination in favor of giving obligatory force to the terms of organic law that it has been said that neither by the courts nor by any other department of the Government can any provision of the Constitution be regarded as merely directory, but that each and every one of its provisions should be treated

as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes."

The Constitution is the "higher law," enacted by the people themselves as a mandate to the Legislature, and is a restriction upon their powers, which otherwise would be absolute. In view of the contention that this amendment is merely a suggestion to the Legislature, which it may observe or not, as financial interests may find it convenient, let us read against the provisions of this amendment so recently adopted at the ballot box:

"It *shall be the duty* of the Legislature to provide *by general laws* for the organization of cities, towns, and incorporated villages, and to restrict their power of *taxation,* assessment, *borrowing money, contracting debts,* and *loaning their credit* so as to prevent abuses in assessment, and in *contracting debts* by such municipal corporations."

There is nothing directory in this amendment. The purpose is clearly expressed to prevent abuses in contracting debt by the municipalities, and the means by which such abuses are to be prevented are "by general laws." It provides that "it shall be the duty of the Legislature" to do those things by *"general laws,"* which is a restriction to that method. The opportunity for abuse in such matters by special legislation procured by a single member of the Legislature, at the instance of local interests, was well known to all men, and the object was to prevent such legislation by the requirement in the Constitution that all legislation affecting such matters should be uniform and enacted by general laws as to which every member of the General Assembly would be fixed with responsibility, whereas, as is well known, special acts of local application receive no attention. To prevent this very evil, as well as to save the waste of time of the General Assembly in such legislation, the former section of the Constitution which permitted local legislation, as well as general laws, in providing for the regulation of municipalities, was stricken out and this amendment was adopted which made it the *duty* of the Legislature to enact such regulations of municipalities by *general laws.*

Referring to this very subject of special acts, *Bynum, J.,* one of the ablest and clearest-headed judges that has ever sat upon this bench, says in *Simonton v. Lanier,* 71 N. C., 505: "Public laws are founded on the gravest considerations of public benefit. They are deliberately enacted, are permanent in character, are for the benefit of all, and of universal application. Not so with private statutes, these are not of common concern, and do not receive the watchful and cautious scrutiny of the Legislature, which is devoted to those of a public character. They are often procured by agents and for a purpose, who are watchful to take advantage of any relaxation in legislative vigilance."

The mandatory character of the provisions of our Constitution, as to municipal indebtedness and to taxation is tersely stated by the Court in *McGuire v. Williams*, 123 N. C., at top of page 356, as follows: "Since the opinion in *Charlotte v. Shepard*, 122 N. C., 602, concurred in by every member of this Court, it must be considered *a settled rule* that the provisions of the Constitution in relation to *municipal indebtedness and taxation are mandatory*, and will be strictly enforced by this Court."

The provisions of this amendment, providing that legislation regulating municipal indebtedness and taxation shall be by general laws is too clear upon its face, and the purpose of its enactment is too well known, to leave any doubt that it was intended to prevent the abuses incident to special legislation, which could be controlled and influenced by local influences in favor of special interests.

One of the most familiar rules of construction of both statutes and constitutions is to give effect to the intent of the framers and of the people who adopted them, and it is especially applicable to all constitutions that they are to be construed so as to promote the objects for which they are framed and adopted. 8 Cyc., 730 (3a). The same proposition is stated in 6 R. C. L., sec. 45, p. 50, that a constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed.

If section 4, Article VIII, as it formerly stood, which permitted regulation of municipalities as to taxation and contracting debts by special act, as well as by general laws, was satisfactory and did not admit of abuses, for what purpose did the Legislature submit, and the people at the polls ratify, a constitutional provision, striking out the section as it stood, and reënacting it in exactly the same words in every respect except the insertion of the words, making it the duty of the Legislature to enact such legislation "by general laws"?

It is also said in 6 R. C. L., sec. 45, p. 51, that it is settled by the highest authority that in construing a Constitution or any clause thereof, "the Court should look to the history of the times and examine the state of things existing when the Constitution, or amendment thereto, was framed or adopted, to ascertain the old law, the mischief, and the remedy," and the text is supported by citations of authorities from U. S. Supreme Court, notably *R. I. v. Mass.*, 12 Pet., 657, and the famouse *Slaughter House cases*, 16 Wall., 36. It is common knowledge that prior to the adoption of this amendment to the Constitution the Legislature was overwhelmed with a mass of special and private legislation affecting particular communities, and not the State as a whole, such legislation being often procured for the benefit of the special local interests of individuals.

The words of this amendment: "It shall be the duty of the Legislature to provide *by general laws*" absolutely commands the manner in which the laws affecting these municipalities and the subjects embraced in that section shall be passed, and the addition of the words of prohibition, directing the opposite not to be done, would be redundant and superogatory.

The defendant contends that a special act enacted by the General Assembly at the Special Session of 1920, entitled "An act relating to the finances of cities, towns, townships, and school districts of Wayne County," and authorizing them to sell their bonds "at such place and at such interest basis, whether above or below 6 per cent per annum, as the official board or body may determine to be the best obtainable," is valid as to the town of Goldsboro notwithstanding the above amendment which requires that all such legislation as to municipalities shall be enacted by general laws, and notwithstanding the two general statutes of 1917, enacted, as they recite, in consequence of such amendment and covering the entire scope of municipal regulation as to the matters cited in that amendment. If the Constitution is to govern, and the legislation of 1917 in accordance therewith, the special act of 1920 in regard to Goldsboro is invalid, because it is in conflict with the constitutional provision, and with the general laws enacted in accordance therewith.

It is asked, Could not the Legislature of 1920 amend or change the acts of the Legislature of 1917? Certainly. But in this matter of regulating municipalities such amendment or change must be made by general laws applying throughout the State, and not by special legislation applying only to the municipalities in a certain county.

There being two conflicting acts, one a "general law," as required by the Constitution, and the other "a special act," the court must hold the former and not the latter to be valid.

In *Atchison v. Barlow,* 4 Kan., 144, it appears in that State, as in this, formerly municipal corporations were organized and regulated by special statutes. The able opinion in that case sets out the abuses therefrom, and how local interests and influences profited financially and otherwise by legislation which could not have been enacted if proposed by general laws applying throughout the State. We need not repeat the details there given, for they are familiar here, and caused the adoption of the amendment to their Constitution almost identical with our amendment above. The Kansas amendment provided: "Art. 12, sec. 5. Provision shall be made by general law for the organization of cities, towns, and villages, and their power of taxation, assessment, borrowing money, contracting debts, loaning their credit shall be restricted so as to prevent the abuse of such power."

In that case the Supreme Court of that State held invalid all special legislation regulating municipalities in said respects, except by general

laws, and has adhered to such ruling ever since, greatly to the protection and satisfaction of the taxpayers in the municipalities of that State. Subsequently, an ingenious attempt was made to evade this constitutional amendment by amending the general statute, in such way that it could not apply but to three cities therein, and the Court, in *Topeka v. Gillett,* 32 Kan., 431, promptly held that invalid because in violation of the constitutional provision.

It has been strenuously urged that Goldsboro has made contracts for municipal improvements, and that just at present it cannot sell these bonds at par, and that if not allowed to sell them below par, the work must be stopped, and the banks in that city, which have advanced money on these bonds, will be seriously incommoded. But such considerations surely cannot prevail to set aside the will of the people of the State, as enacted in their Constitution. The provision had a wise purpose over and above the saving of time of the General Assembly wasted in special legislation. It is common knowledge that there are a few large bond-buying houses in the Union who purchase municipal bonds at the lowest available figure, and resell them at a large profit. Their local agents in this State can readily combine by agreeing upon a price among themselves below par (if sales below par are not prohibited by a general act, which cannot be evaded by special legislation), and bonds bought at a low figure in consequence of suppression in competition of the bond buyers, can later be parceled out among the buyers. The effective protection of the general act of 1917, which forbids the sale of municipal bonds below par, has been that such bonds, which have the advantage of being also tax-free, have hitherto sold readily at par. If that protection is nullified as to any one city, it may be removed as to any other whenever, with or without the coöperation of local influences, special legislation can be procured exempting such municipality from the control of the constitutional provision which prohibits local legislation in such matters by requiring general laws.

It is not suggested that in this instance there has been any combination of bond buyers or any ulterior motive on the part of any one. We have under consideration the possibilities of abuse that will be opened up. It will be readily seen that such occasions will occur if the constitutional provision requiring uniform legislation in regulation of the finances of municipalities and their power of contracting debts is not strictly adhered to. It is true that just at present there is a financial stringency, but it cannot be that the 6 per cent, tax-free bonds of a growing, prosperous, wealthy municipality like the city of Goldsboro can long be without sale at par, and should such condition occur, the Legislature could respond by a general act giving to all corporations the same power to sell their bonds below par.

It would be invidious to allow a few municipalities to sell their bonds below par while forbidding this privilege to all others. If the situation is such that Goldsboro cannot sell its bonds at par, while other towns are forbidden to sell at less than par, doubtless there is local patriotism and financial ability in Goldsboro that will tide over the situation until the city can obtain par for its bonds as is required of other municipalities. We know that Mecklenburg County has recently sold $300,000 of its bonds at 108; that Nash also has recently sold its bonds at 102; Randolph County and the thriving town of Hickory at par and interest, and "there are others."

Should there be a permanent depression in the market for 6 per cent, tax-free bonds of solvent municipalities, the remedy is for the Legislature to amend the general statute by extending the power to sell at less than par to all municipalities. But to permit this to be done as to few towns by special legislation tends to depress the market for all municipal bonds, and gives unlimited opportunity for a "rake-off" whenever influential combinations can manipulate the bonds of any particular towns. It was to prevent this that the control of the finances of the municipalities was placed with the Legislature, and that the Constitution requires that such legislation shall be by general laws and uniform.

Besides the reasons above given, special acts allowing certain municipalities to sell their 6 per cent, tax-free bonds below par are unconstitutional for another reason. We have a usury law, C. S., 2306, which imposes a penalty for exacting a greater interest than 6 per cent. The Bank of Statesville procured a private act amending its charter, ch. 64, Laws 1869-70, which authorized it "to discount notes and other evidences of debt, and to lend money upon such terms and rate of interest as may be agreed upon," and it was held in a strong opinion by *Bynum, J.*, in *Simonton v. Lanier,* 71 N. C., 503, that such act was unconstitutional and invalid, so far as it could be construed to authorize a rate of interest in excess of the general rate of 6 per cent, because it was in violation of the time-honored constitutional provisions: Art. I, sec. 7, of the Constitution, which declares that "No man or set of men are entitled to exclusive or separate emoluments, privileges, or immunities," and Art. I, sec. 31, "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." *Judge Bynum,* after quoting the above provisions of the Constitution, pertinently asked: "What public service has this bank rendered that it should be granted the exceptional privilege" that it should be exempted from the usury law? and said: "The wisdom and foresight of our ancestors are nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation—the insidious and everworking foes of free and equal government." This decision has never been overruled or

questioned, and its wisdom and justice has commended it to the approval of the public and the Court as is shown by the numerous citations thereto to be found in Anno. Ed., which we need not therefore take the space to recapitulate.

Not only is this special legislation authorizing the city of Goldsboro to sell its bonds below par in violation of the above quoted sections of the Constitution, which require "Equal right to all and special privilege to none," and in violation of the amendment passed for the express purpose of requiring uniform legislation as to all municipalities, and in violation of the general acts passed, in pursuance thereof by the Legislature of 1917, but it is a serious discrimination against other towns and cities which are required to sell their bonds "at not less than par," and tends to depress the price of all municipal bonds in the State with great loss to the taxpayers, and giving unlimited opportunity for "rake-offs" to powerful combinations of capital which will be formed to depress the price of such bonds, and it is in violation of our usury law, and will inevitably force the repeal of that statute, which for so long a time has been a protection to our people; for who will lend money to a farmer, merchant, or any other legitimate business at 6 per cent if such towns as Goldsboro are allowed to sell 6 per cent, tax-free bonds at 4 to 6 per cent below par, which privilege will be extended to other cities by special act, and we may see the sale price of municipal bonds brought down to a far lower figure still. If the bonds are sold at 94, the present and future citizens of Goldsboro will pay for years to come $6 annually as interest for every $94 received (which is considerably more than 6 per cent on $100), besides the $6 initial "rake-off" to the buyers. Other towns will get similar acts in derogation to the Constitution. Local financial "rings" will be formed to elect boards to sell "bonds at less than par"—which phrase has "depths lower still," as is held in lively remembrance by those who can recall the time when even State bonds were hawked at 30 and less.

For these reasons I earnestly insist that this special act, giving this special privilege to Goldsboro to sell its bonds at less than par, is in violation of the constitutional provision enacted to prevent, among other things, this very legislation, and opens the doors wide to the very "abuses" which the amendment to require uniform legislation, "by general law," of municipalities was framed and adopted to prevent.

BROWN, J., dissenting: I can add nothing to the forcible dissent of the *Chief Justice* in this case.

With perfect deference for the opinion of the majority of my brethren, I feel that the decision of the Court is extremely unfortunate, and at one blow strikes down one of the most valuable amendments ever made to

our Constitution. The decision is destructive to the efforts of the General Assembly to maintain the credit of the cities and towns of the State by forbidding the sale of their securities below par. The general municipal act, enacted strictly in pursuance of the Constitution, presents a wise and elaborate scheme for the government of cities and towns. It is intended to be uniform, and to govern all alike. If the act had not been destroyed by this Court, it would have maintained the credit of municipalities, and have prevented gross abuses in disposing of their bonds.

It was this very policy that restored the credit of North Carolina after the Civil War. Art. V, sec. 4, of the Constitution provided that "until the bonds of the State shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit," etc. It is well known that at that time the obligations of the State were hawked about and sold for what they would bring. What money the State borrowed, it had to pay a high rate of interest for. Instead of yielding to existing conditions, the people of the State resolutely forbade the sale of bonds at any price less than par. The consequence was that in a few years the State was able to dispose of its bonds without sacrifice. If our municipal act was upheld by this Court, and the plainly expressed will of the people obeyed, as it should be, the credit of our cities and towns would be undoubtedly maintained, and their securities not be placed at the mercy of a lot of bond sharks.

Municipal securities are greatly desired by the rich as they are free from Federal income tax and afford an absolutely safe investment. A 6 per cent bond of such a thriving city as Goldsboro, with such a splendid population, ought not to be allowed to be sold at less than par. It is a great blow to the credit of the city, and if this decision had been otherwise it would be only a short time before its bonds would sell at par. The record of the sales of sound municipal bonds in New York at this time shows that such securities sell on a 6 per cent basis, and in some instances less. It is better that Goldsboro should be temporarily inconvenienced than that the policy of the State in providing a uniform law for all cities and towns should be destroyed.

The fate of this wise and valuable amendment of 1916 to the Constitution reminds me of the epitaph on the tombstone of a small child:

"If I am so soon done for,
What was I begun for?"

PEARL ALLEN v. J. N. ALLEN.

(Filed 1 December, 1920.)

1. **Divorce—Marriage— Alimony— "Subsistence" — Statutes— Attorney's Fees.**

Ch. 24, Laws of 1919, amending sec. 1567 of the Revisal, in reference to alimony or support, provides, in the sound discretion of the court, for an order for the necessary "subsistence" of the wife *pendente lite*, and supersedes the allowance for alimony, which latter included an allowance for attorney's fees, and under the amendment an allowance for attorney's fees is not permissible.

2. **Divorce—Marriage—"Subsistence"—Alimony—Defenses—Statutes.**

Under the provisions of ch. 24, Laws of 1919, amending sec. 1567 of the Revisal, it is immaterial what counter charges the defendant makes against the plaintiff, his wife, in her application for her necessary "subsistence" *pendente lite*, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury.

CLARK, C. J., concurring in part; ALLEN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from order of *Ray, J.*, on 10 May, 1920, from ROCKINGHAM.

This is a proceeding commenced under ch. 24 of the Public Laws of 1919, amendatory of sec. 1567 of the Revisal, for the purpose of securing to the plaintiff subsistence for herself and children, together with counsel fees. From an order allowing subsistence and counsel fees, made by his Honor, Judge Ray, in the Superior Court of Rockingham County, the defendant appeals.

J. M. Sharp and P. W. Glidewell for plaintiff.
J. C. Brown and C. O. McMichael for defendant.

BROWN, J. The judge made an allowance to the plaintiff for subsistence of $200 on 1 April, 1920, upon due notice. No exception was taken to this allowance, and it was paid in full by the defendant. The case was then continued for further hearing until 11 May, 1920, to be heard at the courthouse in Wentworth. At that time an allowance was made to the plaintiff of $75 for herself and children, together with $250 attorneys' fees in addition. In his first order the judge finds as a fact: "That the defendant has left the plaintiff, and has taken from her without legal process the four older children, and has failed and refused to support the said plaintiff, and has refused to let her see the said four children, and has taken under claim and delivery all the household and

kitchen furniture and provisions, and has locked them up; and it further appearing to the court that the baby, two years old, is still with the plaintiff, and that the defendant is trying to, without legal process, take that child from the plaintiff."

Upon this finding we are of opinion that the plaintiff is entitled to an allowance for necessary subsistence pending the action and until the issues can be determined by a jury. In our judgment it is immaterial what counter charges the defendant makes against the plaintiff. If he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of the wife, until the issues can be determined by a jury. The sum allowed for subsistence must be left to the sound discretion of the Superior Court judge, and there is no evidence of an abuse of such discretion in this case.

The act of 1919 is plainly intended to supersede the statute heretofore regulating alimony *pendente lite,* and consequently all the decisions bearing thereon are of no value. The Legislature has carefully avoided the use of the word "alimony" anywhere in the statute. Counsel fees have heretofore been allowed as comprehended under the term *alimony* because they were necessary in order to enable the wife to prosecute her action. But in this statute the word *subsistence* is used and the word *alimony* omitted, and there is no provision whatever that we can find authorizing the allowance of counsel fees in a proceeding brought under the statute.

We are of opinion that the order allowing subsistence should be affirmed, and that the order allowing counsel fees should be reversed.

Modified and affirmed.

CLARK, C. J., concurring in part: There are but two assignments of error. The first is that the court allowed alimony *pendente lite* in a proceeding under Rev., 1567, authorizing "actions for alimony without divorce." There had been decisions of this Court that alimony *pendente lite* was not authorized in actions brought under that section, but was allowable only in actions brought under Rev., 1566, in actions for divorce. But to cure this defect, ch. 24, Laws 1919, expressly provides that in actions like this under Rev., 1567 for "alimony without divorce," alimony *pendente lite* could be allowed in the discretion of the court. This chapter must have escaped the attention of the appellant's counsel.

The only other assignment of error is that the judge "signed the order" for which no grounds are given, neither in the exception itself nor in the assignment of error, and therefore it is invalid.

There is an exception urged, however, that the judge did not find the facts upon which he based his order. The fact of abandonment is, however, *expressly found,* and that of marriage is admitted, which are

the two facts required to be found as the basis for an allowance *pendente lite* under Rev., 1566. *Skittletharpe v. Skittletharpe,* 130 N. C., 72, and *Bidwell v. Bidwell,* 139 N. C., 402. Besides, under the language in Rev., 1567, the judge is not required to "find the facts" as he is required to do under proceedings in 1566 by the language thereof.

The recriminatory allegations in the answer are not to be considered in a motion of alimony *pendente lite* when there has been a marriage and abandonment, as is well stated by *Hoke, J.,* in *Medlin v. Medlin,* 175 N. C., 530; *Skittletharpe v. Skittletharpe,* and *Bidwell v. Bidwell, supra.*

Up to ch. 53, Laws 1852, alimony *pendente lite* was not allowed in actions for divorce, *Earp v. Earp,* 54 N. C., 119. But the humanity of that day revolted at this injustice, and authorized such an allowance, in the discretion of the court.

The Laws 1872, ch. 193, authorized the wife to sue for alimony, without asking for divorce. *Cram v. Cram,* 116 N. C., 288. It was subsequently ascertained that this latter act inadvertently failed to authorize the allowance of alimony *pendente lite* in that proceeding, and this defect was cured by the enactment of ch. 24, Laws 1919.

The above is the history of "alimony *pendente lite*" in this State. But it must be noted that "counsel fees and suit money" were allowed as costs before, and are not derived from the allowance of alimony, which word comes from the Latin *alimentum,* and means simply an allowance for subsistence, and is statutory.

Counsel fees and suit money have been allowed from time immemorial, and do not come under any provision for alimony, 19 C. J., 226, 227, and notes; and the power to make such allowance exists irrespective of statutory authority. 19 C. J., 228; 21 Cyc., 1604, and cases there cited. Such an allowance rests upon the principle that in every action between the husband and wife, the husband is liable for "costs" in any event, and the wife is allowed counsel fees and suit money for costs "to enable her to bring her case in court," without which the right to bring an action against her husband would be illusory and a mockery. 1 R. C. L., 909-912. The amount of such allowance has always rested in the discretion of the court, and cannot be reviewed "unless there is clearly an abuse of discretion." The amount of alimony is also discretionary with the trial judge unless there is a gross abuse of discretion. The whole subject is reviewed, with the citations of our authorities, in *Moore v. Moore,* 130 N. C., 333, also see citations to that case in Anno. Ed., and *Jones v. Jones,* 173 N. C., 285, and cases there cited.

A wife, engaged in household duties, bearing and rearing children, and being often the cook for the family also, receives no wages and has no opportunity for gainful occupation, and hence it is elemental justice

that she be allowed a reasonable sum for counsel fees and court costs to enable her "to present her side in court," which has always been allowed by the courts, and also the statute now provides alimony *pendente lite* when she has not sufficient property of her own so that she may not starve while having the merits of her alleged wrongs investigated by a judge and jury.

Especially should she be so allowed, when, as the judge found as facts in this case, the husband has stripped her of a home, locked up the provisions, household and kitchen furniture, and by his recriminatory charges seeks to blast the character utterly of the mother of his six children. Whether his charges are true or not, only a jury can decide, and she should have a "square deal" to defend herself by an allowance for counsel fees and subsistence till the facts are determined. This is what the acts of 1852 and 1919, *supra,* now C. S., 1666, 1667, provide.

ALLEN, J., dissenting: This is an action by the wife against the husband for support without divorce, brought under sec. 1567 of the Revisal, as amended by ch. 24 of the Laws of 1919.

After the action was commenced the plaintiff moved upon notice for an order for support and counsel fees, which motion was supported by the affidavit of the plaintiff alleging various acts of cruelty and mistreatment, failure of support by the defendant, and abandonment.

At the time when the motion was returnable the defendant was not able to be present, and upon request the motion was continued to a future date, the judge requiring the defendant to pay $200 to the plaintiff, which was done, and in this order there are certain recitals which will be hereafter referred to.

Afterwards the husband appeared and filed an affidavit in which he denied all of the material allegations in the affidavit of the plaintiff, and particularly that he had separated himself from his wife, and on the contrary alleged that she had abandoned her home.

He also alleged that the plaintiff had been cruel and abusive in her treatment of him, that she had refused to attend to the duties of the home and that she was guilty of acts of infidelity. He also introduced supporting affidavits from a number of citizens showing that he had been kind and considerate, that he was a man of good character, and that the plaintiff was a woman of bad character, that he had provided for his wife and children, and that she had abandoned him.

There were also six affidavits supporting the charge of infidelity.

The plaintiff introduced five affidavits as to her good character, but all of them except one referred to her character when she was a young woman.

Upon the hearing his Honor made the following order:

"This cause coming on to be heard before his Honor, J. Bis Ray, judge presiding, 11th Judicial District, and being heard upon allegations of the complaint, answer, and affidavits, and after argument of counsel the court finds as a fact that upon the allegations of the complaint, and the proof the plaintiff would be entitled to a divorce from bed and board, and is entitled to *alimony pendente lite* and attorney's fees; it is therefore ordered that the defendant secure to the plaintiff $75 as alimony until further order of the court, and $250 attorney's fees, in addition to the alimony herein allowed. This 17 May, 1920. J. BIS RAY,
Judge Presiding."

The defendant excepted and appealed.

In actions for divorce from the bonds of matrimony or from bed and board, if the wife "shall set forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complaint, or other proof, that she has not sufficient means whereof to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties." Rev., 1566.

"The judge must find the essential and issuable facts, and set them out in detail so that his court can determine from the facts as found whether the order for alimony can be upheld as the correct legal conclusion. . . . These findings, and the order predicated thereon, are not finally conclusive on the parties nor receivable in evidence on the trial of the issues before the jury, unless modified on further notice and hearing, they are conclusive for the purposes of the motion, and operating as they do presently to deprive a defendant of his property, they should be decided and set out in conclusive form and in such detail that the appellate court, as stated, may be able to determine whether they justify the order made." *Easeley v. Easeley,* 173 N. C., 531.

It was held in the *Easeley case* that a finding by the judge that the "plaintiff had made out a *prima facie case* on the issue of abandonment" was insufficient to support an order for alimony, and that the judge must "find and set out the relevant facts." The finding in this case that "upon the allegations of the complaint and the proof the plaintiff would be entitled to a divorce from bed and board" is not more specific than the one condemned in the *Easeley case.*

If, however, the action was for support alone, and not for divorce (Rev., 1567), which is the action now before us, no order for alimony

pendente lite could be made prior to ch. 24, Laws of 1919. *Hodges v. Hodges,* 82 N. C., 122, approved in *Crews v. Crews,* 175 N. C., 171.

In the latter action the only issuable facts were: "(1) As to whether the marriage relation existed at the time of the institution of the proceeding; (2) whether the husband separated himself from his wife," and the reasons and excuses of the husband for the separation were irrelevant, the Court holding that the husband could not defeat the action for support by proof of the infidelity of the wife, but must wait and seek his remedy in an action for divorce, when, if successful, he would be relieved of the order for support, which was not final.

If the marriage and separation of the husband were admitted, the judge made the order for support after hearing both parties, but if either was denied, no order could be made until the controverted fact was settled by a jury. These principles are discussed and settled in *Skittletharpe v. Skittletharpe,* 130 N. C., 72; *Hooper v. Hooper,* 164 N. C., 2; *Crews v. Crews,* 175 N. C., 171.

In 1919 (ch. 24, Laws 1919) the statute permitting actions for support without divorce was changed very materially by substituting the following for sec. 1567 of the Revisal:

"If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of her husband. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Court of the district in which the action was brought, for an allowance for such subsistence, and it shall be lawful for such judge to cause the husband to secure so much of his estate, or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the saparate estate of the wife: *Provided,* that no order for such allowance shall be made unless the husband shall have had five days notice thereof. Such application may be heard in or out of term, orally or upon affidavit, or either or both." (Certain parts not material omitted.)

The statute does not change the issuable facts in actions for support, nor does it affect the principle that these must be passed on by a jury

before a judgment can be rendered, but it does permit the judge to make an order for subsistence of the wife and children during the pendency of the action, thus conforming the procedure to applications for alimony *pendente lite* in actions for divorce, and, as on such applications, the material facts of marriage and separation by the husband must be found by the judge as a basis for his order, which findings are not conclusive on the parties nor receivable in evidence on the trial of the issues before the jury.

There is, however, a marked difference in the order, which may be made in actions for divorce, and in those for support.

In the first, when the wife makes it appear "that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof the judge may order the husband to pay her such alimony during the pendency of the suit," etc., and such alimony includes counsel fees, but in the second under the act of 1919, the application is for an allowance for subsistence alone, without reference to the expenses of suit, alimony is not mentioned, and the order is for subsistence for the benefit of the wife and children.

When the act of 1919 was adopted, the General Assembly knew that in actions for divorce the wife must show that she did not have sufficient means to defray the expenses of suit, and that authority to order alimony included counsel fees. It was also known that in actions for support no order for subsistence or counsel fees could be made *pendente lite,* and, with a knowledge of these facts, having restricted the amendatory act to subsistence, we cannot extend its meaning to include the fees of an attorney, when the General Assembly has declined to do so.

Applying these principles, the order appealed from should, I think, be set aside, because it allows attorney's fees in an action for support, which is without authority of law, and there is no finding of fact, although the answer of the defendant denies that he has separated from the plaintiff, and, on the contrary, alleges that the plaintiff has willfully abandoned him, which, if true, would not come within the meaning of the statute, which allows an order to be made if the husband "shall separate himself from his wife."

It is true it is recited in a prior order that the defendant had left the plaintiff, which might be sufficient, but the order from which the appeal is taken does not purport to be based on that order, which was made before the answer was filed and before the defendant had been heard on a motion for a continuance, "without prejudice to the rights of either party upon the final hearing," and the recitals were for the purposes of the former order and should have no bearing on this appeal.

As I understand the record, the material fact that the defendant has separated himself from his wife, which means more than living apart, has not been made, and without such finding no order for support or counsel fees should be sustained.

WALKER, J., concurs in this result.

M. T. CHILTON v. PATSY SMITH AND JOHN R. SMITH.

(Filed 1 December, 1920.)

1. Trusts—Parol—Deeds and Conveyances—Statute of Frauds.

A parol trust cannot be established between the parties in favor of the grantor in a deed conveying an absolute fee-simple title to lands, nor can such deed be converted into a mortgage without allegation and proof that a clause of defeasance or redemption was omitted therefrom by reason of ignorance, mistake, fraud, or undue influence. C. S., 938.

2. Mortgages — Deeds and Conveyances — Conveyance to Mortgagee — Fraud—Presumptions—Burden of Proof.

The principle establishing a *prima facie* case of undue influence, and placing the burden of proof on the mortgagee to disprove it when the mortgagor has conveyed the mortgaged lands to him in fee simple in payment of the debt, does not apply because the mortgagee, the plaintiff in his action to recover possession, happens to be the president of a bank which holds a number of the defendant's notes secured by mortgage on his land, with the plaintiff as endorser, in the absence of any control or coercion on his part, and defendant has placed his defense upon a separate and distinct ground.

WALKER, J., concurring in result.

APPEAL by defendants from *McElroy, J.*, at April Term, 1920, of STOKES.

This was an action of ejectment, tried at the Spring Term, 1920, of STOKES, before *McElroy, J.*, and a jury. The action was brought against Patsy Smith and Susan Smith, who answered alleging that they were holding the land in controversy under and as tenants of John R. Smith, who came in and being made party defendant, filed his answer alleging that at the time he executed his deed to the plaintiff there was a parol agreement between them that the plaintiff would reconvey the land described in said deed, upon repayment to him by the defendant, out of the rents and profits of the land, all of the money paid by the plaintiff for the benefit of the said John R. Smith. He was allowed to amend his answer by inserting the following paragraph:

"9½. The said plaintiff pretended to be the friend of the defendant for the purpose and with the intent of procuring the legal title to the land above mentioned, intending to defraud the defendant out of the legal title to the same; that the defendant relied upon the statement of the plaintiff that he would reconvey the land to the defendant, and would hold the same as security for money advanced by the plaintiff to this defendant, and relying upon such statements and assurances, the defendant was misled, deceived, and induced to sign the deed above mentioned; that the plaintiff stated to this defendant that if he would execute the deed to him (the plaintiff) he would hold the same as security and reconvey the same to the defendant at a later date when the defendant should repay him the money so advanced, but did not intend to do so, and at the time the plaintiff made such statements he knew they were false, and made them for the purpose of cheating and deceiving the defendant out of the land. And the defendant, relying thereon, was induced thereby to execute said deed, and was thereby defrauded out of his land."

The plaintiff, replying to said paragraph 9½, averred that it was "untrue, and expressly denied the same."

The jury responded to the issues submitted as follows: (1) Was the deed of 31 July, 1915, executed by John R. Smith and wife to M. T. Chilton, intended as a mortgage, and if so, was the redemption clause omitted from said deed by reason of the fraud of the grantee? Answer: "No." (5) Are the defendants in the wrongful and unlawful possession of said land, as alleged in the complaint? Answer: "Yes." (6) What damage, if any, is the plaintiff entitled to recover? Answer: "1 per month from 23 April, 1916."

These findings made it unnecessary to answer the other issues submitted. Judgment upon the verdict in favor of the plaintiff. Appeal by defendant.

McMichael, Johnson & Hackler for plaintiff.
Jones & Clements and Holton & Holton for defendant.

CLARK, C. J. The defendant, John R. Smith, did not allege in his answer that his deed to the plaintiff was intended as a mortgage, nor did he allege, or offer proof, that the clause of *defeasance* or *redemption* was omitted therefrom by reason of ignorance, mistake, fraud, or undue influence or advantage, but admits that it was a deed absolute upon its face; that he knew it was such, and was intended to be so drawn; that it was mailed to him by the plaintiff, who was 12 miles away, and was signed and acknowledged by him, with full knowledge of its contents in the absence of the plaintiff, and was then delivered by him to the plaintiff.

The defendant having failed to allege and offer proof that the clause of defeasance or redemption was omitted from the deed by reason of ignorance, mistake, fraud, or undue influence, the evidence tendered by him to show an oral agreement by the plaintiff to reconvey, or that he made the deed relying on such promise, which the defendant did not intend to keep, was incompetent, and was properly excluded. *Sowell v. Barrett,* 45 N. C., 50; *Brown v. Carson, ib.,* 272; *Campbell v. Campbell,* 55 N. C., 364; *Briant v. Corpening,* 62 N. C., 325; *Bonham v. Craig,* 80 N. C., 224; *Egerton v. Jones,* 102 N. C., 278; *Norris v. McLam,* 104 N. C., 159; *Sprague v. Bond,* 115 N. C., 530; *Newton v. Clark,* 174 N. C., 393; *Williamson v. Rabon,* 177 N. C., 302; *Newbern v. Newbern,* 178 N. C., 3.

In *Gaylord v. Gaylord,* 150 N. C., 227, it was held that a parol trust cannot be established between the parties in favor of the grantor in a deed, when the effect will be to contradict or change by a contemporaneous oral agreement the written contract clearly and fully expressed. This is a well considered case in which the subject was elaborately discussed, and which has been repeatedly recited as authority—*see* citations in the Anno. Ed. And it has been followed since that volume has been annotated in *Newton v. Clark,* 174 N. C., 394, citing numerous cases; and *Williamson v. Rabon, supra,* and *Newbern v. Newbern, supra,* where the subject was again discussed.

To permit the terms of a solemn conveyance, absolute on its face, to be contradicted by a contemporaneous parol agreement would be in the teeth of the letter and the intent of the statute of frauds. C. S., 988.

In *Fuller v. Jenkins,* 130 N. C., 554, it was held that "Where it was agreed between the grantor and the grantee at the time the deed was delivered that it should operate as a mortgage, the grantor is entitled to have the deed declared a mortgage by reason of such agreement, although the redemption clause was not omitted by reason of ignorance, mistake, fraud, or undue advantage." But this case seemingly stands alone, and in *Williamson v. Rabon,* 177 N. C., 306, it was fully considered and expressly overruled.

If a mortgagor conveys to the mortgagee the mortgaged property, the conveyance is *prima facie* made under undue influence, because the mortgagor is *in chains* and the burden is on the mortgagee to prove the contrary. But that is not the case here, though there was a mortgage for $1,000 given by the defendant to secure a debt to which the plaintiff was his surety and John R. Smith was debtor to a bank, of which the plaintiff was president, for money borrowed. It is not alleged or shown that any confidential relation existed, which placed the defendant under the control or undue influence of the plaintiff. The defendant's case

rests solely upon an alleged contemporaneous oral agreement in conflict with the terms of the conveyance.

In view of the uniform decisions of this Court, and the elaborate discussion of the principles now presented by the defendant in *Gaylord v. Gaylord*, 150 N. C., 222, and *Williamson v. Rabon*, 177 N. C., 304, we could add nothing that would justify our restatement of the principles so clearly laid down in those and other cases above cited.

No error.

WALKER, J., concurs in result only.

MAMIE W. GOODE AND HER HUSBAND, GEORGE GOODE, v. AGNES GOODE HEARNE AND HER HUSBAND, WESLEY HEARNE, ET AL.

(Filed 1 December, 1920.)

1. Wills—Interpretation—Intent.

A will should be interpreted from the language in the instrument as a whole, to ascertain and enforce the intention of the testator, when not in violation of law; and in determining upon this intent each and every part thereof will be given significance, and apparent inconsistencies will be harmonized when it can reasonably be done by fair and reasonable interpretation, giving its language its natural and customary meaning unless it clearly appears that some other permissible meaning is intended.

2. Same—Ambiguity—Estates—Defeasible Fee—Early Vesting of Estates.

Where a defeasible fee in an estate is devised, and no definite time fixed for it to become absolute, the time of the testator's death will be adopted in the interpretation of the testator's intent as expressed in the will, unless it appears from the terms thereof that some intervening time is indicated between such death and that of the first taker; and in case of ambiguity, the courts are inclined to regard the first taker as the primary object of the testator's bounty, and will lean to the interpretation that tends to promote the early vesting of estates.

3. Same—Statutes.

A devise in fee simple to the testator's two named children and her daughter-in-law of all of "my real estate," equally, and to the children of the daughter-in-law by her husband, the testator's son, the share of their mother's estate "in the event of her death"; and in a subsequent item a provision that the remainder of all other property, real and personal, shall be equally divided between these beneficiaries, and if the children of testator's daughter-in-law survive their mother, "they shall inherit her share of my property as provided in" the preceding item: *Held*, it was the intent of the testator that the estate devised to the daughter-in-law should vest in her if living at the time of the death of testator, under the first item of the will, which is further shown by the expressions in

the later clause, indicating that the grandchildren should inherit directly from the testator in the event their mother should predecease her. Rev., 1581.

CIVIL ACTION, heard on the pleadings and the admissions contained therein before *Bryson, J.*, at October Term, 1920, of MECKLENBURG.

From the pertinent facts so presented it appears that J. M. Goode died in Mecklenburg County on 10 December, 1918, having duly executed his last will and testament, disposing of his realty, a valuable house and lot in the city of Charlotte, and also his personal estate, and leaving him surviving three children, to wit, George Goode, intermarried with Mamie W. Goode, coplaintiff, and Agnes Goode Hearne, wife of Wesley Hearne, and Mamie G. Morris, parties defendant. That Mamie W. Goode, a devisee under said will, and her husband, George, as coplaintiff, have instituted the present action against Agnes Hearne and her husband, Mamie G. Morris, and four minors, Evelyn Clarke Goode, and the children of George and M. W. Goode, duly represented by guardian *ad litem,* alleging that these minors, without just right, are claiming a proprietary interest under said will which constitutes a cloud on the title and interest of plaintiff, Mamie W. Goode, as owner of one-third of the realty devised in item two of said will. The complaint also contains proper and adequate averment looking to a sale of said land for division among the true owners.

The court below being of opinion that the plaintiff, Mamie W. Goode, was the owner of one-third interest in the realty, the subject of this litigation, and that the minor defendants had no interest therein, entered judgment against said minors; and further, that the property be sold at the end of two years according to the closing paragraph of the will. The guardian *ad litem* excepted and appealed from the judgment against the infants, there being no objection as to the method and time of sale.

E. R. Preston and Frank H. Kennedy for plaintiffs.

Clarkson, Taliaferro & Clarkson for guardian ad litem of minor defendants et al.

Pharr, Bell & Sparrow for defendants Agnes Goode Hearne and Mamie G. Morris.

HOKE, J. The will of J. M. Goode, upon which the rights of these parties depend, has been duly proven and recorded, and is in terms as follows:

"Know all men by these presents, that I, J. M. Goode, being of sound mind and memory, but realizing the uncertainty of life and the certainty of death, and hereby revoking all former wills by me made, do make and ordain this my last will and testament in form and substance as

follows: My executor hereinafter named shall give my body decent burial, pay all my just debts, and collect all money belonging to my estate.

"2. I give and devise in fee simple to my two daughters, Mamie G. Morris and Agnes Hearne, and to my daughter-in-law, Mamie W. Goode, the wife of George W. Goode, share and share alike, all my real estate wherever situated, and it is my will that the children of my daughter-in-law, Mamie W. Goode, by her husband, George W. Goode, shall, in the event of their mother's death, inherit her share of the estate.

"3. I give and bequeath all my household and kitchen furniture to Mamie G. Morris and Agnes Hearne.

"4. It is my will that all the rest and remainder of my property, real, personal, or mixed, including all cash money, be equally divided between my two daughters, Mamie G. Morris and Agnes Hearne, and my daughter-in-law, Mamie W. Goode, and that if they, the children of my daughter-in-law, survive her, they shall inherit her share of my said property, as provided in section 2 of this my last will and testament.

"5. My city property not to be sold in two years from the date of my death. (Signed) J. M. GOODE."

It is the approved position here and elsewhere, in the construction of wills, that unless in violation of law the intent of the testator, as expressed in the will, shall prevail, and in ascertaining this intent the entire will shall be considered, giving to each and every part significance and harmonizing apparent inconsistencies where this can be done by fair and reasonable interpretation, and that the language of the instrument shall be given its natural and customary meaning unless it clearly appears that some other permissible meaning is intended. The decided cases with us are to the effect also that where a defeasible estate is conferred by will with no definite time fixed for the same to become absolute, the time of the testator's death will be adopted unless it appears from the terms of the will that some intervening time is indicated between such death and that of the first taker, and further, in determining this matter and in case of ambiguity, the courts are inclined to regard the first taker as the primary object of the testator's bounty, and will lean to the interpretation that tends to promote the early vesting of estates. In the comparatively recent case of *Bank v. Murray,* 175 N. C., pp. 62-65, some of the rulings referred to are stated as follows:

"Subject to the position that the intent and purpose of the testator as expressed in his will shall always prevail except when the same is in violation of law, it is a recognized rule of interpretation with us that when an estate by will is limited over on a contingency and no time is fixed for the contingency to occur, the time of the testator's death will

be adopted unless it appears from the terms of the will that some intervening time is indicated between such death and that of the first taker, and to the same general effect are *Whitfield v. Douglas,* 175 N. C., 46; *Bell v. Keesler,* 175 N. C., 526; *Bank v. Johnson,* 168 N. C., 304; *Dunn v. Hines,* 164 N. C., 113; *Galloway v. Carter,* 100 N. C., 111; *Price v. Johnson,* 90 N. C., 593, and other numerous cases. Considering the terms of the will in view of these authorities and the rules of interpretation they approve and illustrate, in the second clause of the will, being the one more directly applicable to the real estate, the plaintiff, Mamie W. Goode, daughter-in-law, and the testator's two daughters, in express terms are given the real estate 'in fee simple, share and share alike,' and the will, then, provides that in the event of the mother's death the children of the daughter-in-law by the son shall inherit their mother's share of the testator's estate." No time being fixed when the contingency is to occur, and adopting the death of the testator as the time the estate devised to the mother, she being then alive, became absolute at that date, and the children have no further proprietary interest—a position that is not only in accord with the authorities cited and others of like kind, but in our opinion is fully confirmed by the language of the limitation itself, which clearly contemplates that these children, if they come into the ownership of the property at all under the will, shall do so as inheritors from the testator. In the fourth clause, disposing of the personal and other property, after bequeathing the same to the daughter-in-law and the two daughters, there is language in the limitation which might justify the interpretation that the mother took a life interest with remainder to the children, the terms being that if these children "survive the mother, they shall inherit her share of the estate," but as applied to provisions in section 2 of the will, such an interpretation would not only be to ignore the positive devise of a fee simple, appearing in that section, but is in contravention to the last clause of this section 4, to the effect that if these children survive their mother "they shall inherit her share of my said property, *as provided in section 2* of this my last will and testament." The testator here, by express declaration, makes this clause two the controlling provision, and the limitation over, "if the children survive the mother," by correct construction refers to a survival by death occurring during the life of the testator. In estates of this kind, where the devise over is on the death of the first taker without "heir or heirs of the body, or without issue or issues of the body," etc., a statute, with us, Rev., 1581, provides that such a limitation shall be held and construed to take effect when such a person shall die, not having such heir or issue, etc., living at the time of his death, or born within ten luna months thereafter, unless the intention be otherwise and expressly and plainly disclosed in the face of the deed

or will creating it. Under this statute, and authoritative decisions construing the same, *Patterson v. McCormick,* 177 N. C., 448; *Kirkman v. Smith,* 175 N. C., 579, and others, some of the earlier cases discussing the general principles of interpretation to which we have adverted, have been changed or very much modified, but their application is unaffected where, as in this case, the devise does not come under the purport and meaning of the statute, and where, in any event, as we have endeavored to show, it clearly and plainly appears to be the intent of the testator on the face of the will that the estate of the first taker shall become absolute at his death. In *Rees v. Williams,* 165 N. C., 201; *S. c.,* 164 N. C., 128, cited for appellant, there were terms in the devise which served to bring that case within the effect and operation of the statute referred to, and there were also special terms in the will, much relied upon in the opinion, and which tended to show that the testatrix did not intend that the estate should become vested at her death. On the record, we are of opinion that the will in question has been correctly construed, and the judgment of the Superior Court is

Affirmed.

M. E. BOYER v. W. G. JARRELL.

(Filed 1 December, 1920.)

1. Appeal and Error—Assignments of Error—Objections and Exceptions—Motions—Dismissal.

An assignment of error cannot have the effect of creating or enlarging an exception taken on the trial, and in making them the appellant after deliberation only selects such of the exceptions taken upon the course of the trial as he then relies upon and desires to present to the Supreme Court, on appeal; and where there are no exceptions in the record as a basis for the assignments of error, a motion to affirm the judgment appealed from will be allowed.

2. Appeal and Error—Reference—Objections and Exceptions.

On appeal from a judgment upon the report of a referee, the appellant must point out the alleged errors by specific exceptions to the findings of facts and conclusions of law, in apt time, and they will not be considered when taken for the first time in the Supreme Court on appeal.

3. Appeal and Error—Reference—Evidence.

Findings of fact by the Superior Court judge upon the report of a referee are binding upon the Supreme Court on appeal, when supported by evidence.

4. Appeal and Error—Objections and Exceptions—Reference—Judgments.

Exception on appeal that the trial judge did not consider the evidence in passing upon the exceptions to the report of the referee, cannot be considered when contradictory of the judgment stating he had done so.

5. Appeal and Error—Reference—Pleadings—Amendments—Findings.

Exception to the action of the trial judge in striking out amendments to pleadings allowed by the referee becomes immaterial on appeal when the facts so alleged have been found adversely to the appellant, on supporting evidence.

APPEAL by defendant from *Lane, J.*, at the Spring Term, 1920, of MECKLENBURG.

This is an action to recover the balance due on certain promissory notes. The defendant filed answer admitting the execution of the notes, but alleging that certain property of defendant embraced in a deed of trust securing said notes, had been sold under the deed of trust and bought by plaintiff at a grossly inadequate price, and asking, therefore, that the sale to plaintiff by the trustee be set aside and the property be resold. The plaintiff admitted that he had purchased the property at the trustee's sale, but denied that the property was sold for a consideration so grossly inadequate as to avoid the sale. The case was referred to referees, who filed a report finding that there had been a complete settlement between plaintiff and defendant, and made certain other findings to be considered by the court if the findings as to a settlement should be set aside. The plaintiff thereupon filed exceptions to the report of the referees, which came on for hearing before Judge Lane. The defendant came in and admitted that the finding of a settlement by the referees was erroneous, and consenting that the exceptions to that be sustained; and Judge Lane, after hearing the evidence and argument of counsel, sustained other exceptions of plaintiff and found the facts.

The referee permitted the defendant to file an amendment, alleging that the sale was not properly advertised, which was stricken out by the judge presiding.

The following judgment, containing the findings of the judge, was rendered:

"This cause coming on to be heard upon the report of the referees, and the exceptions filed thereto by the plaintiff, and being heard, and the court having duly considered the evidence produced in the cause, the argument of the counsel, and the report of the referees, and the exceptions, the court sustains the exceptions of the plaintiff numbered 1 to 14, inclusive, and from the evidence in the case the court finds the following facts:

"1. That on 29 October, 1913, the defendant executed to the plaintiff his four several promissory notes, aggregating $6,527.50, all bearing interest from date, payable annually, one for $881.88 maturing 29 October, 1914; one for $1,881.87, maturing 29 October, 1915; and one for $1,881.88, maturing 29 October, 1916; and one for $1,881.87, maturing 29 October, 1917; and that at the same time defendant, to secure said

notes, executed to C. W. Tillett, Jr., trustee, a deed of trust conveying to him a house and lot on East Seventh Street, said deed of trust providing that upon failure to pay any of said notes at maturity, or any part of the interest on any of said notes when due, then all of the said notes should immediately become due and payable, and upon request of the holder of any of said notes the said trustee should sell the said property at public auction at the courthouse door of Mecklenburg County, after advertising said sale for thirty days at the courthouse door and three other public places in Mecklenburg County, or in a newspaper published in said county, said deed of trust being exhibit 'C,' having been recorded in the office of the register of deeds of said county, in Book 323, page 602.

"2. That the defendant did not pay said notes as they became due, and did not pay the interest on same according to the terms thereof, and on said 1 January, 1916, had paid only $102.91 on said notes.

"3. That on 24 January, 1916, plaintiff entered into a written agreement with defendant (exhibit 'E'), that if the defendant would pay him $35 per month to be credited on said notes he would not press him for payment until January, 1917, in order to enable defendant to make private sale of said property, if possible; that plaintiff waited on defendant until January, 1917, and longer, but defendant did not sell said property or pay said notes or the interest due thereon, but between 24 January, 1916, and 2 June, 1917, did pay the plaintiff the sum of $595.

"4. That on 14 June, 1917, there was due on said notes all the principal sum of $6,527.50 and $905.86 interest over and above all payments which had been made on said notes; and on said date the plaintiff requested the said trustee to sell the property embraced in said deed of trust under the terms thereof.

"5. That on 16 July, 1917, the trustee, after advertising the property embraced in said deed of trust according to terms thereof, and after notifying defendant twice, sold same at public auction to plaintiff for the price of $2,500, which sum was credited on the notes, and said trustee executed to plaintiff a deed for said property, which is marked exhibit 'D.'

"6. That the trustee caused a proper notice of sale, setting forth and describing the property to be sold and the time and place of sale, to be posted at the courthouse door and three other public places in Mecklenburg County thirty days before said sale, and also had same published in the *Charlotte News,* an evening paper published in Charlotte, N. C., in the issues published on Friday, 15 June; Wednesday, 20 June; Wednesday, 27 June, and Wednesday, 4 July, 1917, and also gave personal notice to the defendant by letter on 14 June, 1917, and over the telephone

a few days before the sale, and that said advertisement was legal and regular and in accordance with the terms of the deed of trust.

"7. That at the time of said sale the amount due on the said notes, including interest, was $7,465.99, and after applying the amount brought by the property at said sale there was left a balance of $4,965.99; that no further payments have been made on said notes, and there is now due by defendant to plaintiff a balance of $4,965.99, with annual interest thereon from 16 July, 1917.

"8. That at the said trustee's sale there was no fraud or collusion or suppression of bidding by the plaintiff, the trustee, or any other person, but that said sale was openly and fairly conducted and held by the trustee on a regular sale day in the presence of a number of persons (variously estimated from 6 to 15) who were present at the sale.

"9. That at said trustee's sale the property was sold subject to prior encumbrances, which amounted to $1,498.40, same being an indebtedness of $1,000 due to an insurance company secured by deed of trust on the property, street paving assessments amounting to $448, and taxes amounting to $41.40; that the prior encumbrances, which have been paid by the plaintiff, or will have to be paid by him to perfect his title, added to the $2,500 bid at the sale and the $35 cost and expenses of sale paid by him, make the total cost of the property to plaintiff $4,024.40.

"10. That said property was listed for taxation in 1917 at $3,450.

"11. That on account of the war there was very little demand for real estate in July, 1917, and very few sales took place, except forced sales, and at such sales property sold at very low prices.

"12. That, considering the state of the real estate market in Charlotte, in July, 1917, $4,024.40 was a reasonable and fair price for the property to bring at a forced sale, and was at least 50 per cent of its fair market value at that time.

"13. That after plaintiff had purchased said property at the said trustee's sale, defendant rented same from plaintiff, agreeing to give plaintiff certain detachable screens and to assign certain unexpired fire insurance policies in return for being allowed to occupy the premises until 31 August, 1917, the agreement being reduced to writing (exhibit 'F'); that defendant held the premises under said contract until 31 August, 1917, when he moved out and relinquished possession to plaintiff.

"The court holds as a matter of law:

"1. That the defendant is due the plaintiff a balance of $4,965.99, with interest thereon from 16 July, 1917, until paid.

"2. That there was no fraud or suppression of bidding at the sale held by the trustee, and the price bid for the property was not so grossly inadequate as to invalidate said sale.

"3. That the defendant, by the contract of 18 July, 1917, ratified and confirmed the sale of the property by the trustee, and is estopped thereby to question the validity thereof.

"4. That the plaintiff is the owner of the property conveyed to him by the trustee, and the defendant now has no right or equity therein.

"It is therefore ordered, adjudged, and decreed that the plaintiff recover of the defendant the sum of $4,965.99, with interest thereon from 16 July, 1917, until paid, and that the plaintiff is the owner of the property described in the answer, and the defendant has no right or equity therein. It is further adjudged that the plaintiff recover of the defendant the costs of this action, to be taxed by the clerk of this court."

The defendant excepted and appealed.

W. T. Shore and Stack, Parker & Craig for plaintiff.

J. D. McCall, Clarkson, Taliaferro & Clarkson, and W. L. Marshall for defendant.

ALLEN, J. The plaintiff moves in this Court to affirm the judgment upon the ground that there are no exceptions in the record as a basis for the assignments of error, and the motion must be allowed.

"The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. The assignment of error, therefore, must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time." *Harrison v. Dill,* 169 N. C., 544.

The exception to the judgment "Is not sufficient to bring up for review the findings of the judge. The alleged errors should be pointed out by specific exceptions as to findings of fact as well as law. Findings of fact by the judge are binding on us where supported by evidence, and when it is claimed that such finding is not supported by any evidence, the exceptions and assignments of error should so specify. Such objection cannot be taken for the first time in this Court. *Joyner v. Stancill,* 108 N. C., 153; *Hawkins v. Cedar Works,* 122 N. C., 87." *Sturtevant v. Cotton Mills,* 171 N. C., 120.

The defendant has, however, lost nothing by failing to enter the exceptions, because the findings of fact are supported by evidence, and therefore conclusive on us, and they destroy the defense alleged in the answer and amended answer.

The objection that the court did not examine the evidence is contradicted by the recital in the judgment, which is, "and the court having duly considered the evidence produced in the cause."

There is no exception to the ruling of his Honor striking out the amended answer, which the referee permitted to be filed, but if exception had been entered it would amount to nothing, because the judge has found the facts against the defendant on the matters alleged in the amended answer as a defense.

Affirmed.

JESSE B. MORRIS v. R. D. PATTERSON.

(Filed 1 December, 1920.)

1. Judgments—Consent—Contracts—Courts.

A consent judgment is a contract of record between the parties entered with the approval of the court.

2. Same—Husband and Wife—Divorce—Statutes.

In an action brought by the wife for a divorce *a mensa*, C. S., 2529, an agreement that the wife have a life estate in certain of her husband's lands, remainder to their children, would have been valid as a voluntary conveyance, and is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. C. S., 1668, and a writ of possession may be issued. C. S., 1664.

3. Same—Fraud—Mistake.

As in other instances of contract, a consent judgment entered in the wife's action for divorce *a mensa*, affecting the husband's lands and the disposition of the children among the parties, but not decreeing a divorce, estops the parties thereto actually consenting, in the absence of fraud or mutual mistake.

4. Courts—Jurisdiction—Judgments—Consent.

While the consent of the parties cannot confer jurisdiction on the courts, a consent judgment entered by a court having jurisdiction over parties who had the power to consent, and over the subject-matter, is conclusive.

5. Judgments—Consent—Fraud—Mistake—Action—Collateral Attack—Burden of Proof.

To attack, in an independent action, a judgment by consent entered by a court of competent jurisdiction of the parties and subject-matter, the burden of proof is upon the plaintiff to show that the judgment was obtained by fraud or mutual mistake, or that consent was not, in fact, given.

6. Judgments—Consent—Amendments—Courts.

A consent judgment can be amended only by consent, and is an exception to the rule that judgments may be modified by the judge during the term at which they are rendered.

7. Judgment—Consent—Lands—Estates—Deeds and Conveyances—Title—Third Persons.

A consent decree for the recovery of lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. C. S., 608.

8. Parties—Judgments—Consent—Vendor and Purchaser.

Where, under a valid consent judgment, the wife and children of the plaintiff have an estate in a part of the husband's lands, they are not parties necessary to the determination of his action to compel his vendee to accept his deeds to lands, including those affected by the consent judgment.

APPEAL by defendant from *Lane, J.*, at September Term, 1920, of RANDOLPH.

At March Term, 1918, there was an action pending in the Superior Court of Randolph brought by Mattie L. Morris against her husband, J. B. Morris, the plaintiff in this case, asking for a divorce from bed and board, and to be allowed to live separate and apart from her husband. At that term a consent judgment was entered, and signed by *Jones, J.*, reciting that the jury had been impaneled, and both parties being present and represented by counsel, and it being shown to him that they had arranged and settled their controversy; and it being shown to the court also that the parties were then, and had been for some time, living separate from each other; and it being further shown to the court that the parties have five living children, "Now, by consent in open court, it is ordered, decreed, and adjudged that the plaintiff have and hold for the term of her natural life the tract of land purchased by the defendant from G. F. York, described as follows: (description of land); and upon the expiration of the life estate the aforedescribed land is to become the property of the children of the defendant, Jesse B. Morris, by his wife, Mattie L. Morris, and of the issue of such as may then be dead." There was a further provision that the plaintiff in that action (the mother) was "to have the care and custody of the three youngest children, and the defendant (the father) the care and custody of the two older children; and that each of the parties should be permitted to visit at will the children left in the custody of the other"; that the parties to that action are "allowed to live separate in the future, and each party releases and quitclaims to the other all interests in the property of the other by reason of the marital relation; that the defendant may have the right to remove from the tracts allotted to the plaintiff

the growing crop and all personal property which he has on the said premises; that each party shall pay one-half of the costs."

On 15 April, 1920, said Jesse B. Morris entered into a contract with R. D. Patterson to convey to him, upon payment of $5,500, a warrantee title to certain tracts of land described in said contract, which includes the land settled as aforesaid upon the plaintiff's wife and children, as recited in the aforesaid consent judgment, and tendered the defendant the deed therefor, who refused to accept the same upon the ground that by the consent judgment of March Term, 1908, certain parts of said land had by final decree been conveyed by the plaintiff to his wife and children, and is still vested in them.

Lane, J., presiding at said September term, held that the consent judgment was null and void, and that the plaintiff could convey a free and unencumbered title to said land, and rendered judgment in the said sum of $5,500 and interest and costs. Appeal by defendant.

Seawell & Millikin for plaintiff.
Dan B. King for defendant.

CLARK, C. J. A consent judgment is simply a contract of record, entered with the approval of the court. In *Bank v. Comrs.*, 119 N. C., 226, it is held: "Consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded. As such, they bind the parties thereto as fully as other judgments," provided the parties had the authority to make such contract. This has been often affirmed since.

The only question for our consideration is the power of the husband and wife to make such contract. In *Cram v. Cram*, 116 N. C., 294, the Court held that our statute, now C. S., 2529, recognized as valid "a deed of separation between husband and wife, registered in the county in which she resides," when she is living separate from her husband, quoting *Sparks v. Sparks*, 94 N. C., 527, though it was further said that the courts did not look with favor upon such contracts, citing *Smith v. King*, 107 N. C., 276.

It follows, therefore, that if the contract between the husband and wife to convey to her a certain tract of land for her support with remainder to her children had been made out of court it would have been, at least, *prima facie* valid, and in any view, the voluntary conveyance would have been binding on the husband.

The action was brought by the wife for divorce from bed and board, and also from separation under C. S., 1667. Such action was without collusion, and was being tried when the parties, both present in person, and also represented by counsel, made known to the court that they had agreed upon a settlement.

This agreement did not include any decree for divorce, which would have been void, but is simply an agreement for separation with a conveyance by the decree, with the consent of the parties, of a certain part of land to his wife and children. Such conveyance the husband could have made if there had been no action pending, and in such proceeding the court could, under the authority of C. S., 1667, have caused "the husband to secure so much of his estate for the benefit of his wife and children as may be proper," and when the court makes such an order granting "alimony by the assignment of real estate, the court has power to issue a writ of possession," C. S., 1668, and under C. S., 1664, the court had power to adjudge the custody of the children, as was done in this case by the consent of the parties.

The court, in the former judgment, had jurisdiction of the parties and subject-matter, and the judgment would have been valid except as to the conveyance to the children after the death of the wife, and as to that the husband, in open court, in person and by counsel, assented to the judgment, and did not appeal.

It is true that consent cannot confer jurisdiction, but when, as in this case, the court had jurisdiction and the parties had power to consent, the judgment is conclusive. In *Gardiner v. May,* 172 N. C., 194, *Walker, J.,* says "As to nature and legal effect of consent judgments . . . where parties solemnly consent that a certain judgment be entered on the record, it cannot be changed or altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and finding of the court that it was obtained by fraud or mutual mistake, or that consent was not in fact given, which is practically the same thing, the burden being upon the party attacking the judgment to show facts which will entitle them to relief. *Edney v. Edney,* 81 N. C., 1; *Stump v. Long,* 84 N. C., 616; *McEachern v. Kerchner,* 90 N. C., 179; *Vaughan v. Gooch,* 92 N. C., 527; *Lynch v. Loftin,* 153 N. C., 270; *Simmons v. McCullin,* 163 N. C., 409, and *Harrison v. Dill,* 169 N. C., 542, where the subject is fully considered and the authorities reviewed."

In *Stump v. Long,* 84 N. C., 616, it was held that "a judgment or order made in a cause by consent of parties, or their attorneys, is binding and cannot be set aside or modified, except upon ground of mistake by both parties or by fraud, and this by civil action and not by motion." This case has been often cited and approved, see Anno. Ed. In *Vaughan v. Gooch,* 92 N. C., 524, it was held: "An order or judgment made by consent cannot be set aside or modified, unless by consent, except for fraud, or mistake of both parties." See cases therein cited and citations in Anno. Ed. In *Simmons v. McCullin,* 163 N. C., 414, it is said: "A judgment entered by the court, upon the agreement of the parties, is, to

say the least, as conclusive upon them as if judgment were rendered in the ordinary course of proceedings," citing many cases. A consent judgment will not be set aside upon the ground of surprise or excusable neglect, *Hairston v. Garwood,* 123 N. C., 345.

Such judgment cannot be impeached collaterally, but only by a direct proceeding for fraud, and where a consent judgment is entered upon a replevin bond in claim and delivery, the sureties could not attack it for fraud by motion, but might proceed by a direct action. *McDonald v. McBryde,* 117 N. C., 125. A consent judgment can be amended only by consent, and is an exception to the rule that judgments may be modified by the judge during the term at which they are rendered. *Deaver v. Jones,* 114 N. C., 651, citing 1 Black Judgments, 305, 308, 319; Freeman on Judgments, 111 *a; McEachern v. Kerchner,* 90 N. C., 179, and many other cases.

In 1 R. C. L., 947, it is held that while decrees allowing alimony may be modified by the court from time to time, that this is not so when the alimony embraced in the decree is entered by the consent of parties, "for such a modification of the decree would be no less a modification of the contract itself; which is not subject to revocation or modification except by consent of the parties thereto," citing *Pryor v. Pryor* (Ark.), 129 Am. St., 102; *Henderson v. Henderson* (Or.), 48 L. R. A., 766; 13 Anno. Cas., 296, and note.

In 15 R. C. L., 645, it was held that a consent judgment was binding upon husband and wife, if consented to by both, citing *Bank v. McEwen,* 160 N. C., 414; *Simmons v. McCullin,* 163 N. C., 409. In 1 Black on Judgments, 319, it is said that while "A court has power to vacate and set aside a consent judgment on account of fraud, mutual mistake, or surprise, it cannot alter or correct it, except with the consent of all the parties affected by it," citing *Kerchner v. McEachern,* 93 N. C., 447; *Stump v. Long,* 84 N. C., 616.

C. S., 608, provides: "Every judgment in which the transfer of title is so declared shall be regarded as a deed of conveyance, executed in due form and by capable persons." In *Rollins v. Henry,* 78 N. C., 350, it was held that "a decree made by consent that the plaintiff will recover the land in controversy had the effect of conveying the legal estate in fee as between the parties," and was good against third persons in the absence of fraud or collusion.

In *Holloway v. Durham,* 176 N. C., 553, *Hoke, J.,* says that "the defendant insists that this being a judgment by consent, the parties are not confined to the matters in controversy presented in their pleadings, and that the present judgment was intended to be and is an adjustment concluding the parties as to any and all damages that plaintiff, his heirs and assigns, might at any time suffer from the erection and maintenance

of defendant's plant. The decisions in this State have gone very far in approval of the principle that a judgment by consent is but a contract between the parties, put upon the record with the sanction and approval of the court, and would seem to uphold the position that such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction, and this with or without regard to the pleadings. *Bank v. McEwen,* 160 N. C., 414; *Bunn v. Braswell,* 139 N. C., 139; *Bank v. Comrs.,* 119 N. C., 214; *Vaughan v. Gooch,* 92 N. C., 524. Such a ruling has the support of well considered authority elsewhere. *Fletcher v. Holmes,* 25 Ind., 458; *Seiler v. Mfg. Co.,* 50 W. Va., 208, 218; Beach Modern Eq. Pr., sec. 794; 2 Black Judgments, sec. 705; 23 Cyc., 728."

There are some circumstances in which a judgment by consent of counsel will be set aside. *Davis v. Bank* (Geo.), 46 L. R. A. (N. S.), 750. But these are the exceptions. Where the parties themselves have joined in the consent, and there is no fraud or mutual mistake shown, the judgment is conclusive.

There are many and insuperable reasons against treating the former judgment of 1908 as a nullity; the court had jurisdiction of the parties and the subject-matter; the consent was by the parties themselves as well as by counsel, and extended only to matters as to which the parties could have agreed out of court; the judgment by consent could not be modified except by consent; this was not an action to set it aside by fraud or mutual mistake, and no ground for such allegation is set out; if there was mutual mistake, then there is the long lapse of time; neither the wife nor the children, who hold title under the consent judgment, are made parties to this action; and the judgment cannot be impeached in this collateral proceeding.

The judgment was entered with the consent of the plaintiff, and is binding upon him as a conveyance of record of the land in a pending suit for alimony, and the land was assigned and settled by the court upon his wife and children in compromise of that matter with the consent of the plaintiff. Any decree in this cause would have been invalid if entered against them, but as the Court is of the opinion that they obtained a valid title by the consent judgment of 1908, it is not necessary that they should be parties to this action between the plaintiff and his vendee.

Reversed.

MOSES L. HILL, BY HIS NEXT FRIEND, v. NORTH CAROLINA RAILROAD COMPANY AND DIRECTOR GENERAL OF RAILROADS.

(Filed 1 December, 1920.)

1. Railroads—Evidence—Negligence—Contributory Negligence—Trials—Questions for Jury—Master and Servant—Employer and Employee.

Evidence that an employee of a railroad company, in the performance of his duties, and obeying the order of its foreman, left a place of safety on its train, provided for his return from work, boarded the train as it was leaving, and was prevented from entering a car on the train because of its narrow door and crowded condition; and while thus being compelled to ride on its running board was struck and injured after going about three hundred yards, by a switch post placed about eighteen inches therefrom, and when the speed of the train had reached twenty miles an hour, and that in starting no whistle was blown or bell rung, is sufficient evidence of the defendant's actionable negligence, and also of the plaintiff's contributory negligence in not doing what was required of him to reach a place of safety or avoid striking the switch post, within the stated space, to take the case to the jury on both of these issues.

2. Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Duty of Employer.

Where an employee is injured under dangerous conditions of which the employer has better opportunity to be aware of, the obligation to exercise care rests to a greater degree upon the employer, upon the principle which requires him to provide the employee a safe place to work in the performance of his duties.

3. Damages—Negligence—Personal Injury.

The measure of damages to be awarded for a negligent personal injury, resulting in a diminution of earning power, is a sum equal to the present worth of such diminution, for the plaintiff's expectancy of life.

4. Appeal and Error—Negligence—Objections and Exceptions—Instructions—Requests.

Where an instruction to the jury upon the measure of damages recoverable for a negligent personal injury, resulting in a diminution of earning power, is not inherently erroneous, it will not be held as such on appeal for not being sufficiently explicit, in the absence of a correct request for special instruction stating the appellant's view.

APPEAL from *Lane, J.*, at September Term, 1920, of ROWAN.

The facts deducible from the plaintiff's testimony and the testimony of the plaintiff's witnesses are as follows: Plaintiff, fifteen years of age, was employed by the defendant to work at the defendant's railroad shops at Spencer, N. C. Plaintiff lived in Salisbury, N. C., and was carried to and from his place of employment by the defendant on an employee's train, known as the "shop train," consisting of cattle cars, converted into cars for employees to ride in, which were without platforms, steps, and doors, and were not equipped with bell ropes or signal

cords, though there was a narrow entrance on the side of the car near its end. On the afternoon of 30 May, 1918, plaintiff boarded the rear car, or supply car, of the shop train to return home. The shop train proceeded toward Salisbury, stopped at the defendant's transfer shed, and plaintiff was requested by a Mr. Litton, who had charge of the supply car, and who had been the plaintiff's foreman that day, to carry a rag wringer to the transfer shed office. Plaintiff immediately alighted from the supply car, ran to the transfer shed office, delivered the rag wringer, and ran back to the train, which was then slowly moving off. No bell was run and no signal of any kind given for the starting of the train. Plaintiff boarded the running board of the nearest car, the fourth car from the rear car of the train, and endeavored to get in it, but was unable to do so on account of the narrow passageway being crowded and blocked by employees. The speed of the train rapidly increased to a rate of twenty miles an hour, and after riding a distance of approximately three hundred yards, plaintiff was struck by a switch post four and a half feet high, standing eighteen inches from the running board, and knocked beneath the wheels of the train. Plaintiff's left foot was crushed six inches above the ankle, and his right foot severely injured. The shop train ran by the plaintiff. The rear car stopped sixty feet from where plaintiff lay beside the track.

The jury returned a verdict finding negligence of defendant, contributory negligence of plaintiff, and assessed damages at $4,000. Judgment thereon, and defendant appealed.

John C. Busby and A. H. Price for plaintiff.
Linn & Linn for defendant.

WALKER, J., after stating the case: There was evidence tending to show negligence on the part of the defendant which was, and should have been, submitted to the jury. The plaintiff was ordered by one having authority to give the order to leave the train, on which he was at the time, and deliver a rag wringer at the transfer shed office, which order he obeyed, and before he could return to the train and to the position which he had previously occupied thereon, the train started off. Plaintiff got upon the running board of the car safely, although the train was in motion and increasing its speed all the time until it was running at the rate of twenty miles an hour, when he was struck by a switch post and knocked under the wheels of the train. There also was testimony that he could not get inside of the car, because it was so crowded with the hands as to prevent his doing so. It was the duty of the defendant, through its servants in charge of the train, to allow plaintiff sufficient time to do what he was ordered to do, and to return to the car he

had left, or, at least, to some safe place on the train. Instead, because of the crowded condition of the supply car, he was compelled to occupy a place of danger, where he was liable to be struck, and was struck by the switch post, and injured as he described. At the time he was an employee of the defendant, and as such he was entitled to be furnished by him, in the exercise of due care, a reasonably safe place to perform his work while in his service. *Atkins v. Madry,* 174 N. C., 187; *Taylor v. Power Co., ibid.,* 583. If a master has a better opportunity to know of defects and dangers than his servant, to whom they are unknown, the obligation to exercise care is not exactly the same. *Atkins v. Madry, supra.* This duty which the defendant owed to him was not fulfilled, and because of this failure of duty, he was severely hurt. It cannot be successfully asserted that it was not the proximate cause of the injury. He was standing on the running board, the only place he could stand, and was struck by the switch post, which was placed near the side of the railroad track. The defendant knew of the danger, or should have known of it, and he should not have so acted as to expose the plaintiff to it. It was the combination of running board and switch post, placed so near to each other as to strike one standing on the former that caused injury to plaintiff, who was unaware of the dangerous situation. Defendant should have placed them wider apart, or he should have warned the plaintiff of the danger. Whether plaintiff exercised due care while holding on to the grab-iron in order to secure and steady himself, or carelessly bowed his back too much, or whether he could have entered the car by reasonable effort and prevented the injury, or whether he could have otherwise avoided it, raised questions for the jury. We do not see how it could be a question of law under the circumstances, as contended that it was. Under the instructions of the judge, the jury found that the plaintiff was guilty of contributory negligence, which affected the question of damages only, and was not a bar to plaintiff's recovery. The charge of the judge was correct in respect to the negligence, and very fair.

Myers v. R. R., 166 N. C., 233, in its essential facts, resembles this case, and there it was held, where the plaintiff acted under a similar order of his superior, that his conduct in getting on the train made contributory negligence a question for the jury.

As to the damages, it is objected that the true rule was not given to the jury, which is, that the damages to be awarded for a negligent personal injury, resulting in a diminution of earning power, is a sum equal to the present worth of such diminution, and not its aggregate for plaintiff's expectancy of life. This rule is the correct one. Otherwise, a plaintiff would recover now for losses, by reason of diminished earning capacity, though they are sustained in ten, twenty, or even thirty

years hence, without any consideration of the fact that he is not entitled to the whole of them presently, as these losses could only be incurred at different periods in the future. Something, therefore, must be allowed, because he is compensated for them before the time when they would be actually suffered. Many cases, in different jurisdictions, sustain the rule. *Fry v. R. R.*, 159 N. C., 362; *Johnson v. R. R.*, 163 N. C., 431; *Pickett v. R. R.*, 117 N. C., 616; *Wilkinson v. Dunbar*, 149 N. C., 20; *Benton v. R. R.*, 122 N. C., 1007; *Watson v. R. R.*, 133 N. C., 188; *O'Brien v. White*, 105 Me., 308; *R. R. v. Carroll*, 184 Fed. Rep., 772; *Fulsome v. Concord*, 46 Vt., 135; *Kenny v. Folkerts*, 84 Mich., 616. But the charge did not altogether ignore this rule, though it was not as fully stated as it might have been. If the defendant desired it to be stated more fully, or in any special way, he should himself have asked for an instruction sufficient to present his view, or so as to direct the attention and consideration of the jury more pointedly to the rule of damages. *Simmons v. Davenport*, 140 N. C., 407; *Beck v. Tanning Co.*, 179 N. C., 123, 127. We have recently said upon this question, in the case of *Harris v. Turner*, 179 N. C., 322, at p. 325: "The judge left the question of damages entirely to the jury, for he could not decide it as a matter of law. . . . When the judge left the amount paid by the defendants for the jury to find, defendants were silent, and, therefore, assented to this treatment of the question. If the defendants desired a special instruction, to guide the jury, they should have asked for it. *Simmons v. Davenport*, 140 N. C., 407. We there held that if a party desires fuller or more specific instructions than those given by the court in the general charge, he must ask for them, and not wait until the verdict has gone against him, and then, for the first time, complain that an error was committed." And in *Davis v. Keen*, 142 N. C., at p. 502: "Any omission to state the evidence correctly or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances, and, after availing himself of the chance to win a verdict, raise an objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object, where the instruction of the court is not itself erroneous. This has been approved in many cases, and very lately in several," citing *Baggett v. Lanier*, 178 N. C., 132; *Futch v. R. R., ibid.*, 282; *Sears v. R. R., ibid.*, 285; *S. v. Stancill, ibid.*, 683. The instruction, as to damages, was somewhat general, but not inherently erroneous, and, therefore, the rule of practice, which we have just stated, should apply.

We find no error in the case or record.

No error.

J. T. SHEPHERD v. J. RUFUS SHEPHERD ET AL.

(Filed 1 December, 1920.)

1. Appeal and Error—Record—Findings—Judgments—Motions.

In passing upon an appeal from the refusal of the Superior Court judge to set aside a judgment, his finding that the motion was solely based upon excusable neglect will preclude the further ground that the judgment was not regularly entered.

2. Judgments—Motions—Excusable Neglect.

It is inexcusable and gross neglect for a plaintiff to take out claim and delivery in his action, fail to file his complaint, and permit a judgment by default to be taken against him according to the course and practice of the courts; and his motion to set aside the judgment for excusable neglect therein will be denied.

3. Appeal and Error—Objections and Exceptions—Judgments—Motions—Irregular Judgments—Evidence—Findings.

Exception to the refusal of the Superior Court judge to consider the evidence on a motion to set aside a judgment, relating to its having been irregularly entered, or to grant the motion on that ground, should be taken at that time, with request that the judge find the necessary facts.

4. Appeal and Error—Assignments of Error—Exceptions—Attorney and Client.

It is necessary that assignments of error be based upon exceptions duly taken and in apt time, which it is the duty of appellant's attorneys to do, and an assignment of error not based upon an exception will not be considered on appeal.

APPEAL from *Lane, J.*, at July Term, 1920, of MONTGOMERY.

This is a motion to set aside a judgment for excusable neglect. The original motion was also based on another ground, it being that the judgment was irregularly taken, having been rendered contrary to the course and practice of the court, but the judge finds as a fact that at the hearing the only ground alleged was excusable neglect. He found the facts and refused to set aside the judgment.

The action was brought by the plaintiff to recover a five-passenger Overland automobile, and under claim and delivery proceedings the car was taken from the defendants and delivered to the plaintiff, who filed no complaint and paid no further attention to the case. Defendants answered by setting up a counterclaim based on false representations as to the condition of the car, and false warranty. Issues were submitted to the jury, and they found that plaintiff did not own the car; that he had made the false and fraudulent representations which deceived the defendants and induced them to exchange a mare with buggy and

harness and $250 "as boot," for the car, and assessed their damages at $305. Judgment was entered upon the verdict, and plaintiff appealed.

J. C. Sedberry and R. T. Poole for plaintiff.
J. A. Spence for defendants.

WALKER, J., after stating the case: As the judge found as a fact that plaintiff moved to set aside the judgment only upon the ground of excusable neglect, nothing else is before us. It is so palpable that plaintiff was guilty of inexcusable neglect, that it is unnecessary to discuss the evidence and the findings. The plaintiff obtained possession of the car under the claim and delivery proceedings and seemed to think that nothing more was required to be done by him. He filed no complaint, and did not attend court to look after his case, but left it to take care of itself, having completely abandoned it. He did retain an attorney, but one who resided in another county, and who did not attend the court at the term he knew the case had been calendared for trial. *Jernigan v. Jernigan,* 179 N. C., 237, and cases cited. There was evidence that he stated to a witness that if anything more was done in the case it must be done by some one else, as he was not going to do anything. It is no wonder that his Honor, upon the evidence, found that plaintiff had been negligent without any excuse for it, as it appears to have been a case of gross negligence. We have often held that a party to a suit in court should give it such attention and care as a man of ordinary prudence usually bestows upon his important business. *McLeod v. Gooch,* 162 N. C., 122; *Waddell v. Wood,* 64 N. C., 624; *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391; *Pepper v. Clegg,* 132 N. C., 312; *Manning v. R. R.,* 122 N. C., 824; *Norton v. McLaurin,* 125 N. C., 185; *Lumber Co. v. Cottingham,* 173 N. C., 323; *Land Co. v. Wooten,* 177 N. C., 248. A recent case much in point is *Jernigan v. Jernigan, supra,* which we have already cited for another purpose.

If defendant intended to insist on the ground that the judgment was irregular, he should have made it known, or, at least, should distinctly have excepted at the time, because the judge did not consider it or find the facts in regard to it. An assignment of error not based upon an exception duly and properly taken is not sufficient. The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal; and its office is to group the exceptions noted in the case on appeal; and if there is an assignment of error not supported by an exception, it will be disregarded. *Worley v. Logging Co.,* 157 N. C., 490; *McLeod v. Gooch,* 162 N. C., at p. 124; *Harrison v. Dill,* 169 N. C., 542-544. If a party desires any special facts to be found, he should request it; otherwise, we presume the judge

found such facts as will support the judgment. *Albertson v. Terry,* 108 N. C., 75; *Hardware Co. v. Buhmann,* 159 N. C., 511; *McLeod v. Gooch,* 162 N. C., at p. 124.

The plaintiff has lost his rights, if he had any, by his own laches, and has himself to blame for the result.

Affirmed.

THE COMMISSIONERS OF HENDERSONVILLE v. PRUDDEN & COMPANY.

(Filed 1 December, 1920.)

1. Municipal Corporations—Cities and Towns—Bonds—Sale—Notice—Publication—Statutes.

Ch. 3, sec. 4, Public Laws of North Carolina, Special Session of 1920, amending sec. 2956, Consolidated Statutes, as to the advertisement or notice of the sale of municipal bonds, requiring, in addition, that such notice be published in "a financial or trade journal, published within the State of North Carolina, which regularly publishes the sale of municipal bonds," does not require that the newspaper designated be exclusively devoted to finance and trade, if the publication will likely give notice to the buyers of this class of securities, and it is sufficient if the newspaper in which the publication is made is one of general circulation in the State and carries advertisemests relating to these matters as a customary and established feature of the issue.

2. Statutes— Interpretation— Municipal Bond— Sales — Notice — Newspapers—Impossibilities.

A statutory requirement, in this case providing that the notice of the sale of municipal bonds shall be made by publication in "financial paper or trade journal, published within" this State, will not be so construed as to require an impossibility.

3. Municipal Corporations—Bonds— Sales— Notice— Publication— Statutes—Financial Newspapers.

Where the notice of sale of municipal bonds has been published in this State in a newspaper of local circulation only, and not in a newspaper of general circulation, carrying advertisements relating to these matters as a customary and established feature of the issue, the bonds so issued are void as between the contracting parties.

4. Municipal Corporations —Bonds —Notice —Publication —Purchaser—Parties—Matters in Fieri.

The proposed purchaser of municipal bonds may refuse to take the bonds for which he is the successful bidder, on the ground that the statute has not been followed which requires advertisement in "a financial paper or trade journal," etc., the objection being between the original parties when the matter is *in fieri.*

5. Courts —Judicial Notice —Admissions—Bonds—Sales—Notice—Publication—Newspapers—Statutes.

Under the principle that the courts will take judicial notice of a rule or custom in the general business of the country when of sufficient notoriety to make it safe and proper to do so, it is *Held*, that, notwithstanding an admission of record of the parties to the contrary, the courts of this State will take judicial notice that there are newspapers of general circulation published here, within the intent and meaning of our statute requiring notice of the sale of municipal bonds to be given in a "financial paper or trade journal," etc.

CIVIL ACTION, heard and decided on case agreed and by consent before *McElroy, J.*, at chambers in ASHEVILLE, N. C., on 2 November, 1920.

The action is to recover the purchase price of municipal bonds of the city of Hendersonville to the amount of $62,000, sold or contracted to defendant company by plaintiff at a stipulated sum on 18 September, 1920, and purporting to have been issued under the Municipal Finance Act, Consolidated Statutes, ch. 56, subch. 111. Defendant refuses acceptance and payment on the alleged ground that the sale of said bonds has not been properly advertised as the law requires. As chiefly pertinent to the question presented, it is admitted in the case agreed: (*a*) "That prior to the sale the said bonds and the proposed sale thereof were duly advertised in the *Hendersonville News*, a newspaper published in the city of Hendersonville, N. C., and having general circulation in said municipality." (*b*) That said sale of said bonds was not advertised "in a financial paper or trade journal published within the State of North Carolina for the reason that no such financial paper or trade journal exists or is published within the State," which regularly publishes notices of the sale of municipal bonds. (*c*) That it is agreed that there is no financial paper or trade journal published within the State which regularly publishes notices of such sales, etc.

Upon the facts submitted, the court being of opinion that these bonds would constitute valid obligation of the city, entered judgment that the defendants comply with the contract, and thereupon defendant excepted and appealed.

E. W. Ewbank for board of commissioners, Hendersonville, N. C.
C. N. Malone and G. A. Thomasson for Prudden & Company.

HOKE, J. The case agreed states, and a perusal of the law will show, that the original finance act applicable to the question, Consolidated Statutes, secs. 2956 and 2920, provided for the publication of the notices of this kind in a "newspaper published in the municipality, or if no newspaper is published therein, then in a newspaper published in the county, and circulating in the municipality, or if there is no such news-

paper, the notice shall be published at the door of the building in which the governing body usually holds its meetings, and at three other public places in the municipality. And in ch. 3, sec. 4, Public Laws, Special Session 1920, ratified August, 1920, on matter specially pertinent to this inquiry, the general act was amended as follows: "Sec. 2956, Consolidated Statutes, constituting sec. 30, Municipal Finance Act, is hereby amended by inserting at the end of said section the following words: The notice required by this section shall be published not only in the manner prescribed by sec. 2920, but also in a financial paper or trade journal, published within the State of North Carolina, which regularly publishes notices of the sale of municipal bonds." It will be noted that the amendment in question does not require the publishing of the notice in a paper devoted exclusively to finance and trade, the design and purpose being to provide for a publication that will likely afford notice to buyers of this class of securities, and we think the requirements of the statute are fully satisfied, and its terms and purpose complied with by publishing the additional notice in a paper having a general circulation in the State, and which carries advertisements relating to these matters as a customary and substantial feature of its issue. We are confirmed in this view by a consideration of the rule of statutory construction very generally recognized, that "a statute is never to be understood as requiring an impossibility if such result can be avoided by any fair and reasonable construction." Black on Interpretation of Laws (2 ed.), p. 119, a position approved and applied by the Court in *Garrison v. R. R.*, 150 N. C., 575, and other cases.

Assuming, as the case agreed clearly contemplates, that the notice provided for must appear in a paper exclusively dealing in financial and trade matters, would be to put the Legislature in the attitude of having provided in an elaborate law for the issue of bonds for governmental purposes and annexing a condition that would render its entire action of no avail. See, also, on question of notice, *Kornegay v. Goldsboro,* at the present term.

The construction of the statute we have indicated being the true one, we must hold that these bonds have not been properly advertised, it appearing so far as the case discloses that the notice of sale has only been given in a newspaper having local circulation, and has not appeared in a financial or trade journal of any kind published in the State. And the matter being *in fieri,* it is open to the original parties to the transaction to present and insist on the objection. *Bennett v. Comrs.,* 173 N. C., 625-630.

We are not inadvertent to the statement and admission in the case agreed that there is no such financial paper or trade journal published in the State, as the statute requires. What effect such an admission

might have on the rights of the parties, if the Court was concluded by it, we are not called on to determine, for we are not bound by it. On the question thus presented in *Board of Health v. Comrs.*, 173 N. C., 250-253, it is held in effect that the Court is not concluded by the admission of parties to a controversy, as to conclusions or inferences of law, nor by admissions of fact when contrary to those of which the Court is required to take judicial notice, citing, among other authorities, *Prichard v. Comrs.*, 126 N. C., 908-913; *Hopper v. Covington*, 118 U. S., 148-151; *Equitable Insurance Company v. Brown*, 213 U. S., 25; *Graef v. Eq. Ins. Co.*, 160 N. Y., 6 Pl. & Pr., pp. 336-338, etc. That was a case where the admission was made by a demurrer, but the reason and principle extends also to an admission presented as in this case for obtaining the decision of the Court on the rights of the parties. And on the question of judicial notice, it is recognized here and elsewhere that the Court will take judicial notice of a rule or custom in the general business of the country when the same is of sufficient notoriety to make it safe and proper to do so. *Furniture Co. v. Express Co.*, 144 N. C., 639, citing, among other authorities, McKelvey on Evidence, pp. 33-34; Wigmore on Evidence, sec. 2580. In McKelvey the general principle is stated as follows: "There is a class of facts of which a court may take judicial notice in its sound legal discretion and supporting them is the single principle of common notoriety, the vital question being whether sufficient notoriety attaches to any particular fact to make it safe and proper to assume its existence without proof." Applying the principle it is undoubtedly safe to assume, and we judicially know that there are several newspapers in this State having an extensive and general circulation in which advertisements for sales of bonds of this character are customarily made, and to which buyers of this class of securities habitually refer for information, publications that fully meet in this respect the requirements of the statute, and in which, or one of them, proper advertisement must be made and shown before a valid sale of municipal bonds can be had.

For the reasons given, we must hold, as stated, that the proposed bond issue and sale to these parties is invalid, and on the relevant facts appearing in the case agreed, there must be judgment entered for defendant.

Reversed.

PAUL CHATHAM ET AL. V. MECKLENBURG REALTY COMPANY ET AL.

(Filed 8 December, 1920.)

1. Judgments —Assignment —Parol Evidence —Trusts —Beneficiaries — Ratification.

It may be shown by parol that an assignment of a judgment, absolute in form, was, in fact, to be held as a security for a debt; and this applies to one acquiring an interest under the assignment, who was not aware of it at the time, but afterwards accepted it and claimed its benefits.

2. Same—Actions—Parties.

Where a judgment has been assigned to one for the benefit of himself and others, the one to whom the judgment has been assigned holds as trustee for the others, and he and the others holding an interest therein may maintain an action against the judgment debtor; and while such assignee is not a necessary party, when he holds merely as a trustee, he is a proper party.

3. Judgments—Assignment—Estoppel—Trusts.

A judgment assigned either absolutely or in trust operates as an estoppel between the judgment debtor and the parties, and privies, or others having an interest therein as *cestuis que trustent*. C. S., 449.

4. Corporations—Judgments—Dividends—Fraud—Execution—Limitation of Actions.

Pending an action to compel the refund of moneys of a corporation wrongfully distributed as dividends among its stockholders, by the assignees of a judgment against it, an attempted liquidation by the corporation is in fraud of the plaintiffs, but the running of the statute of limitations does not begin until execution has been issued against the corporation and returned unsatisfied; and C. S., 441 (9), as to the time for commencing an action after the discovery of the fraud, has no application.

5. Corporations—Parties—Receivers.

It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those thereunder beneficially interested, to maintain an action against its officers and stockholders for misapplication of its funds in distribution among the shareholders as dividends.

ALLEN, J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL by both parties from *Shaw, J.*, at September Term, 1919, of MECKLENBURG.

At February Term, 1917, of Mecklenburg, Paul Chatham and the Charlotte Rapid Transit obtained judgment against the defendant, the Mecklenburg Realty Company, for $10,000 and interest from date of judgment. On appeal, this was affirmed with modification that the judgment should bear interest from 19 May, 1913, the date of the contract sued upon, and not from the first day of the trial term as in actions for tort, where the verdict does not expressly allow interest. A petition

to rehear was denied. Execution upon the judgment was issued 14 March, 1918, and was returned 2 April, 1918, *"nulla bona."* Thereupon plaintiffs made demand upon the officers and directors of the Mecklenburg Realty Company to pay in sufficient funds from the assets of the company which had been distributed among the stockholders to liquidate said judgment, which was refused.

This action was begun 2 April, 1918, against the directors and stockholders of the Mecklenburg Realty Company to enforce payment of said judgment, and upon an order for examination, made in this cause, by the officers of the Mecklenburg Realty Company, it was ascertained that its entire assets and capital had been distributed among the stockholders. On 17 August, 1917, the plaintiffs in the judgment assigned to E. T. Cansler and H. L. Taylor one-fifth interest in the proceeds as security for payment of fees for legal services rendered, and to be rendered in said case. On 2 January, 1918, the plaintiffs in the judgment assigned to H. L. Taylor $2,305 in said judgment as security for debts due him, but for which he held other security amply sufficient to secure said debts. On 2 January, 1918, the same plaintiffs assigned to Margaret Kavanaugh as security for certain debts due her the balance arising from the proceeds from said judgment.

The Mecklenburg Realty Company, on 7 December, 1916, filed a certificate of voluntary dissolution, and thus attempted to dissolve. The summons in the original action in this case had been served upon said realty company theretofore on 12 August, 1914.

When this cause came on for trial at September Term, 1919, of Mecklenburg, both parties, by consent, entered on the minutes of the court, waived trial by jury, and consented that the issues of fact be tried by the court, who heard the evidence and rendered the findings of fact and judgment holding that the assignees of an interest in judgment were not necessary parties in the said action; that plaintiffs' cause of action against the stockholders of the Mecklenburg Realty Company was barred by the three-year statute of limitations; and that plaintiffs could only recover against said stockholders to the extent of the assets and capital of said company, which had been distributed among them within said three years, but that plaintiffs' cause of action against the directors of said company was not barred by the statute of limitations. Both parties appealed. At Spring Term of this Court, 1920, a *per curiam* order was entered that the assignees of interests in the judgment should be made parties in the Superior Court, with leave to them to file pleadings and to the other parties to except, and that the action taken should be certified to this Court, the case being retained here for further orders, but the order of this Court was "not to be taken as conclusive upon the parties who might except thereto, and they could take such course in the

Superior Court, or in this Court, to protect their rights as they may be advised." The pleadings had below in pursuance to said order have been certified to this Court, and are now a part of the record of this case.

Cansler & Cansler and H. L. Taylor for plaintiffs.

W. S. O'B. Robinson, Jr., and Morrison & Dockery for officers and directors.

C. W. Tillett for stockholders.

CLARK, C. J. Though the assignments were absolute in form, the judge finds as a fact from the evidence that they were made as a security for debts for legal services and other indebtedness. H. L. Taylor testified that the assignment to himself and to Mr. Cansler was as security for the payment of fees due them as counsel, and that at his suggestion a further assignment was made of an interest in judgment to secure an indebtedness due his client, Mrs. Kavanaugh. She was not at the time aware of this provision for her benefit, but has since then accepted it, and has filed her pleas in this Court, as well as Cansler and Taylor, claiming their beneficial interests in the proceeds of the judgment.

"The Court finds as a fact that plaintiffs have such an interest in said judgment, as gives them the right to prosecute this action in their own name, in behalf of themselves and all other creditors having an interest." The above assignees of a beneficial interest in said judgment have been made parties and filed pleadings in behalf of such beneficial interests. Thus all parties interested in the judgment are before the court. The original owners of the judgment could thus maintain the action in their own behalf, and for the benefit of their assignees as trustees of an express trust under the terms of said assignments, and can prosecute this action. "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." C. S., 449.

It was proper, though not necessary, that such assignees should be made parties, which has been done, and they have filed their supplemental pleadings. The exception that the owners and plaintiffs in the judgment could not bring this action was properly overruled.

The proceedings to recover the assets and capital which has been distributed among the shareholders and against the officers and directors was in the equitable jurisdiction of this Court. The statute is simply a cumulative legal remedy. *Barnawell v. Threadgill,* 40 N. C., 89; *Oliveira v. University of N. C.,* 62 N. C., 70; *Humphrey v. Wade,* 70 N. C., 281.

In *Settle v. Settle,* 141 N. C., 563, the Court affirmed the above principle from which it is clear that the statute declaring the liability of directors and stockholders to creditors, upon the admitted facts of this case, merely extended the equitable powers of the court to obtain possession of the assets of the corporation and administer them in accordance with the principles of equity, and does not substitute the statutory remedy to the exclusion of the equitable remedy heretofore existing. The intent of the Legislature was to make the remedy of creditors swifter and more efficacious, and the statutory remedy does not restrict the right of the creditors by shortening the time within which those rights could have been enforced in an equitable proceeding.

A creditor who has obtained a judgment against a corporation can maintain such action when the execution has been returned *nulla bona.* In *Guilford v. Georgia Co.,* 112 N. C., 36, the Court said: "There being no distinction between actions at law and suits in equity in this State, any proper relief can be granted in a civil action. A creditor's suit is of itself a very comprehensive and liberal action. It is not demurrable, because the remedy might have been had by supplemental proceedings. *Bronson v. Ins. Co.,* 85 N. C., 411; *Hughes v. Whitaker,* 84 N. C., 640. It is not demurrable because the cause of action is dormant. *Bacon v. Berry,* 85 N. C., 124; *Bank v. Harris,* 84 N. C., 206; *Mebane v. Layton,* 86 N. C., 571. It is an old and well settled mode of procedure, fully adequate to settle all conflicting interests."

This right of action existed prior to the statute, and is not penal in its nature, and the statute governing penal actions has no application. The summons in the action in which the judgment was recovered was served upon the Mecklenburg Realty Company 12 August, 1914. The judgment was obtained at February Term, 1917, and is conclusive as to the indebtedness. The officers and stockholders of the realty company, in December, 1916, evidently seeing beforehand that judgment would be obtained in February following, attempted to evade payment by their voluntary proceeding for dissolution in December, 1916, and the distribution of the capital and assets of the corporation among the stockholders. This was an attempted fraud, and as was held in *McIver v. Hardware Co.,* 144 N. C., 484: "When the property has been divided among the shareholders, a judgment creditor, after a return of an execution against a corporation unsatisfied, may maintain a creditor's bill against a single shareholder or against as many shareholders as he can find within the jurisdiction, to charge him or them to the extent of the assets thus diverted, it is immaterial whether he got them by fair agreement with his associates, or by an act wrongful as against them."

The judgment is an estoppel upon the officers and stockholders of the corporation, and cannot be collaterally attacked by them. *Heggie v.*

Loan Asso., 107 N. C., 581; *Clark v. Marsh Corp.*, 10 Cyc., 733, and cases there cited; *Hawkins v. Glenn*, 131 U. S., 319, in which last the facts are almost identical with those in this case.

C. S., 1197, provides: "In the case of the dissolution of a corporation, the debts due to and from it are not thereby extinguished, nor do actions against a corporation which is dissolved before final judgment abate by reason thereof, but no judgment shall be entered therein without notice to the trustees or receivers of the corporation." The action was pending at the time the dissolution proceedings were taken out, and the directors and trustees were fixed with notice thereof, and at the rendition of judgment they not only appeared by counsel, but appealed to this Court, and after the affirmation of the judgment here applied for, and were refused a rehearing. C. S., 1193, continued the existence of the corporation for three years for the purpose of prosecuting and defending actions, and section 1194 constitutes the directors trustees to wind up the affairs of the corporation, collect debts due it, sell and convey the property, and, *"after paying its debts,* divide any surplus money and other property among the stockholders." And section 1198 provides for the distribution of funds, and section 1199, *supra,* provides that the debts due to and by such corporations shall not be extinguished nor actions abated by dissolution before final judgment.

There is no statute of limitation which protects either stockholders or the directors who receive the capital and assets of the corporation with notice by the pending suit of a claim of the plaintiff. In *Long v. Miller*, 93 N. C., 233, it was held that even though a contract sued upon was barred by the statute, yet the creditor could follow the funds placed in the hand of the trustee to secure such indebtedness. To the same purport are *Faison v. Stewart,* 112 N. C., 334; *Baker v. Brown,* 151 N. C., 15, and many other cases. Both the directors and the stockholders of the company received and held the capital distributed among them in trust and for benefit of the creditors.

The cause of action in this case for the recovery of assets of the corporation from the stockholders and the directors did not accrue until judgment was obtained against the corporation upon the indebtedness and the return on the execution issued thereon *"nulla bona."* Until that time they could not have taken proceedings to compel the return of the assets distributed among the stockholders, and the application thereof to the plaintiff's judgment. *Hughes v. Whitaker,* 84 N. C., 640, in which it was said that the plaintiff's remedy "is open, and is not obstructed by the lapse of time, since until he recovers judgment his claim as a creditor is not established." In that case the judgment creditor was seeking to pursue the funds of the estate which had been fraudulently alienated. "No cause of action accrues against the shareholder until the creditor

has failed to make the amount of his judgment or ascertained claim from the assets of the company, or unless, perhaps, in certain cases it appears to be useless to proceed against the corporation." *Hawkins v. Glenn,* 131 U. S., 319; *Scoville v. Thayer,* 105 U. S., 143.

In *Taylor v. Bowker,* 110 U. S., 113, it was held that in a proceeding "to enforce judgment against the property of a corporation whose charter had been surrendered, the cause of action does not accrue until the execution has been returned against the corporation."

If there were any statutes of limitation which began to run against the plaintiff's cause of action prior to the judgment and return of the execution, it was the 10-year statute "for relief not herein provided for," C. S., 445; *Lynch v. Johnson,* 171 N. C., 615, and cases there cited; *Allen v. Gooding,* 173 N. C., 95; *Barnes v. McCullers,* 108 N. C., 55; *Ross v. Henderson,* 77 N. C., 170, and numerous other cases.

It is true that C. S., 441 (9), provides that "An action for relief on the ground of fraud or mistake must be brought in three years." If that section applied, it is further provided in that section that "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake." It does not appear here that the plaintiffs made such discovery before the rendition of the judgment and the return of the execution unsatisfied, and indeed, until that was done they had no cause of action to recover the misapplied assets of the corporations. Besides, the distribution of such assets did not take place until within less than 3 years before the beginning of this action. In no aspect are the plaintiffs barred by the statute of limitation.

We are of opinion that the plaintiffs were entitled to proceed directly against the stockholders and directors who received the assets of the Mecklenburg Realty Company without the appointment of a receiver, and that the plaintiffs' cause of action against the stockholders and directors of said company is not barred by the statute of limitation.

In the plaintiffs' appeal the judgment is modified in accordance with the above opinion. In the defendants' appeal,

No error.

ALLEN, J., dissenting: At February Term, 1917, of the Superior Court of Mecklenburg, Paul Chatham and the Charlotte Rapid Transit Company, in which Chatham was the principal stockholder, recovered judgment against the Mecklenburg Realty Company, a corporation, for $10,000, and being unable to collect the judgment, the same plaintiffs, without the joinder of other parties, instituted this action against the stockholders and directors of the realty company to compel the payment of the judgment.

The former action was commenced 12 August, 1914.

The realty company began the distribution of its assets among its stockholders in 1911, and in that year paid to each stockholder $157.50 on each share of stock of the par value of $100; in 1913, $10; in 1916, $7.94, and on 7 December, 1916, all of the assets being distributed, the corporation was dissolved.

The judge finds that Paul Chatham and the Charlotte Rapid Transit Company are the only creditors of the realty company, and that the payments to the stockholders were made without intent to defraud the plaintiffs.

It also appears that before this action was commenced the plaintiffs made three assignments of their judgment, the first two being as security for debts, and the last to Margaret Kavanaugh, and the record failing to disclose that Mrs. Kavanaugh knew of the assignment to her, or that she had accepted the same, the order recited in the opinion was made, which states that it was not to be conclusive on the parties.

In obedience to the order, Mrs. Kavanaugh filed the following plea in the Superior Court:

Pursuant to the order of the Supreme Court made in this case, Mrs. Kavanaugh hereby comes into court and makes herself a party plaintiff herein, adopts the complaint heretofore filed herein, joins in the prayer for relief therein contained, and agrees to be bound by any judgment rendered herein by the Supreme Court.

And the said Mrs. Margaret Kavanaugh hereby accepts the assignment of the judgment sued on in this action, and prays that she may be declared to be the owner thereof, subject to the previous assignments of H. L. Taylor and E. T. Cansler, if in law, equity, and good conscience she is entitled thereto.

MRS. MARGARET T. KAVANAUGH,
By H. L. Taylor, Attorney in Fact.

The other assignees were made parties, and neither they nor the Charlotte Rapid Transit Company and Paul Chatham resist the prayer of Mrs. Kavanaugh to be declared the owner of the judgment subject to the prior assignments, and the defendants allege in their answer that she is the owner of the judgment.

It appears, therefore, that no party to this action denies the allegation of Mrs. Kavanaugh that she is the owner of the judgment sued on, by assignment executed before this action was commenced, and this presents two questions for decision.

1. Can the owner of a judgment assign it, and afterwards prosecute an action in his own name to enforce payment?

2. If not, can the assignee be made a party to an action instituted by the original owner after appeal to the Supreme Court, and continue the prosecution of the action?

1. It was undoubtedly the doctrine of the common law that the assignment of a judgment, whether absolutely or as security, only passed the equitable and beneficial interest, leaving in the plaintiff in the judgment the legal title, but this legal title was not held for the benefit of the assignor, but to enable the assignee to bring an action in the name of the assignor to his own use.

As said in *Winberry v. Koonce,* 83 N. C., 353, the assignor "occupies the relation of a sort of trustee in the sense of being bound to allow the use of his name in actions at law for their collection."

The doctrine at common law, and under modern authority, is stated in 15 R. C. L., 778, as follows: "At common law the effect of an assignment of a judgment was merely to transfer an equitable title, and the assignee was not permitted to bring an action thereon in his own name, but the assignee, by virtue of his equitable interest, had the right to control the collection of the judgment, and for that purpose to use the name of the plaintiff, his assignor, and to receive the money collected. The general rule today is that an assignee of a judgment is the real party in interest in actions based upon such judgment, and may bring suit in his own name. Where an assignment of a judgment has been made as collateral security for the payment of a designated debt, the right of the assignee to sue is not impaired by the residuary interest of the assignor, and the latter cannot bring suit, unless it be alleged, that the assignee neglects or refuses to do so, under circumstances calculated to prejudice the right of the assignor."

Our State, departing from the refinements and subtleties of the common law, follows the modern thought in this particular, and deals with the substance instead of the mere shell of a legal title.

The statute (Rev., 400) provides that "Every action must be prosecuted in the name of the real party in interest," and the Court said in *Moore v. Nowell,* 94 N. C., 270, after holding that the assignee may maintain an action on the judgment in his own name, "The judgments mentioned and described in the complaint, were assigned to the plaintiff in writing, for value, and he became the complete equitable owner of them and the 'real party in interest.'"

This case was approved in *Ricaud v. Alderman,* 132 N. C., 64, where it is stated that "It is well settled that a judgment is assignable, and that the assignee for value acquires *all of the rights and remedies of the original plaintiff.*" (Italics mine.)

It is therefore clear to me that the original plaintiffs cannot maintain this action because they parted with all interest in the judgment by assignment before the action was commenced.

2. The second question is answered by what is said in *Bennett v. R. R.,* 159 N. C., 347, which is quoted by *Walker, J.,* in *Reynolds v. Cotton Mills,* 177 N. C., 425.

"While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment. *Best v. Kinston,* 106 N. C., 205; *Merrill v. Merrill,* 92 N. C., 657; *Clendenin v. Turner,* 96 N. C., 416."

"In the last case it is said: 'The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this *would not be to allow an amendment, but to substitute a new action for the one pending.*'"

If, however, the assignees could be substituted as plaintiffs, the statute of limitations is pleaded, and as it would run against them until actually made parties, their cause of action would be barred by the statute of three years.

I think the action ought to be dismissed.

BROWN, J., concurs in this opinion.

C. W. McCOURRY ET AL. v. B. M. McCOURRY.

(Filed 8 December, 1920.)

Surveys—Magnetic Needle—Variation—Judgments—Boundaries.

To ascertain a dividing line between adjoining owners of land determined by judgment in 1885, as running from a certain point west, it is necessary to take into consideration the variation of the magnetic needle, which, by common knowledge, is different in various parts of the world; and when the only evidence by expert surveyors is that this variation in this locality is one degree for every twenty years, and that by reason thereof due west then is now north 88¼, an instruction that if the fact is so found by the jury upon the evidence to answer the issue accordingly, is a correct one.

APPEAL by defendant from *Harding, J.,* at August Term, 1920, of YANCEY.

In 1885 in partition proceeding a decree was entered for the division of the land of Silas McCourry, deceased, among his children. The last line of division between the *feme* plaintiff and the defendant (which alone is here in controversy) reads: "From a poplar standing on east bank of said creek, thence west 190 poles, passing near the spring to a stake on the top of the William Griffith ridge." This description appears in the boundary of the tracts allotted to both the plaintiff and the defendant in said proceedings.

At June Term, 1914, of Yancey a judgment was signed by *Cline, J.*, in an action over the location of this line because of timber which had been cut by the defendant, and the judgment was signed by *Cline, J.*, on the issues found by the jury by which the plaintiff was given the land "to red line from 1 to 4 on the map." A writ of assistance was issued and a survey ordered to put the plaintiff into possession. When the surveyor attempted to run the line in controversy, which, according to the call in the partition proceedings, was "west 190 poles from a poplar," an admitted point, the defendant would not permit the surveyor to make allowance for the variation one degree for 20 years, which the surveyor on each side testified was the proper and customary allowance for the variation in the compass. Thereupon the plaintiff brought this action, the defendant contending that the line should run "due west 190 poles" without variation, and requested the court to so charge the jury, and claimed also that the defendant was estopped by the former judgment of *Cline, J.* The court submitted the following issue: "Does the dividing line between the plaintiff and the defendant begin at the poplar 'B' on the map, and run thence 190 poles with a variation of 1¾ degrees?" The court directed the jury, "if they believed the evidence to answer the issue 'Yes,'" and entered a judgment on the verdict rendered accordingly. Appeal by defendant.

Watson, Hudgins, Watson & Fouts for plaintiffs.
Charles Hutchins and A. Hall Johnston for defendant.

CLARK, C. J. The dividing line between the *feme* plaintiff and the defendant in the partition proceedings of their father's land in 1885 was "From the poplar (an admitted point) west 190 poles to the top of Griffith ridge." The defendant contends that the line should be so run without any allowance for the variation of the needle. The plaintiffs contend that owing to the variation of the magnetic needle that this would not be the line actually laid off in 1885, and that the true line can now be laid off only by allowing for such variation 1¾ degrees, *i. e.*, the line will now read "north 88¼ west," 190 poles.

John M. Houck, the surveyor appointed by the court in this case, testified that he made the survey; that he had been a surveyor between 50 and 60 years, and that "it is the custom of all surveyors since 1805 to allow one degree variation of the needle for 20 years, and that a line which was laid off in 1885 to run due west would now run north 88¼ west, owing to such variation in the needle.

Mr. Young, witness for the defendant, testified that he had been county surveyor for 16 years; he stated that "it is the usual custom to allow a variation of one degree for every 20 years," and on cross-examination he

said: "The proper variation for a line run in 1885 is 1¾ degrees." Though in his opinion the line could have been more properly ascertained by making the survey in a different manner, which he indicated, on this, which was the pertinent point in issue, he agreed with Mr. Houck; and the judge properly told the jury that "if they believed the evidence" to find the issue accordingly.

It is common knowledge that there is a regular variation in the compass, which is different at different places on the globe, and the testimony of both surveyors is that in this locality the magnetic north is moving westward at present one degree for every 20 years. Therefore, a line which ran due west in 1885 would now run north 88¼ west. In the course of time the variation will begin to swing back. Authoritative tables are from time to time printed by the governments of the world, showing the variation at different places, but in this case the evidence of the two surveyors was uncontradicted that for this locality the above is the customary and proper allowance, which was doubtless based upon scientific data.

Until the discovery of the magnetic needle, which became known in Europe just before the discovery of America by Columbus, ships dared not put boldly to sea, but coasted along from headland to headland, rarely out of sight of land. Something over 100 years ago it was discovered that there was a variation in the needle from the true north year by year, and varying in different localities.

Besides, the complete revolution of the earth on its own axis every 24 hours, and its annual sweep around the sun, the earth has nine other regular movements—eleven in all—one of the latter being a change in the position of the poles of the earth moving in an ellipsis by which the "north star," which should be in exact prolongation of a line through the two poles of the earth, shifts its position, relative to our north pole, which gradually moves to the west, and then in an ellipse returning to the east, and thus back to its original position. This compels a regular variation in the magnetic needle which can be calculated years in advance, and all well informed surveyors act upon and allow for such variations. There are some other variations in the needle due to local causes, such as iron in the ships, or in the ground, and the direction of valleys and streams, which need not be considered here. If the uncontradicted testimony of the experts on this case, the surveyors, is to be believed, the verdict and judgment have correctly located the line as it was actually laid off in 1885.

Light moves at the speed of 186,300 miles a second, a speed which would carry it around the earth more than 6 times in the tick of a second by the clock. Light comes from our sun, which is over 93,000,000 miles away, in a little over 8 minutes. The nearest fixed star (and all

the fixed stars are suns) is 275,000 times further from us than our sun, and it therefore takes light from it 4½ years to reach us, but the north star is more than eight times further off, and the light from it takes over 36½ years to reach us. How and why that body, at such an incredible distance, should so control the magnetic currents on this tiny planet upon which we live, and why the magnetic needle in all compasses vary with the slow wobbling of our poles relative to the north star, is not yet known, but all ships at sea at their peril must take notice of it for safe voyaging, and all surveys on land to be accurate must conform.

It may be that the pole star has not this influence, but it always marks the true north. It never sets or rises like other stars, and the only change in its relative position to the earth is caused by the elliptic revolution of our north pole.

Owing to scientific facts, the line in dispute, which was properly laid out as "due west 190 poles" in 1885, can be identified now only by setting the compass "north 88¼ west." If this were not done, the defendant would have gained and the plaintiff would have lost a strip of land covered by the variation and the timber cut thereon.

No error.

J. G. REID v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY ET AL.

(Filed 8 December, 1920.)

1. Negligence—Evidence—Railroads—Fires—Sparks from Locomotive—Nonsuit—Trials.

In an action against a railroad company to recover damages for setting fire to plaintiff's house by sparks from its locomotive, in bright daylight, evidence tending to show that eight or nine minutes after the passing of defendant's locomotive fire caught on the roof of plaintiff's house nearest the defendant's track, midway between the kitchen chimney and flue, the wind carrying large quantities of smoke from the locomotive drawing a heavy train, which was exhausting heavily, towards the plaintiff's house, and that the fires in plaintiff's chimney and stoves had died down early in the day, is sufficient upon the defendant's actionable negligence to take the case to the jury, and to deny defendant's motion to nonsuit; and testimony of witness that he had seen the smoke, but no sparks coming from the locomotive, at the time, does not exclude the inference by the jury that the locomotive was throwing them out with the exhaust. *Deppe v. R. R.*, 152 N. C., 79, cited and applied.

2. Same—Instructions.

Held, the evidence in this action to recover of defendant railroad company damages caused the plaintiff for negligently setting fire to his house

by sparks from its passing locomotive, did not justify the giving of defendant's requested instructions, that if "all the evidence were believed, the spark arrester was such as was approved at the time, and the engine was being handled by competent and skillful operatives, in a skillful and competent manner."

APPEAL by defendant from *Long, J.*, at April Term, 1920, of RUTHERFORD.

This action is to recover damages for the negligent burning of the plaintiff's residence and furniture. There is no contest as to the plaintiff's title to the property burned, or as to the value thereof. The assignments of error are the refusal of a motion for a nonsuit, and for the refusal of a prayer to instruct the jury as prayed, that "if they believe all the evidence, the defendant at the time of the fire had a spark arrester such as was at that time approved and in general use, as required by law, and that the engine was being handled by its operatives in a competent and skillful manner by competent and skillful operatives."

Verdict and judgment for plaintiff; appeal by defendant.

Solomon Gallert for plaintiff.

Pless, Winborne & Pless, H. S. Morrison, and J. J. McLaughlin for defendant.

CLARK, C. J. The fire occurred on 20 March, 1919, when there was a high wind, at a time when the house "was as dry as could be," and there had been no rain for some days. The fire caught on the roof of the house nearest the defendant's track, between 3 and 4 p. m., 8 or 9 minutes after defendant's coal train, with a large engine pulling 50 cars, had passed. The track was 237 feet, or 79 yards from the house. When the fire was discovered it was about as large as "a medium-sized dish pan," and was half-way between the kitchen chimney and the flue. When the engine passed it was exhausting heavily, making much noise, and the smoke was coming towards the house. The witness testified that he was standing on the kitchen porch, and that the fire caught on the kitchen roof. The stove flue was pretty close to the south side of the kitchen, and prejected about five feet above the roof. It was well protected by brick. The fireplace was at one end of the kitchen and the stove was at the other.

It was in evidence that there was 10 feet between the stove and the fireplace, which were at opposite ends of the kitchen; that there had been no fire in the stove since before noon when dinner was served, and that the fire in the stove had gone out, and the fire in the kitchen fireplace, which had been built between 9 and 10 in the morning, had burned down to two or three chunks and coals.

This evidence, taken in the most favorable light to the plaintiff, if believed by the jury, might well warrant the inference that the large engine, exhausting heavily and drawing 50 coal cars, which passed a few minutes before the fire broke out on the kitchen roof, when there was no fire either in the stove or in the fireplace, nor had been for some time, the wind blowing from the track directly toward the house, and bringing the heavy smoke rolling out of the engine, brought sparks, though being in the daytime, on a bright day, there was no evidence of sparks being seen. The plaintiff was therefore entitled to have the issues submitted to the jury. In *Moore v. R. R.*, 173 N. C., 311, relied on by the defendant, there was no evidence to connect the defendant with the fire other than the bare fact that the defendant's locomotive passed by the plaintiff's property not very long before the fire. In this case, as in *Deppe v. R. R.*, 152 N. C., 79, there was evidence tending to show that the fire came from the defendant's engine, and there is the exclusion of every other known source, if the jury believed the evidence for the plaintiff.

It was not error to refuse the prayer for instruction, which called upon the judge to express an opinion on the facts. If, as the jury found, the fire was caused by sparks from the defendant's engine, that of itself was some evidence of negligence, either in the condition of the spark arrester or in the operation of the engine. This was so held in *Currie v. R. R.*, 156 N. C., 424, 425. There was no evidence that the engine was not throwing sparks, but merely that the witness did not notice any, nor did the evidence justify an instruction that if "all the evidence were believed, the spark arrester was such as was approved at the time, and the engine was being handled by competent and skillful operatives at the time in a competent and skillful manner." There was evidence that the fireman was an "extra" fireman; that he did not fire regularly on that engine, on which he fired only on one trip some two months before. The spark arrester had been in constant use for 3 or 4 months, and the inspection of the spark arrester which had been made not long before the fire, was done by a witness who testified that he was a carpenter, and not in the employ of the railroad company, and had not done work of that kind before, and that the spark arrester was not long afterwards taken out for repairs.

No error.

FLORA A. ELLER v. W. H. STAR.

(Filed 8 December, 1920.)

Deeds and Conveyances—Plats—Streets—Lots—Purchaser—Dedication.

Where the owner of land plats it into lots, streets, etc., stakes them off in accordance with the plat, and offers the lots for sale as so marked. and a purchaser buys one of these lots in accordance with the representations thus made, he acquires the right to the use of the streets, which will not be lost as against other purchasers in the absence of his consent, whether the dedication of the streets has been accepted by the municipal authorities or not; and a purchaser of such lots may not close a street beneficial to the use or enjoyment by another such purchaser.

APPEAL by defendant from *Harding, J.*, at June Term, 1920, of WILKES.

In 1892 a land company purchased 100 acres inside Wilkesboro, and had it laid off into blocks, lots, streets, and alleys, and a map was made. At a public sale many lots were sold off by this map, which was on exhibition, and in addition streets were trimmed out and stakes driven up to show the actual location. Among these streets was Main Street, running west from the courthouse, and Cherry and Spruce streets, running north and south and crossing Main Street, and College Street, running parallel with Main Street, and crossing Cherry Street.

The plaintiff owns three lots in block 32, which is bounded on the west by Cherry Street, on the north by College Street, on the east by Spruce street, and on the south by Church Street. Defendant built a wire fence entirely across Church Street on the east of Cherry Street, and has completely obstructed the passage from plaintiff's lot to Cherry Street, the one improved street leading to Main Street, and her only outlet. The plaintiff contends that the land company having dedicated a strip of land 50 feet wide, designated on the map as Church Street, and sold numerous lots to divers persons with reference to said map, the land company could not revoke the dedication without first obtaining the consent of all persons who have acquired property in good faith with reference to the map as well as the consent of the public authorities.

The jury found that the land company laid out the lots and streets which were surveyed off and staked and a map made thereof, and sold lots at public auction, among them plaintiff's lots, in connection to their relative position in regard to Church, Cherry, and other streets, and that the land company did not revoke and discontinue these streets, nor did the plaintiff acquiesce therein, and had no notice of any attempted revocation when she purchased these lots; that the defendant is obstructing Church Street, and the plaintiff is not barred by laches.

Upon the verdict, judgment was entered that "the space of 50 feet in width extending from Cherry Street east to Spruce Street, and to the eastern end of Church Street, as the same was originally laid out, surveyed, staked off, and mapped, and as shown on the Wilkesboro Land and Development Company's map of Wilkesboro, known as the J. D. Wilson map, and as shown on K. M. Allen's tracing of said map, is hereby declared a street for the use and convenience as such to the plaintiff and persons owning lots adjacent to said Church Street, and it is therefore ordered and adjudged that the defendant be and is hereby ordered to remove the obstruction set up in the complaint, and the defendant is further restrained and enjoined from interfering with the use of said Church Street, and it is adjudged that the defendant pay the costs of this action." Appeal by defendant.

Hayes & Jones for plaintiff.
F. B. Hendren for defendant.

CLARK, C. J. The evidence is somewhat voluminous, and there are many exceptions, but the decision of this appeal practically depends upon the correctness of the following instruction, which is assigned as error:

"The burden is on the defendant, gentlemen of the jury, on this issue, to satisfy you that there was such a revocation. Under the law of this State, whenever any person, whether it be a corporation or an individual, conveys a tract of land, whether in a city or not in a city, whether out of the corporation or in the corporation, and surveys it out and marks out upon the face of the land streets, alleys, subdivides it up into blocks and lots, and makes a map of it, and holds out the plat and the map which is the plat, and the survey, and offers those lots for sale, based on that plat, and the survey calls for the streets set out in the survey and plats, and the purchaser buys that property with the understanding and the representation that the streets are there, and are to remain there, the purchaser buys the property for building lots or otherwise, the law says that the owner of the land has dedicated to public use for streets that part of the land marked out on the map and designated on the face of the ground as streets, that it becomes the property of the public; that is, it has the right to use it, to go upon it, that the property owners who purchased the lots have a right to have the streets remain as laid out; that the owners of the land have no right, at their own arbitrary will, moved by interest, or factiousness, or otherwise, to close them; that they have no right to do that; that they have been fixed for the use of the public—that is what the law means by dedication, for that it has been sold to the public—not that it has been conveyed

by any conveyance by deed, but when they make the map and sell the land with the marks on the ground, and so hold out to the purchasers, and the land is purchased on that basis, there is then such a dedication for the public use of streets that they are not permitted to take it back; although the title to the fee may be in them, there is an easement that belongs to the public which they cannot revoke."

We think this is a correct statement of the recognized law as laid down in our decisions with uniformity. The subject is fully discussed with citation of our authorities to the above effect by *Allen, J.*, in *Elizabeth City v. Commander*, 176 N. C., 26. In a still more recent case, *Wittson v. Dowling*, 179 N. C., 542, *Hoke, J.*, reciting our authorities, restates the same principles, quoting, among others, from *Avery, J.*, in *S. v. Fisher*, 117 N. C., 733, as follows: "If he and those claiming under him had sold a single lot abutting on this apparent extension of North Elm Street, he, and those claiming under him, would have been estopped from denying the right of such purchaser, and those in privity with him, to use the street as laid down in the plat, . . . and this dedication of an easement, appurtenant to the land sold, would have been, as between the parties, irrevocable, though the street had never been accepted by the town for public use."

The company could not have lawfully revoked and discontinued the streets, unless every one concerned had acquiesced. *Wittson v. Dowling, supra.*

No error.

LACY CROWELL v. W. J. CROWELL.

(Filed 8 December, 1920.)

Husband and Wife— Actions— Assault— Venereal Disease—Statutes— Damages—Punitive Damages.

While at common law a wife could not maintain an action without joining her husband, or against him personally, this was changed by statute, Rev., 408, with relation to her separate property, and by the Legislature of 1913, including the right as to personal injuries and torts; and now she may maintain her action against her husband as in assault, for coercing her and willfully and maliciously giving her a venereal disease, in which case, punitive as well as compensatory damages may be awarded.

ALLEN, J., concurring in result; WALKER and HOKE, JJ., dissenting.

APPEAL by defendant from *Lane, J.*, at May Term, 1920, of MECKLENBURG.

This is an action by the wife against the husband, alleging in her complaint the marriage and their living together as man and wife; that

the defendant contracted a venereal disease, and that he "took advantage of his marital relation with said plaintiff and infected her with said vile and loathsome disease," and asks for judgment "for actual and punitive damages."

The defendant filed a written demurrer to the effect that the complaint showing upon its face that the parties were man and wife prior to, and during all the time of the acts complained of, that "the complaint does not contain facts sufficient to constitute a cause of action." And further, that said action is "both without law to warrant the maintenance thereof, and also against the public policy of the State."

The court overruled the demurrer, and thereupon the defendant filed an answer, and upon the issues submitted, the jury found that the defendant "wrongfully and recklessly infected the plaintiff with a loathsome disease, as alleged in the complaint," and assessed the plaintiff's damages at $10,000; and further, that at the institution of this action the defendant was about to dispose of his property and remove it from this State for the purpose of defrauding the plaintiff.

The defendant excepted, and appealed from overruling the demurrer; for refusal to set aside the verdict; for permitting the plaintiff to testify that the day before they separated she informed him that he had infected her with venereal disease; and to testify that she estimated the value of his property to be worth between $25,000 and $50,000, and that he was disposing of it very rapidly, getting her to join in deeds for most of the property, and that he told her that he was going to Cuba to make his home, and to set up a bar-room.

The defendant also excepted to the following paragraphs in his Honor's charge:

1. "If you find as facts from the evidence, and by its greater weight, that the defendant knew that he was infected with a foul and loathsome venereal disease, and thereafter, although having such knowledge, he wrongfully had sexual intercourse with the plaintiff, and thereby infected her with said disease, that he did so willfully and recklessly—that is, in reckless and wanton disregard of the plaintiff's rights, being indifferent to her welfare, and not caring whether he infected her or not—then you should answer the first issue 'Yes.' "

2. "She would be entitled to a just and reasonable compensation for whatever injuries she may have sustained as a necessary and proximate result of the defendant's wrong. She would be entitled to a just and reasonable compensation for any physical or mental suffering which followed as a necessary and proximate result of the defendant's wrong."

3. "If you come to the issue of damages, you might, if in your discretion you saw fit, allow the plaintiff punitive damages."

Judgment, and appeal.

Stewart & McRae and John M. Robinson for plaintiff.
Thaddeus A. Adams for defendant.

CLARK, C. J. The defendant made no motion to nonsuit, and does not contend that there was not sufficient evidence to justify the verdict on the first issue, "Did the defendant wrongfully and recklessly infect the plaintiff with a loathsome disease, as alleged in the complaint." He submitted no requests for instructions. The exceptions to the evidence do not require discussion. Practically the only point presented by this appeal is whether or not a cause of action is alleged in the complaint.

Paragraph 5 of the complaint alleges "that the defendant, by reason of his illicit relations with lewd and profligate women, contracted a venereal disease of a foul and loathsome character, and of a highly infectious and malignant nature, and although *he well knew that he was so infected,* and well knew the character of said disease and its dangerous and infectious nature, he *concealed from the plaintiff the fact that he was* so infected with said disease, and on or about the.....day of....., 1919, *committed an assault* and *trespass upon the person of the plaintiff,* and infected her with said foul and loathsome disease, injuring her and damaging her as hereinafter set out."

There can be no question in this day that if the defendant had violently assaulted his wife and caused serious bodily injury to her person, and humiliation to her, she could maintain an action for damages against him. Even under the obsolete ruling of the courts (for it was never statutory) that a husband could chastise his wife with immunity, there was an exception that he was liable if he caused her serious bodily harm or permanent injury.

In *S. v. Monroe,* 121 N. C., 677, it was held that a druggist committed an assault when he dropped croton oil on a piece of candy and gave it to a third party. It was a far greater assault for the husband to communicate to his wife, while concealing from her the fact that he was infected therewith, a foul and loathsome disease—which has caused her serious bodily injury, and which the medical books hold to be a permanent injury of which she can never be entirely cured.

In *S. v. Fulton,* 149 N. C., 485, the Court held that the husband was indictable for wantonly and maliciously slandering his wife under Rev., 3640, now C. S., 4230, which made it indictable for "any one to slander an innocent woman." The objection was there taken that this did not apply to the husband, by reason of the marriage relation, and that this had been so held in *S. v. Edens,* 95 N. C., 693. The Court overruled *S. v. Edens,* but held, by a divided Court, that the defendant in the *Fulton case* had a vested right to rely upon *S. v. Edens.*

The plaintiff, who was 22 years of age and living with her father at the time of her marriage, was shown to be of good character at that time, and ever since, by a minister of the gospel, and other witnesses, and even the defendant testified that "the plaintiff was a virtuous woman and was faithful to me during our married life, and yet is so far as I know—I don't say otherwise." He further testified that he was divorced from his first wife; that he committed adultery while living with his second wife, and furnished her with witnesses to prove it by which she got a divorce upon that ground; that he had had trouble in Gastonia on account of a woman, and says "women have always been my trouble. Have recently been convicted of being drunk and carrying a pistol." It was stated on the argument that the defendant has recently been convicted in Virginia, under the White Slave Act, and sentenced to 2 years, and has also been convicted and sentenced in that State for abduction of a girl under 16, and that case is pending on appeal.

The defendant also admitted, on cross-examination, that he has had venereal disease, and said: "Sometimes it takes me longer to get over a case of gonorrhea than others. Sometimes it takes me a month, sometimes four months, and sometimes six months." . . . "On Sunday after this suit was started I had a lewd woman in my automobile, and passed the plaintiff's house four times; I had my arm around the back of the seat."

Notwithstanding that the defendant had testified on the cross-examination that his wife was a virtuous woman, he intimated on being recalled that he was forced to marry her because she had become pregnant by him. The plaintiff testified that he did not have sexual intercourse with her until after the marriage, and that he tried to get her to procure a divorce from him, offering to furnish her with witnesses to prove his adultery while living with her. He did not deny this, and admitted that he had done this with his second wife to enable her to get a divorce. The testimony of the plaintiff was that she had contracted the disease from her husband, and as to her humiliation and physical injury sustained thereby, and the physician testified that she was thus infected, and that his diagnosis was confirmed by clinical findings and by laboratory tests of another expert. The defendant testified that on one occasion "plaintiff came to my office and could not get in; I was locked in, the woman in there got out."

As the plaintiff's counsel well said, aside from the question of assault, it is a well settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease, *Skillings v. Allen,* 173 (Minn.) N. W., 663, *A fortiori* the defendant would be liable in the present case whether guilty of an assault or not, and independent of the fraud or concealment. In *Schultz v. Christopher,* 65

Wash., 496, and in *Bandfield v. Bandfield*, 117 Mich. 80 (cases cited by the defendant), the Court recognized that the infection of the wife with venereal disease by the husband was a tort, but held that upon their statutes, which differ from those in this State, the wife could not sue her husband for a tort upon her person. But in *Prosser v. Prosser*, (1920), 102 S. E. (S. C.), 787, under a statute which is *verbatim* our Rev., 408, C. S., 454, it was held that "under such statute a married woman can maintain an action in tort against her husband for an assault upon her," holding that while it was otherwise at common law, a proper construction of this statute "gives to a wife every remedy against the husband for any wrong she might suffer at his hands. More than this, a wife has a right in her person, and a suit for a wrong to her person is a thing in action; and a thing in action is property, and is her property, and the action is therefore maintainable under *Messervy v. Messervy*, 82 S. C., 550."

In *Graves v. Howard*, 159 N. C., 594, *Allen, J.*, said: "Rev., 408, further provides that the wife may maintain an action without joinder of her husband: (1) when the action concerns her separate property; (2) when the action is between herself and her husband; and our Court has construed this section to confer upon the wife the right to maintain an action against her husband, *Shuler v. Millsaps*, 71 N. C., 297; *McCormac v. Wiggins*, 84 N. C., 279; *Manning v. Manning*, 79 N. C., 293; *Robinson v. Robinson*, 123 N. C., 137; and *Perkins v. Brinkley*, 133 N. C., 158."

The defendant objects that this applies only to property rights concerned in actions, but damage or injury to her person is a property right. Our statute, 1913, ch. 13, provides: "The earnings of a married woman, by virtue of any contract for her personal service, *and any damage for personal injuries or other torts sustained by her*, can be recovered by her suing alone, and such earning or recovery shall be her sole and separate *property* as fully as if she had remained unmarried." This gives her the right of recovery of damages for *any* personal injury or other tort sustained by her, and there is no exemption of her husband from liability in an action by her which she is authorized to bring under Rev., 408; C. S., 454. As long as the Court held (*Price v. Electric Co.*, 160 N. C., 450) that the recovery by the wife of damages for personal injuries was the property of the husband, it was useless for her to sue him under the right given by Rev., 408 (2), but the act of 1913, ch. 13, making such damages her property was promptly passed at the first session of the General Assembly thereafter curing this and enabled the wife to maintain an action against her husband to recover damages for injuries committed upon her person by him.

For the same reason that in *S. v. Fulton, supra,* the Court held that the statute making *"any one"* liable to indictment for the slander of a virtuous woman made the husband liable to such indictment, notwithstanding the common-law theory, and even the express decision in *S. v. Edens, supra,* to the contrary, we must hold that the statute of 1913, ch. 13, and Rev., 408, gave the wife a right to recover damages for injuries to her person, or for other torts sustained by her, against her husband as fully as against any one else, as was held in *Prosser v. Prosser, supra.*

In 26 R. C. L., 577, it is said: "The fact that a case is novel does not operate to defeat a recovery if it can be brought within the general rules applicable to torts." In *Brown v. Brown* (1914), 88 Conn., 42, that Court pertinently says that "if the wife may sue for a broken promise, why may she not sue for a broken arm?" Like the South Carolina Court, in the *Prosser case,* it holds that her claim for damages is a property right. It says: "The tort gives rise to a claim for damages. Such a claim is *property,* not in her possession, but which she may by action reduce into possession, just as she might before her coverture have had an action against him for such a tort committed before that event. The husband's delict, whether a breach of contract or a personal injury, gives her a cause of action. Both necessarily follow from the fact that a married woman now retains her legal identity and all her property, both that which she possessed at the time of marriage and that acquired afterwards."

In *Johnson v. Johnson* (Ala.), 77 So., 335, the Court held that the statute of that State authorizing the wife to recover damages for injuries to her person or reputation made the damages her separate property, and the statute which authorized her to sue alone for their recovery, authorized her to sue her husband for such injuries and torts, abrogating the common-law fiction of identity between husband and wife to that extent. The statutes of that State upon that subject are almost identical with ours above quoted.

Fielder v. Fielder, 42 Okla., 124, held that a married woman could maintain an action against her husband for injuries received from a gun shot wound inflicted during coverture. That case, referring to *Thompson v. Thompson,* 218 U. S., 611, pointed out that the latter decision was based upon the statutes for the District of Columbia, which in this respect are not as liberal and progressive as in most of the States, and the Court concurred in the dissenting opinion of *Justices Harlan, Holmes,* and *Hughes* (which, in the opinion of the writer, was the "big end" of the Court at that time).

In *Gilman v. Gilman,* 78 N. H., 4, it was held that the statute of that State, providing that a married woman may "sue and be sued on any

contract by her made, or for any wrong done, as if she were unmarried," put husband and wife on an equality as to property, torts, and contracts, and that she could maintain an action against her husband for assault as fully as she could against any one else. In *Fitzpatrick v. Owens,* 124 Ark., 167, the Court held that a married woman may maintain an action against her husband for a tort, in that case for an assault, and when it resulted in a wrongful death her administrator could maintain an action therefor. And this is the trend of recent decisions throughout the country, 13 R. C. L., 1397; and notes 1915 D, p. 73.

As to the suggestion that the defendant could be indicted, that was a matter for the State, which has not thus proceeded, and a conviction would be no reparation to the plaintiff. Besides, if the unity does not prevent an indictment, why should it prevent a civil action?

At common law neither civil nor criminal actions could be maintained by the wife against the husband because of the alleged unity of persons of husband and wife, or rather the merger of the wife's existence into the husband's. The real reason was that by marriage the wife became the chattel of the husband (as a reminder of which to this day at a marriage some man "gives the woman away"), and therefore her personal property by the fact of marriage became his, as was the case in this State as to wives until the Constitution of 1868, though as to slaves it had ceased on their emancipation in 1865. The owner lost the right to chastise his slaves in 1865, but the wife was not emancipated from the lash of the husband till nine years later, in 1874, when in *S. v. Oliver,* 70 N. C., 60, *Settle, J.,* tersely said, "We have advanced from that barbarism." His authority for making such ruling was that ch. 5, Laws 1715, and ch. 133, Laws 1778, now C. S., 970, adopted such parts only of the common law which are "not abrogated, repealed, or become obsolete." So much of the common law as exempted the husband from liability civilly or criminally for assaults, slanders, or other torts or injuries committed by him on his wife is invalid now, both because it has become obsolete and at variance with the customs and sense of right, and with our form of government, which confers "equality before the law" upon all, and because it has been expressly abrogated and repealed by the statutes above quoted, which confer upon the wife the right to sue and be sued alone, "when the action is between herself and her husband," and to recover, suing alone, damages for her personal injuries or other torts sustained by her (act 1913, ch. 13, now C. S., 2513) without exempting her husband from such liability.

The true ground for the exemption formerly of the husband from liability to the wife for his torts, and for his assumption of her property, as already said, was because by the marriage she became his chattel. The fanciful ground assigned for this doctrine, which was far more unjust to

married women than that prevailing in other countries under the Civil law or even in the countries under the rule of the Koran, is stated by some of the old writers to be the words in Genesis 2:23-24: "And Adam said, 'this is now bone of my bones and flesh of my flesh,'" adding that a man and wife "shall be one flesh." And now, "speaking for myself and not by commandment" (as St. Paul said on more than one occasion, 1 Cor., 7:6, and 2 Cor., 8:8), this statement was made by Adam and not by Deity, and is untrue as a matter of fact, besides Adam was not a law-giver, but the most culpable lawbreaker known to all the ages. The consequence of his lawbreaking, according to the belief of multitudes, was the greatest and most universal of any man, and according to orthodox teachings, affects all mankind since, and if we are to credit the vision of the great English poet, had its immediate effect upon the inanimate world as well:

> "Earth felt the wound; and nature from her seat,
> Sighing through all her works, gave signs of woe
> That all was lost."—*Paradise Lost*, Book IX, line 782.

It is more than passing strange that in this day of enlightenment, this statement by the greatest malefactor of history, who could frame no laws for any future day and generation, nor keep those made for himself, should be solemnly cited to justify the continuance of age-long injustice and degradation to one-half of the human race. The origin of such treatment was perhaps natural in the economic conditions of a barbarous age, when superior physical force made the wife the slave of the husband. But those conditions have passed. All the conditions and customs of life have changed. Many laws have become obsolete, even when not changed by statute, and the Constitution, as this has been, and no principle of justice can maintain the proposition in law, or in morals, that a debauchee, as the defendant admits himself to be, can marry a virtuous girl, and, continuing his round of dissipation, keep up his intercourse with lewd women, contracting, as he admits, venereal disease, communicate it to his wife, as the jury find, subjecting her to humiliation and ruining her physically for life, and seeking to run off with all his property, abandoning her to utter indigence; yet be exempted from all liability by the assertion that he and his wife are one, and that he being that one, he owes no duty to her of making reparation to her for the gross wrong which he has done her.

It must be remembered that there is not, and never has been, any statute in England or this State declaring that "husband and wife are one, and he is that one." It was an inference drawn by courts in a barbarous age, based on the wife being a chattel, and therefore without any rights to property or person. It has always been disregarded by

courts of equity. Public opinion and the sentiment of the age as expressed by all laws and constitutional provisions since have been against it. The anomalous instances of that conception, which still survive, in some courts are due to construing away the changes made by corrective legislation or restricting their application.

Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to "love, cherish, and protect" her. Civilization and justice have progressed thus far with us, and never again will "the sun go back ten degrees on the dial of Ahaz." Isaiah, 38:8.

No error.

ALLEN, J., concurring in result: At common law the wife could not maintain an action of any kind against her husband.

This doctrine was founded upon the idea that matrimony is "an honorable estate, instituted of God in the time of men's innocency, signifying to us the mystical union that is between Christ and his Church," and that those who assume its obligations "are no more twain but one flesh." See *Freeman v. Belfer,* 173 N. C., 582.

The husband and wife become one person by marriage, and as one cannot sue himself, neither could the husband sue the wife, nor the wife the husband, and as we have substantially adopted the common law the principle prevails with us, except as it has been changed by statute.

Changes in the legal status of husband and wife began prior to 1868, but by the Constitution of that year the wife became the owner of her separate estate freed from the control of her husband, and in order that these rights of property might be protected it was provided (Rev., 408), "That the wife may maintain an action without the joinder of her husband: (1) when the action concerns her separate property; (2) when the action is between herself and her husband; and our Court has construed this section to confer upon the wife the right to maintain an action against her husband." *Graves v. Howard,* 159 N. C., 598.

It thus appears that by this radical change the wife may now sue her husband for breach of contract to recover her property, and for damages to her property, all of which is contrary to the common law.

The Legislature has also removed the disability to contract, and in 1913 provided that her "earnings" for personal services and "any damages for personal injuries, or other torts sustained by her," shall be her separate property and "can be recovered by her suing alone."

I think the weight of authority is that these statutes, which are to be found in most of the States, do not give a right of action against the husband for personal injuries, but simply permit her to sue alone on causes of action theretofore recognized, but as the denial of the right of

action has always been based on the unity of the person, and as this unity has been destroyed so far as her right to maintain an action is concerned, I see no reason for holding that she cannot maintain an action against her husband for a wanton, willful injury, which permanently impairs her earning capacity, when the statute says she is entitled to her earnings and may sue alone to recover them.

If the wife can sue the husband in contract, or to recover property, or for injury to her property, why may she not maintain an action for impairment of health, which decreases her earning capacity, caused by the wanton conduct of her husband?

The danger to the domestic tranquility is not greater in the one case than in the other, and at last this must depend not on common law or statute but on mutual respect, confidence, forbearance, and affection.

Brown v. Brown, Anno. Cases, 1915, D (Conn.), and *Feidler v. Feidler,* 42 Okla., 124, are direct authorities for the position herein stated, and in *Thompson v. Thompson,* 218 U. S., 611, a case relied on by the defendant, there is a vigorous dissent by *Justice Harlan,* concurred in by *Justices Holmes and Hughes,* which he concludes as follows: "Congress, under the construction now placed by the Court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention of her property, and at the same time deny her the right to sue him separately for a tort committed against her person."

WALKER and HOKE, JJ., dissenting: This case is so distressing and repellant in its details that it is difficult, as it seems, to give it that dispassionate consideration which every case should have. There is not a word of condemnation too severe to be applied to the conduct of the defendant. He has subjected himself to the penalties of the criminal law, but not to prosecution by his wife, and simply because that unity of person which has always been attributed to the marital relation still exists, notwithstanding that married women have been endowed with so many property rights, as they should have been; which appear to furnish the only argument for the destruction of that unity so important for the preservation of the peace and happiness of the home. Married women owned, and were constantly acquiring, property by gift, inheritance, and purchase just as in the case of men, and it was clearly their right to have and possess it freed from the control of their husbands, and this has now become a legal right with a few certain exceptions. But the

Legislature has wisely refused to abolish that legal unity existing between man and wife, which was deemed by it so essential in securing the blessings of the marital union, in which, not only the principles, but society and the community are so deeply concerned. The privacy of the home is as sacred as it ever was, and it is often better "to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive," as said by *Justice Settle* in *S. v. Oliver,* 70 N. C., 60, at p. 61, and this is done from motives of public policy, in order to preserve the sanctity as well as the peace and tranquility of the domestic circle. It concerns too deeply the public welfare that this should be done, for *us* to change it without a mandate from the Legislature, which makes and controls the public policy of the State, and for the reason we have given, among others, it has withheld its consent to any such amendment of the law. It has been considered so essential to the well-being of the community that this doctrine of the marital unity should continue to be the rule with us, that those who have the only power to legislate and abolish it have refrained from doing so. We should not attempt to do that which will effect radical changes in the law by mere construction, for with the policy, wisdom, or justice of the legislation in question this Court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority. It, therefore, has always been considered as utterly opposed to our public policy to change the law in this respect.

At common law no cause of action arose in favor of either husband or wife by reason of any injury to the person or character of one committed by the other, *Thompson v. Thompson,* 218 U. S., 611; *Peters v. Peters,* 156 Cal., 32; *Abbott v. Abbott,* 67 Me., 304; *Bandfield v. Bandfield,* 117 Mich., 80; *Strom v. Strom,* 98 Mich., 80; for instance, libel or slander. This doctrine of nonliability is founded not on the inability of the one spouse to sue the other, but on the principle that husband and wife are one person in law, and it is well exemplified in the cases which hold that a wife, after an absolute divorce from her husband, though she is then fully capable of suing him, still can maintain no action against him for a tort or wrong committed by him during the marriage relation against her person or character. *Henneger v. Lomas,* 145 Ind., 287; *Libby v. Berry,* 74 Me., 286. So it is generally recognized that the Married Woman's Property Acts, which enlarge the rights of married women even to such an extent as to permit a wife to sue her husband, do not entitle her to sue him for an injury to her person or character after their marriage, for the reason that whether a husband is liable to his wife therefor is not a mere question of procedure, but of substantive right. *Schultz v. Christopher,* 65 Wash., 496; *Brown v. Brown,* 88 Conn., 42; *Smith v. Smith,* 73 Mich., 445; *Fiedler v. Fiedler,* 42 Okla.,

124. And this is held true under a statute authorizing the wife to bring and maintain an action in her own name for any injury to her person or character, the same as if she were sole; such a statute merely changes the procedure, but gives no new right, and applies only to such causes of actions as could be maintained by the husband and wife as coplaintiffs before the statute took effect. *Coleman v. Burr,* 93 N. Y., 17.

On account of the unity of husband and wife, no cause of action arises at common law in favor of a wife against her husband for an assault and battery or personal injury inflicted by him on her during coverture. Thus no cause of action arose in favor of a wife against her husband from his wrongful act in forcibly taking her to an insane asylum, nor would a right of action for damages arise in favor of a wife from his wrongfully and maliciously inoculating her with a venereal disease, *Deeds v. Strade,* 6 Idaho, 317, nor for false imprisonment and malicious prosecution. This denial of the existence of a cause of action for assault and battery was not based on the incompetency of a wife to maintain an action at law against her husband on account of the relation of the parties to each other, and therefore a wife could not, after divorce, though the divorce removed the common-law disability of the wife to sue her husband, maintain an action for assault and battery committed by him prior to the divorce. It is generally held that statutes authorizing a wife to maintain an action against her husband only authorizes her to maintain alone such actions as previously could be sustained when brought by the husband alone, or by the husband and wife jointly. On the same reasoning which denies the right of a wife to maintain an action against her husband, it has been held that a husband cannot maintain an action against his wife for injuries inflicted on him either at common law or under statutes giving her the right to separate property, and permitting them to contract with each other.

But this question of the unity of person existing between husband and wife has been recently considered by the United States Supreme Court in the case of *Thompson v. Thompson,* 218 U. S., 611 (54 L. Ed., 1180); 21 Anno. Cases, 921; 30 L. R. A. (N. S.), 1153; Aff. 31 App. Cases (Dist. of Col.), 557 (14 Anno. Cases, 879), which was a civil action by a wife to recover damages from the husband for an assault and battery committed on her person. The Court there held as follows: The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person, by D. C. Code, p. 1155, authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried. The act of Congress applicable to the District of Columbia is not less extensive or comprehensive than are our statutes in regard to

the rights of married women, if it does not cover much less ground. We cannot refrain from referring extensively to the reasons given by that exalted tribunal, in its able and learned opinion, as delivered by *Justice Day*, though we might quote all of it advantageously in this case. That Court said that the limitation upon the wife's right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband. This construction is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes. It is suggested that the liberal construction insisted for in behalf of the plaintiff in error in this case might well be given, in view of the legislative intent to provide remedies for grievous wrongs to the wife. Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would, at the same time, open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel, and alleged injuries to property of the one or the other, by husband against wife, or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the law-making power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the Government. In cases like the present, interpretation of the law is the only function of the courts. It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the Legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be

serious, it would have been easy to have expressed that intent in terms of irresistible clearness. We can but regard this case as another of many attempts which have failed to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration. Some of the cases of that character are: *Abbott v. Abbott,* 67 Me., 304; *Schultz v. Schultz,* 89 N. Y., 644; *Freethy v. Freethy,* 42 Barb., 641; *Peters v. Peters,* 42 Iowa, 182. Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The Court, in protecting her rights and awarding relief in such cases, may consider, and, so far as possible, redress her wrongs and protect her rights.

This clear and vigorous statement of the true law upon this subject would seem to conclusively demonstrate the correctness of the Court's position that statutes relating to the property rights of married women, and to their rights to sue separately for torts committed against them by third persons, do not include the right of a wife to sue her husband for such a tort as was committed here, however grievous and humiliating to her, and however atrocious was the act of her husband. Hard cases are said to be the quicksands of the law. It is not because of any consideration for such men as he is that the law is as we have stated it to be, but to prevent the great and lasting evil to the community at large by establishing a principle most harmful to it. It is a decision in favor of every man and woman who has an interest in the welfare of the public, which should be protected and safeguarded, lest greater evil be the result. It is but another application of the acknowledged maxim of the law that private convenience, or advantage, must yield to the public good. As *Justice Day* so well said, the wife is not without remedy to vindicate the right and to punish, according to his deserts, this human miscreant who has so vilely and profanely broken the sacred vows, which he made at the marriage altar, by his infamous conduct, and the cruel and heartless treatment of his wife, polluting and debauching her by his foul and contaminating touch, and filling her blood with the poison of a most loathsome disease. Nothing could be so horrible and repulsive, and he will deserve all the punishment he may receive for this grave and enormous wrong to her. But we must not be led away from correct thinking and impartial judgment by any such consideration as the enormity of the evil done by him. His conduct, however aggravated, does not change the law. It stands just as it was before. The State may indict him for this foul assault upon his wife's person, but his wife cannot sue him because of the personal unity that subsists between them.

The unity of person, as to husband and wife, has not been completely severed by our law, as to contracts or torts, as will appear from Consol. Statutes of 1919, secs. 2515, 2518, the first of those sections forbidding certain contracts between husband and wife, unless executed in the prescribed way, and the second of the sections providing that the husband shall be jointly liable with the wife for her torts, and for costs and fines, and he is jointly liable with her for certain crimes or offenses committed solely by her, he, on account of their relation or oneness to each other, presumably being present and participating in the offense, and supposed to exercise a kind of control over her. It may be added that by section 2516, contracts between them which are "inconsistent with public policy are void." Section 2513, as to her earnings and "damages for personal injuries, and other torts sustained by her," manifestly refer to contracts with and torts of other persons than her husband, as the language of the section most clearly demonstrates. There are one or two other sections which more or less tend the same way. The writer of this opinion went as far as was possible under the law, even to its extreme limit, in order to sustain and protect the wife's right to the full enjoyment of her separate property and to facilitate her unrestricted use and enjoyment thereof (in *Vann v. Edwards,* 135 N. C., 661), and he would do the same here in order to compensate her, if such a thing can be done, for this outrageous violation of her person, but the law stops him in the pursuit of a remedy that will avail her, as this is a question of substantive law, and not of procedure, and that has not been altered, as has the other, so that she can recover, and we cannot go beyond what has been provided for her. We must keep within the law, however much we may desire to award her an adequate sum for this grievous and vicious wrong. The law is our only rule of action in the premises.

The case of *Banfield v. Banfield,* 40 L. R. A. (Mich.), 757, is like this in its facts, except that there the husband communicated to his wife a still more loathsome disease. But that able and learned Court denied her right to sue, and held that "personal wrongs inflicted upon her give her no right to a decree of separation or divorce from her husband, and our statutes have given the courts of chancery exclusive jurisdiction over that subject. This Court, clothed with the broad powers of equity, can do justice to her for the wrongs of her husband, so far as the courts can do justice, and, in providing for her, will give her such amount of her husband's property as the circumstances of both will justify, and in so doing may take into account the cruel and outrageous conduct inflicted upon her by him, and its effect upon her health and ability to labor. 2 Am. & Eng. Enc. Law (2 ed.), p. 120; 2 How. Anno. Stat., p. 6245. In the absence of an express statute, there is no right to maintain an action at law for such wrong. We are cited to no authority holding the

contrary. We cite a few sustaining the rule: *Abbott v. Abbott,* 67 Me., 304; *Freethy v. Freethy,* 42 Barb., 641; *Peters v. Peters,* 42 Iowa, 182; *Schultz v. Schultz,* 89 N. Y., 644; Cooley Torts (2 ed.), p. 268; Schouler, Dom. Rel., p. 252; Newell, Defamation, p. 366; Townsend, Slander and Libel (3 ed.), p. 548."

The cases we have cited are also to the effect that even after the marital tie is severed, the wife cannot sue the husband for a wrong committed before the divorce. *Libby v. Berry,* 74 Me., 286 (*S. c.,* 43 Am. Rep., 589). And the rule works both ways, as the husband cannot sue the wife for a tort committed upon him, as by an assault with a gun. *Peters v. Peters,* 103 Pac. (Calif.), 219 (*S. c.,* 23 L. R. A. (N. S.),), 699.

The *Fulton case,* 145 N. C., 489, has no bearing upon this question. There the State prosecuted, and not the wife. The question of the marital unity was not at issue, and there was no determination based upon it. The writer of this opinion concurred in the principle there decided, that the husband was indictable for the slander of his wife, but, as we have said, that is not the question here, as the right of the State to indict, and of the wife to sue, are two very different things. The State can indict any person for a violation of her laws, and the wife can sue, in any case, except where denied the right to do so, as she is in this instance.

If the unity of man and wife has been abolished, why have we still remaining as one of the relics of the ancient common law the estate by the entirety which is solely based, as we have often said, upon this very doctrine of unity. In that instance the twain is still but one.

We are ready to denounce the brutal conduct of this man towards his virtuous wife, as severely as judicial propriety will permit, but we cannot go beyond the law in giving a right which it denies to her, though we would willingly do so if it were proper that we should.

We are of the opinion that this action should be dismissed, as it has not the sanction of the law.

ROYAL FURNITURE COMPANY v. WICHITA FURNITURE COMPANY.

(Filed 8 December, 1920.)

Summons—Process—Service—Nonresidents—Principal and Agent—Corporations.

Under the principle that valid service of summons can be made upon a nonresident, by service upon his agent here having charge or management of a branch of his principal's business requiring the exercise of his own

judgment or discretion; it is held that service in this State, upon the agent of a nonresident furniture corporation, who had discretionary power or judgment in purchasing furniture, is valid in plaintiff's action to recover on a contract of sale of furniture made with the same person.

APPEAL by defendant from *Harding, J.*, at the May Term, 1920, of CALDWELL.

This is an action to recover $324 alleged to be due by contract.

The defendant, a foreign corporation, entered a special appearance, and moved to dismiss upon the ground that H. T. Leslie was not a managing agent of defendant, and upon the hearing of the motion the following facts were found and the following order made:

"1. A summons was issued herein on 27 August, 1919, which was served by the sheriff of Caldwell County on that date. The sheriff made return as follows: 'Served on 27 August, 1919, by leaving a copy of the same with H. T. Leslie, managing agent of the defendant company.'

"2. The defendant is a corporation of the State of Kansas. The said H. T. Leslie is its employee, but is not an officer or director of the corporation.

"3. That at the time of the service of the said summons upon the said H. T. Leslie in Lenoir, Caldwell County, the said H. T. Leslie was on a visit to said town in behalf of the defendant for the purpose of buying furniture for the defendant. The said Leslie is buyer of the defendant corporation, and has authority to make purchases as above. The order upon which the controversy and suit arose was made by said Leslie in behalf of his principal. The refusal to pay the bill which is the subject of this suit was made by defendant through the agency of the said Leslie. Upon the occasion when the service was made upon the said Leslie he was present in North Carolina for the purpose of making contracts for merchandise for the defendant, and did actually enter into contracts for the purchase of furniture in behalf of said defendant.

"The court therefore holds that the said Leslie having power to contract a debt for the defendant corporation within this State, is such a managing agent that he may be served with summons for the recovery of said debt, and denies the motion of defendant upon its special appearance, and directs that answer be filed within thirty days from the adjournment of this term." Defendant excepted.

The action was afterwards tried, and from a judgment for the plaintiff defendant appealed.

Mark Squires for plaintiff.
Lawrence Wakefield for defendant.

ALLEN, J. Leslie, upon whom the summons was served, made the contract for the defendant on which this action rests. He was the buying agent of the defendant, and as such had to exercise his discretion and rely on his own judgment. At the time the summons was served he was in North Carolina, engaged in making contracts for the defendant for merchandise, and while here did make such contracts. The letter refusing to pay the claim of the plaintiff is signed, "The Wichita Wholesale Furniture Company, per H. T. Little."

These facts fully sustain the ruling that Leslie was a managing agent upon whom service of the summons could be made.

"The term 'managing agent' has no strict legal definition, and it is not easy to formulate or lay down a general rule that will govern all cases. The question must depend in every case on the kind of business conducted by the corporation, what the general duties of the supposed 'managing agent' are, and whether it can be fairly said that service on such agent would bring notice to the corporation. Much discussion may be found in the cases on this question, and it is one on which there is some disagreement. The earlier cases held that a managing agent was one who had full and complete authority in all branches of the corporation's business. The later decisions, however, are more liberal in their interpretation of the term, and the weight of authority and the better rule is that a managing agent is one who has exclusive supervision and control of some department of the corporation's business, the management of which requires of such person the exercise of independent judgment and discretion, and the exercise of such authority that it may be fairly said that service of summons on him will result in notice to the corporation." 21 R. C. L., 1353.

"The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent on any specified line of business transacted by the corporation in the State where the service is made." *Denver & R. G. R. Co. v. Roller,* 100 Federal (C. C. A.), 741.

"As a general rule, a managing agent of a foreign corporation, within the contemplation of a statute authorizing service of process on such an officer, is one whose position, rank, and duties make it reasonably certain that the corporation will be appraised of the service made; in other words, one who stands in the shoes of the corporation in relation to the particular business managed by him for the corporation. *Doe v. Springfield Boiler & Mfg. Co.,* 44 C. C. A., 128; 104 Fed., 864; *Palmer v. Chicago Evening Post Co.,* 85 Hun., 403; 32 N. Y. Supp., 992; Beale, Foreign Corp., sec. 273; Murfree, Foreign Corp., sec. 215." Note 4 L. R. A. (N. S.), 460.

"It may be said, however, that the later decisions are more liberal in interpreting the term 'managing agent' than were the earlier ones. While no general rule can be stated which will serve to assist in determining the matter, such managing agent must be in charge, and have the management of some department of the corporation's business, the management of which requires of the agent the exercise of an independent judgment and discretion; not that he shall not be under the general direction of the corporation; all agents are subject to the general control of their principals, but in the management of his particular department he shall have authority to manage and conduct it at his discretion and judgment direct." *Federal Betterment Co. v. Reeves,* 4 L. R. A. (N. S.), 465.

"A person who has authority to contract a debt for the corporation within this State is so far the managing agent within the State that service may be had upon him for that debt that will bind the corporation. The agent is commissioned to contract the debt, and the corporation thereby secures the benefit of his services. It must also take the burden of being liable to an action therefor." *Klopp, Bartlett & Co. v. C. C. G. W. Co.,* 33 Am. St., 669.

We need not, however, go further than our own State, as the same principle is stated by *Hoke, J.,* in *Whitehurst v. Kerr,* 153 N. C., 79, as follows: "While there is some apparent conflict of decision in construing these statutes providing for service of process on corporations arising chiefly from the difference in the terms used in the various statutes on the subject, the cases will be found in general agreement on the position that in defining the term 'agent' it is not the descriptive name employed, but the nature of the business and the extent of the authority given and exercised which is determinative, and the word does not properly extend to a subordinate employee without discretion, but must be one regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him."

All of these conditions are met in this case; the defendant was notified of the service, and the motion to dismiss was therefore properly denied.

No exceptions were taken by the defendant on the trial of the issues.

No error.

C. D. BLACKLEDGE v. F. M. SIMMONS.

(Filed 8 December, 1920.)

1. Estates—Rule in Shelley's Case.

The ancient rule of law in relation to the title to lands laid down in the rule in *Shelley's case* obtains in North Carolina, there being no statutory change therein. The history of this rule, and the reason for it, discussed by WALKER, J.

2. Same—Wills—"Heirs of the Body"—Children—Purchasers.

An estate devised to the testator's daughter for life, and at her death unto the "heirs of her body lawfully begotten," and in the event she should die without "heirs of her body," then to the testator's heirs at law: *Held*, the intent of the testator, which controls the interpretation, will be gathered from the terms employed in the will considered as a whole; and the words "heirs of her body" will not be taken in their technical sense, as denoting an entire class of heirs to take as such, in indefinite succession, but as *descriptio personae*, and therefore be construed as the children of the testator's designated child, who take in fee simple as purchasers, and prevents the limitation over to the "heirs" general of the testator.

APPEAL by defendant from *Connor, J.*, at February Term, 1920, of CRAVEN.

This is a civil action to settle the title to the land in dispute, the parties agreeing as to the facts of the case. It will suffice to state as briefly as we can their respective contentions, as they will fully disclose the nature of the controversy.

On 26 January, 1821, Edmond Hatch devised the land in controversy by his will, which is duly recorded in the clerk's office of Craven County, N. C. It is under this will that both plaintiff and defendant claim title.

Item 3 of the will is as follows: "I give unto my daughter Mary Blackledge, for and during her natural life, the plantation and land whereon I now live, with 'The Haywood,' and at her death I give the said Haywoods lands unto the heirs of her body lawfully begotten, and in case my said daughter Mary shall die without heirs of her body as aforesaid, then the said Haywood land I give to my heirs at law.

Item 6. "The lands which I have herein given to my daughter Mary during her life is to be in the possession of my executor until the same is paid for by the said Mary; and when the said Mary shall pay for the said lands, that is to say, shall pay the balance I now owe for its purchase, then my said executor shall give up to her its possession."

Plaintiff's claim of title is as follows:

1. Item 3 of the will of Edmond Hatch, above quoted.

2. Deed by Buckner Hatch and Samuel or Lemuel Hatch to Mary Blackledge, daughter of Edmond Hatch, and wife of William S. Black ledge.

3. Deed from W. S. Blackledge and Mary, his wife, to John H. Bryan.
4. Deed from John H. Bryan to William S. Blackledge.
5. Will of W. S. Blackledge.
6. The plaintiff is the son of R. B. Blackledge named in the foregoing will, Item 3. R. B. Blackledge died 14 January, 1916, and suit was started in November, 1917.

Defendant's claim of title:

1. Will of Edmond Hatch, Item 3, above quoted.
2. R. B. Blackledge and wife by mortgage to W. G. Brinson.
3. W. G. Brinson, mortgagee, by deed to J. L. Hahn.
4. J. L. Hahn, by deed to R. B. Blackledge.
5. R. B. Blackledge mortgaged to A. Hahn.
6. Proceedings of foreclosure, A. Hahn against R. B. Blackledge.
7. L. J. Moore, commissioner, deed to F. M. Simmons.
8. F. M. Simmons has been in possession of the land under the Moore deed since 1887, and has enjoyed solely the rents, profits, and possession since that date.

Plaintiff claims that the defendant, F. M. Simmons, was in possession, holding the life estate of R. B. Blackledge, and that his possession did not become adverse to plaintiff until the death of R. B. Blackledge, on 14 January, 1916, as will more fully appear.

The common source of title is Item 3 of the will of Edmond Hatch, which is quoted above. Edmond Hatch died leaving a daughter, Mary Hatch, and three sons, Buckner, Samuel (or Lemuel), and John. Buckner Hatch and Samuel (or Lemuel) Hatch joined in a deed for this land to their sister Mary, who married R. B. Blackledge, and she and her husband both died in 1856, leaving two children, R. B. Blackledge, the father of the plaintiff, and Virginia Harrison. R. B. Blackledge died intestate 14 January, 1916, leaving him surviving the plaintiff, his son, and three other children. If plaintiff is entitled to recover at all, he is entitled to recover an undivided one-fourth interest in the property, the first and most important question for the consideration of the Court being the proper construction to be placed upon Item 3 of the will of Edmond Hatch.

If the rule in *Shelley's case* applies, then Mary, the daughter of Edmond Hatch, took the fee, as contended by plaintiff, and not a life estate, as contended by defendant.

Her brothers, Buckner and Samuel (or Lemuel) afterwards conveyed to her, and she and her husband, W. S. Blackledge, conveyed to John H. Bryan, and John H. Bryan at the same time reconveyed to W. S. Blackledge, the effect of these deeds being to take the title out of the wife and put it in the husband. W. S. Blackledge then made his will, in which he devised the lands to his son Richard (R. B. Blackledge) for life, and

after his death to be equally divided among his children. If W. S. Blackledge had the fee, then his son, R. B. Blackledge, took only a life estate under the will of his father, and the plaintiff under said will took an undivided one-fourth interest in the property, as he was one of the children of R. B. Blackledge. The plaintiff contends that if R. B. Blackledge only had a life estate, the deeds made by him and his wife above set forth only conveyed a life estate, and that, when the defendant Simmons bought at the foreclosure sale in the proceedings brought by A. Hahn and others against R. B. Blackledge, he only got such estate as R. B. Blackledge had, which was only a life estate under the will of his father, W. S. Blackledge, and that the possession of the defendant since 1887 up to 14 January, 1916, when R. B. Blackledge died, was the possession of a life tenant and did not become adverse to the plaintiff until after the death of R. B. Blackledge in 1916. So the plaintiff contends that the important and material question to be decided by the Court is, "What estate passed under Item 3 of the will of Edmond Hatch?" This item, in brief, gives to Mary Blackledge for and during her natural life the Haywood lands, and remainder at her death unto the heirs of her body lawfully begotten, and in case she dies without heirs, then to the heirs of Edmond Hatch.

Defendant's claim:

1. Will of Edmond Hatch (Item 3 hereinbefore set out).
2. R. B. Blackledge and wife by mortgage to W. G. Brinson.
3. W. B. Brinson, mortgagee, by deed under sale to J. L. Hahn.
4. J. L. Hahn by deed to R. B. Blackledge.
5. R. B. Blackledge, mortgage to A. Hahn.
6. Proceedings of foreclosure in Superior Court, entitled "A. Hahn v. R. B. Blackledge."
7. L. J. Moore, commissioner, deed to F. M. Simmons. Sale made under Blackledge mortgage to Hahn by court decree.
8. F. M. Simmons has been in possession of the land in controversy under the deed from L. J. Moore, commissioner, since 1887, and has enjoyed solely the rents, profits, and possession since that date.
9. In the event plaintiff is entitled to recover, it is agreed that he shall recover a one-fourth undivided interest in and to the lands described in the deed from L. J. Moore, commissioner, to F. M. Simmons, and it is agreed that the value of the rents and profits since 1916 amounts to $400, and that the value of the permanent improvements made by F. M. Simmons on the lands since 1887 amounts to $400. If plaintiff is entitled to recover, that he recover one-fourth of rents and profits to be set off by one-fourth of value of permanent improvements, and that F. M. Simmons is the owner absolutely and in fee simple of three-fourths undivided interest in the lands described in said deed. In the

event plaintiff is not entitled to recover, that the defendant is owner absolutely of the entire interest.

The court gave judgment for the defendant, and plaintiff appealed.

D. L. Ward for plaintiff.
Ward & Ward, Moore & Dunn, and Guion & Guion for defendant.

WALKER, J., after stating the case: This appeal requires that we should determine again, as this Court has in many similar cases before, whether the rule in *Shelley's case* applies to its facts. This rule is considered to be of the highest antiquity, Judge Blackstone having so stated in his argument of *Perrin v. Blake,* 4 Burr., 2579 (1 Blackstone's Rep., 672; Doug. Rep. (3 ed.), 343, and note 1; Hargr. Law Tracts, 490), and added that the same principle was first established in a case reported as far back as 18 Edward, 2. 1 Fearne on Remainders, p. 85 (4 Am. Ed. and 10 London Ed.). He held it by no means clear that the rule took its rise merely from feudal principles, and was rather inclined to believe that it was first adopted to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Another foundation of the rule was probably laid in a principle diametrically opposed to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. It appears that Blackstone held to the latter view, and, upon the whole, he inferred that the rule was of remote antiquity, and was known and applied long before the decision of the case from which it derived its name; that it was not merely grounded on any narrow feudal reason, but applied, in the very first recorded instance, to the liberal and conscientious purpose and policy of making easier the conveyance of the land by charging it with debts of the ancestor. Now, in regard to the rule of law or legal construction, whereby the limitation to the heirs, etc., is executed in the ancestor, though should we admit the reason upon which it first took place no longer to exist, yet the subject of the rule still remains; there are still the same limitations of estates for it to operate upon; and the law having been once so established (no matter upon what ground), the courts of law, who considered themselves as intrusted with the power, not of abrogating or altering old, or enacting new, but only of expounding and pronouncing established laws and legal rules, have, through a long succession of determinations on this point, grounded their judgments upon that rule, as will appear when we come to consider the several cases respecting it. The views stated above are discussed at large by Mr. Fearne in his deservedly famous treatise on the law of Contingent

remainders (4 Am. Ed.), at pp. 80 to 90. He says, at pp. 88 and 89: "But if the admitted antiquity of the rule, if its adoption and prevalence during a period of near five hundred years (reckoning from the case, 18 Ed., 2, cited by Judge Blackstone) have not yet stamped it with legal sanctity, nor entitled it to the attention and observance due to an established rule of law, vain, I am afraid, will be any resort to its origin or principles, at a period when they are confessedly either too remote or too latent for any more energetic influence that what they can derive from the researches of learning or the conception of hypothesis." Reference also may be made to Hargrave's Law Tracts, vol. 1, pp. 498, 500, and 572; 4 Bacon's Abr., 301; 5 Bacon's Abr., 715 and 731; 2 Burr., 1106. There are those, and they are not by any means a few, who regarded the rule as of feudal origin, and that it was introduced to prevent frauds upon the tenure and the lord, or the donor, from being deprived of its fruits, such as the benefits of wardship, marriage, etc., which would have accrued to him upon a descent, but not if the heirs were construed to be purchasers. Judge Blackstone, in the argument of *Perrin v. Blake, supra,* said that "were it strictly true that the origin of the rule in question was merely feudal, and calculated solely to give the lord his profits of tenure, of which (by the by) he had never met with a single trace in any feudal writer; 'still it would not shake the authority of the rule or make us wish for an opportunity to evade it.' There is hardly an ancient rule of real property but what had in it more or less of a feudal tincture." And Mr. Fearne, in that connecting and commenting upon what is there stated, says: "It is true, where those things which are the objects of any rule of law cease to exist, there the rule itself must of necessity cease for want of subject-matter to relate to, or have any effect upon; but it by no means follows that where the same objects of a law still continue, that there the law should cease, only because the very state of things which was the first occasion of it no longer exists. Whilst the same subject continues, there must be still the same necessity for some rule or regulation concerning it. But if the old rule of law were to cease with the circumstance or state of things which gave it birth, the subject would remain at large, unregulated by any law, and exposed to the arbitrary direction of ignorance, partiality, or caprice, until the legislature should interfere and make a new law respecting it. This would be opening a door perpetually to all that uncertainty, confusion, and inconvenience which laws and rules were intended to obviate and prevent. The conclusion is, that every rule of law once established continues to be so, while the subject of it exists, until altered by some solemn act of legislation."

But whether the rule originated the one way or the other, it has always been recognized by us as firmly established in our jurisprudence, and

there are strong reasons why it should remain so, and the one stated by Judge Blackstone is not the least of them.

A very full and satisfactory discussion of the rule in *Shelley's case,* in its several phases, showing its application or nonapplication to various kinds of cases, will be found in *Price v. Griffin,* 150 N. C., 523, and eight other selected cases, reported in 29 L. R. Anno., 935 (N. S.), at p. 935, with an elaborate note, at p. 963. We think it will be disclosed by the note to those cases that many courts have sustained the view taken in this opinion, that in the case of wills the strict enforcement of the rule is not so imperative as, but more liberal than, in that of deeds, greater latitude of construction being permitted in the former.

With this rule of law admitted, let us now inquire how, if at all, it affects this case. The limitation is, "I give to my daughter, Mary Blackledge, for and during her natural life, the land whereon I now live, with 'The Haywood,' and at her death I give said lands to the heirs of her body lawfully begotten, and in case of my said daughter Mary shall die without heirs of her body, as aforesaid, the said Haywood land I give to my heirs at law." A layman in reading this clause might naturally and reasonably infer that the words, "the heirs of her body lawfully begotten," meant her children, and not her heirs generally, who, under the statute of descents, would take in succession to her, from generation to generation indefinitely, because the words "heirs begotten of her body" would in common speech be capable of the meaning that they were the heirs of her body begotten in lawful wedlock, which would describe her legitimate children. It would exclude any illegitimate children who, under certain circumstances, and by virtue of our statute, would, in a restricted way, be her heirs. Consol. Statutes of 1919, ch. 29, Rule 9. The law does not always so regard the limitation, but looks to the entire will to ascertain its meaning. This particular case is controlled by two comparatively recent cases, in which are cited many decisions bearing upon the question, and we need confine our discussion principally to them. There is a limitation over to the devisor's heirs at law, in case Mary should die without heirs of her body, and this was held in *Puckett v. Morgan,* 158 N. C., 344, to indicate that the devisor meant children of Mary, instead of her heirs generally, who would take under the statute of descent. The substance of that decision was, as stated in the head-note, that for a devise of land to come within the meaning of the rule in *Shelley's case,* the subsequent estate must be limited to the heirs *qua* heirs of the first taker, or to the heir or heirs of the body as an entire class or denomination of persons, and not merely to individuals embraced within that class. The rule in *Shelley's case* applies only when the words "heirs" or "heirs of the body" are used in their technical sense, and not when such terms are used as *descriptio*

personarum. It will not apply to a devise of lands when, from the instrument, the intention of the devisor can reasonably and legitimately be construed as giving a life estate to the first taker with remainder over to designated persons of a certain class of heirs, as in this case to the "bodily heirs" of M. Therefore, where there was a devise to M. of certain described lands, "during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters"; it was held that M. took only a life estate in the lands, with remainder to her children living at the time of her death, the intention of the testator in the use of the term "bodily heirs," in connection with the other words employed in the devise, being descriptive of a certain class of heirs, upon failure of whom the remainder would go to the brothers and sisters of M. The rule is one of law and not of construction, to ascertain the intention of the testator. It applies where the words are sufficient of themselves to bring the case within it, and there are no explanatory terms giving indication as to how they were intended to be used. Whether the technical heirs were intended by the devisor, or a particular class of heirs, must be determined by a construction of the will or deed under consideration. *Parkhurst v. Harrower,* 142 Pa. St., 432, and to bring a case within the operation of the rule, the limitation must be to the heirs in fee or in tail as *nomen collectivun,* for the whole line of inheritable blood. Theobold, in his work on Wills, 340-342, says that while the rule in *Shelley's case* seems to be applied with greater strictness in England than in this country, even there, when it appears from the context of the instrument that the words are used, not in the technical sense, but as mere *descriptio personae,* they are taken as words of purchase, and not of inheritance, and the rule does not apply. See, also, *Allen v. Pass,* 20 N. C., 212; *Starnes v. Hill,* 112 N. C., 18; *Smith v. Proctor,* 139 N. C., 322. In *Starnes v. Hill, supra, Chief Justice Shepherd* says: "As the courts are astute in discovering the intention from the context of the conveyance, and readily give effect to every word from which such intention can reasonably and legitimately be inferred, it does not often occur that the application of the rule (in *Shelley's case*) has the effect of subverting the real intention of the grantor or testator." In *Puckett v. Morgan, supra,* we held explicitly that where there is a remainder over to another, and different line of descent, upon failure of the heirs of the body, the latter words take the case out of the rule, as they unequivocally indicate the devise in remainder was intended for the children to take, as a class, and not as heirs by descent from their ancestor, the result being that the latter acquire only an estate for life, and her children the fee under the will. The case is sufficiently like this one to control it. Several cases, which were decided in this Court, are cited in support of *Puckett v. Morgan, supra. Rollins v. Keel,* 115 N. C.,

68; *Francks v. Whitaker,* 116 N. C., 518; *Bird v. Gilliam,* 121 N. C., 326; *May v. Lewis,* 132 N. C., 115; *Howell v. Knight,* 100 N. C., 254.

Justice Hoke said, in *Radford v. Rose,* 178 N. C., 288, at p. 291: "In that case the devise was to Thomas B. Tyson, 'During the term of his natural life, then to the lawful heirs of his body in fee simple, on failing of such lawful heirs of his body, then to his right heirs,' and it was held that Thomas B. Tyson took an estate in fee as the limitation to the right heirs over did not change the course of descent, and this is true of the will before us, because the plaintiff, being a Rose, if she died without having had children, her heirs and the heirs of her father, the testator, would be the Rose family. And this fact—that the Rose family would be the heirs of the plaintiff if she had no children—marks the distinction between this case and *Puckett v. Morgan,* 158 N. C., 344, and *Jones v. Whichard,* 163 N. C., 244, both of these cases being decided upon the principle that the language of the ulterior limitation carried the estate to a different line of descent, and was sufficient, when read with the other parts of the will, to show that the words 'bodily heirs' were used as a description of the person and not to denote a class who were to take in succession, and therefore that the rule in *Shelley's case* did not apply."

It is said in *Puckett v. Morgan, supra:* "The words 'if any' would be quite appropriate to indicate the possibility of no issue, but not to indicate the contingency of no lawful heirs, for it is rarely possible for one to die without heirs, and not uncommon to die without children. Then again, the reversion over is to a class of heirs at law who would certainly inherit in the event of a failure of issue." So here the same observation may be made, as the first taker would not be likely to die without heirs by descent from her, whereas she might well die without "heirs lawfully begotten of her body," giving to those words the meaning of children. The case of *Puckett v. Morgan, supra* (opinion by *Justice Brown*), was fully approved in the later case of *Jones v. Whichard,* 163 N. C., 241 (opinion by *Justice Hoke*). It is there said that "in order to its proper application, the word 'heirs' or 'heirs of the body' (these last by reason of our statute, Rev., 1578), must be used in their technical sense, carrying the estate to such heirs as an entire class to take in succession from generation to generation, and they must have the effect to convey 'the same estate to the same persons, whether they take by descent or purchase,' and whenever it appears from the context, or from a perusal of the entire instrument that the words were not intended in their ordinary acceptation of words of inheritance, but simply as a *descriptio personarum* designating certain individuals of the class, or that the estate is thereby conveyed to 'any other person in any other manner or in any other quality than the canons of descent provide,' the rule in question

does not apply, and the interest of the first taker will be, as it is expressly described, an estate for life," citing *Puckett v. Morgan, supra,* and the following cases, not as yet mentioned by us. *Wool v. Fleetwood,* 136 N. C., 460, at 470; *Whitesides v. Cooper,* 115 N. C., 570; *Mills v. Thorne,* 95 N. C., 362; *Ward v. Jones,* 40 N. C., 404. The language of the will in *Puckett v. Morgan,* and of the deed in *Jones v. Whichard,* is not materially different from that of the will in this case, and the three, therefore, should have the same construction, that the remainder is not to the heirs by descent from the first taker, but to them, as purchasers, under the will, the first taker having only a life estate.

The result is that the defendant has acquired the title under the children of Mrs. Blackledge by the *mesne* conveyances to him. This affirms the judgment.

Affirmed.

JAMES A. FOX AND WIFE v. THE TEXAS COMPANY.

(Filed 8 December, 1920.)

Explosives—Negligence—Defenses—Unrelated Evidence—Wires.

When there is evidence that the defendant was negligent in keeping large quantities of gasoline at its distributing plant, requiring a watchman, which it did not have; that a stream of gasoline was seen flowing from the defendant's warehouse under such surroundings as would make an explosion probable, and that the plaintiff's injury was proximately caused by an explosion in the defendant's warehouse, unconnected evidence that a piece of wire had been found near the defendant's warehouse is too remote or conjectural to be admitted on the theory that the warehouse had been dynamited by others for whose acts the defendant was not responsible.

NOTE. For further digests, see *Stone v. The Texas Co.*, and *Newton v. The Texas Co.*

APPEAL by defendant from *McElroy, J.,* at March Term, 1920, of GUILFORD.

This is the last of the three cases heard together at this term, and growing out of the explosion on 3 May, 1919, at the defendant's plant in Greensboro, at the corner of Lee and Lithia streets.

The *feme* plaintiff was at her home in bed, suffering with a dislocated knee, when the violence of the explosion blew her out of the bed and severely injured her, and partially wrecked the house.

The jury, by their verdict, found for the plaintiff, and assessed her damages at $3,000. Judgment was entered on the verdict, and defendant appealed.

Wilson & Frazier and Bynum & Strudwick for plaintiffs.

Guy Stevens, Roberson & Dalton, and Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: The main features of this case are not unlike those in the other two cases, *Stone v. Texas Oil Co.* and *Newton v. Texas Oil Co.*, decided at this term. If there is any difference it is very slight, and not sufficiently substantial to change the result. His Honor could not have granted the motion to nonsuit, because there was evidence for the consideration of the jury upon the question of negligence, and, we think, the jury have found correctly upon the first issue as to negligence and proximate cause, and the damages are not reviewable here.

The testimony as to the wire found near the defendant's premises was too remote and conjectural to be received as evidence, and was properly excluded. *Byrd v. Express Co.*, 139 N. C., 273; *March v. Verble*, 79 N. C., 19; *Lewis v. Steamship Co.*, 132 N. C., 904. Finding a piece of wire is far from proving that the defendant's plant was dynamited, especially in the presence of strong evidence that its own contents was exploded from internal causes of its own making. It was so disconnected from the plant as to form only the basis of a mere guess, which does not rise to the dignity and force of evidence.

The court substantially gave the instruction contained in the fourth assignment of error, and as to the one in the fifth assignment, the defendant had more gasoline than it was entitled to store in the way it did, and it was violating the plain terms of the ordinance in keeping and using its plant as it did. No license or permit could protect the defendant from a violation of the positive prohibition of the ordinance, nor did the license purport to do any such thing.

The cases of *Wright v. C. & N. W. Rwy. Co.*, 27 Ill. App., 200; *Terminal R. Asso. v. Larkins*, 112 Ill. App., 36, and *Klein v. Becton*, 5 L. R. A., p. 1237, which were cited by the defendant, can be of no avail to it, for here there was evidence as to the cause of the fire, or from which the jury might well infer what was the cause of it, and as to *Kress v. Lane*, 5 L. R. A., p. 1376, if it is in line with our decisions, it differs from this case, as the evidence in this record does not show a wanton act committed by a third person in causing the fire, but a negligent act of the defendant in exposing the volatile vapors of the gasoline to be ignited and exploded at any time, when it was most probable that such a thing would happen, as the stream flowed towards the railroad, and even under the trestle, where it was constantly within reach of falling sparks or live cinders.

We have so fully discussed the question of the violation of a statute or ordinance being negligence *per se,* and cited the recent authorities, in the *Stone* and *Newton cases,* that it would be more than useless to pursue the subject any further. The defendant is relying on cases which have been radically modified or overruled. See *Leathers v. Tobacco Co.,* 144 N. C., 330; *Starnes v. Mfg. Co.,* 147 N. C., 556.

The sixth assignment is the same, in substance, as the one relating to the nonsuit.

The judge charged the jury fully and correctly as to proximate cause, and the jury could not have misunderstood him. He linked the negligence and the proximate cause together as being necessary to constitute an actionable wrong, and told the jury that negligence by itself was not sufficient to charge the defendant with liability, but that it and proximate cause must coexist, with a causal connection between them, before an actionable wrong is committed. This disposes of the seventh assignment.

The special requests for instructions, as shown in the eighth and ninth assignments, called upon the court to express an opinion upon the facts, and if intended to ask for a charge upon the law, they were erroneous and properly refused, but the subject has been so fully and copiously discussed as to the violation of the ordinance and its effect that more need not be said, and this applies to proximate cause as again brought forward in the ninth assignment, and we also include the tenth assignment, which relates to the same matter.

The eleventh assignment embraces two propositions, violation of ordinance section 412, and negligence *per se,* and the exception is general and contrary to the well settled rule. They both must be erroneous, or the exception fails. As we have held that the violation of an ordinance is negligence *per se,* one, at least, of the instructions was right, and the general exception is bad. *Singleton v. Roebuck,* 178 N. C., 201; *S. v. Bryant, ibid.,* 702, at p. 708; *S. v. Ledford,* 133 N. C., 714, and *Nance v. Tel. Co.,* 177 N. C., 313, where the cases are collected; *Harris v. Harris,* 178 N. C., 7.

The other exceptions are formal. We have considered the assignments of error *seriatim,* because of the importance of the case, and our desire to emphasize our decision upon the questions involved and not to overlook any of them.

We need not refer to the maxim *res ipsa loquitur,* and the extent to which it applies to the case, as we have discussed it fully in the other cases.

There was sufficient evidence to carry the case to the jury. If previously, by the exercise of ordinary care such an accident as occurred in this instance was prevented, it would seem to follow that the jury might

consider the fact in determining, in connection with the other facts and circumstances, whether the defendant was careful this time. They might well have inferred from the flow of the gasoline before there was any explosion that some one of the persons who was at the plant the evening before, by inadvertence, and not, of course, by design, had left open one of the valves, faucets, or vents, as they may be called, or that a spigot or plug had been removed and not replaced. This may be said without accusing any one of a wrong except that involved in negligence. Such a thing has often been done, and no one found to admit it, because, perhaps, the very act of negligence would show a diversion of his attention at the time from what he was doing, so that he might honestly and ing good faith believe that it was not his fault. That is the most reasonable theory in regard to this fateful accident, fraught with such a destruction of property and injury to so many persons. It may be the thoughtless act that spread disaster all about in this populous city, hard by a large normal school, where so many were gathered, but the law does not excuse thoughtlessness, and especially where the situation was such as to call for the highest degree of care. The presence of a watchman was clearly demanded under such circumstances, and if he had been faithful to his duty this suit would not be here.

The license of a board, even if complied with in its requirements, and there was no ordinance to expressly forbid it, would not excuse the leaving of a requisite duty unperformed.

No error.

JOHN G. STONE v. THE TEXAS COMPANY.

(Filed 8 December, 1920.)

1. Municipal Corporations—Gasoline—Ordinances—Cities and Towns—Fires.

A dealer in a city for the sale of gasoline, contained in tanks and in large quantities, in a warehouse at the corner of two streets near the tracks of a railroad company, where locomotives are frequently passing, and with a spur track leading up to a warehouse, are amenable to the provisions of an ordinance of the city requiring that such business must be conducted under a license to be issued when the applicant has submitted to the proper city authorities its plans and specifications to be approved by its board; and this requirement is a valid one.

2. Negligence—Negligence Per Se—Municipal Corporations—Cities and Towns—Ordinances.

When a seller of gasoline, etc., has not complied with the requirements of a valid ordinance regulating such matters, in failing to get a license for the conduct of such business, and damages are directly caused thereby,

without contributory fault, in setting fire to property of an adjacent owner, the violation of the ordinance is negligence *per se*, and whether it was the proximate cause of the injury resulting therefrom is a question of fact for the jury. As to whether the maintenance of such conditions is either a public of a private nuisance, *Quaere?*

3. Same—Evidence—Questions for Jury—Courts—Res Ipsa Loquitur.

Where the defendant has stored in its warehouse tanks containing large quantities of gasoline for sale or distribution among its customers in a city, and maintains, without a watchman, its equipment in violation of a city ordinance, and there is evidence tending to show that a stream of gasoline, enveloped by a highly explosive vapor, flowed from the warehouse wherein the gasoline was stored towards and under a railroad track adjoining its property, where trains were constantly passing, it is sufficient evidence as to the negligence of the defendant to be submitted to the jury, in an action for the destruction by fire of a house of an adjacent owner of lands, upon the inference, which the jury could have drawn from the testimony, that the damage to plaintiff's property was proximately caused by contact of live sparks thrown out by the passing locomotives with the said stream of gasoline, or the carelessness in the use of matches or lighted cigars or cigarettes by pedestrians and others; and that there was evidence from which the jury could find that the defendant's negligence, in allowing the gasoline to escape from its premises, was the proximate cause of the explosion and the injury. The doctrine of *res ipsa loquitur* is explained and applied.

4. Same—Nonsuit—Rebuttal Evidence.

Where the plaintiff's evidence tends to show that the defendant maintained, in violation of a city ordinance, a large supply station for the sale and distribution of gasoline in such manner as to be a menace to adjacent lands, and likely to be ignited by locomotives frequently passing on tracks near thereto, or by the careless use of fire by passersby, and that he has been damaged by the fire, and the defendant offers no evidence in rebuttal, the refusal of the defendant to explain, is a relevant and competent circumstance against it; and, upon the whole evidence, the refusal of a motion to nonsuit was proper.

APPEAL by defendant from *McElroy, J.*, at March Term, 1920, of GUILFORD.

The negligence complained of was: First, that the defendant had kept on its premises a large and unlawful quantity of gasoline, and stored the same in an unlawful manner, contrary to the ordinance of the city of Greensboro; second, that it kept no watchman upon its premises; third, that it violated section 412 of the ordinances of Greensboro; fourth, that it permitted gasoline in large quantities to flow freely upon the streets and sidewalks of the city of Greensboro, where it could be easily, and was, ignited. That as a result of such negligence, inflammable vapors exploded at about 7 o'clock a. m. on 3 May, 1919, and that such explosion was so great as to wreck and ruin the plaintiff's dwelling, and many others.

Some of the material parts of the evidence in this case, upon which the verdict of the jury is based, are as follows:

1. Over 30,000 gallons of gasoline were stored on defendant's premises inside the corporate limits of the city of Greensboro, in a populous community.

2. A warehouse used to fill metal drums of 50 or 60 gallon capacity with gasoline.

3. Red coloring matter kept in warehouse or basement.

4. A large stream of red-colored gasoline flowing from such basement into Lithia Street.

5. Trains passing within 30 feet of warehouse, and over gasoline.

6. Gasoline fumes will explode from flame or sparks.

7. Explosion in warehouse—flame at same time in warehouse and street, where gasoline was seen.

8. Two metal drums used for gasoline were found in the ruins—head blown out of one of them.

9. No watchman was kept on defendant's premises.

10. Violation of city ordinance of Greensboro, in storing and keeping gasoline—conveyed into house by pressure, etc.

11. Gasoline at ordinary temperature gives off an inflammable and explosive vapor, and it occurred in this instance, causing the explosion.

The case was tried and submitted to the jury upon the theory of negligence, and the burden of proving actionable negligence was put upon the plaintiff. It developed on the trial that the defendant established, operated, and maintained upon its premises certain unlawful structures, wherein gasoline and kerosene in large quantities were stored, and was liable to the plaintiff for the injury resulting therefrom. On 3 May, 1919, the defendant's plant was located inside the corporate limits of the city of Greensboro, at the intersection of Lee and Lithia streets. It was bounded on the south by Lee Street, on the west by Lithia Street, and on the north by the double tracks and sidetracks of the North Carolina and Southern Railroads, and on the east by dwellings, built on comparatively small lots, the plaintiff's lot being the next lot east of the defendant's premises and fifty (50) feet from the east line thereof. The plant was located in a populous section of the city and about two hundred (200) feet from the State Normal and Industrial College, a large educational institution inhabited by many people. Lithia Street slopes to the north and passes under the tracks of the above named railroads, it being the main line of the Southern Railroad, and a large number of trains pass and repass the defendant's premises each day.

The defendant used its premises as a storage plant for gasoline and other products, which it sold at wholesale. It had thereon a ware-

house, under which there was a large basement, pumphouse, shed, and three large tanks, a vertical tank with a capacity of 60,000 gallons used for the purpose of storing gasoline, and two horizontal tanks, each with a capacity of 15,000 gallons, one of which was used for the storage of gasoline, and the other for kerosene. The warehouse was on the northwest corner of the lot, and its north platform was even with the railroad siding. This warehouse was used for the storage of barreled goods and metal drums were filled in the warehouse for shipment, the metal drums holding from 50 to 60 gallons of gasoline. The two horizontal tanks were just south of the warehouse and were elevated some four or five feet above the ground. The vertical tank was east of the warehouse and stood some distance above the ground. The gasoline was conveyed to a vent in the warehouse from the storage tanks above mentioned by pipe-lines, and was forced into the warehouse by pressure. Gasoline could also be taken from the horizontal tanks by truck, there being a vent in the front of such horizontal tanks. There was a drain from the basement of the warehouse that emptied on Lithia Street at a point about 15 feet from the railroad embankment.

At the time above mentioned, there was an explosion in the warehouse of the defendant company. The plaintiff was standing in his kitchen at the time, and on looking around saw the main storage-house explode and burst into flames. He saw pieces of scantling and paper roofing falling in every direction. Some of the weatherboarding of the warehouse fell in his garden, pieces of it being ten and twelve feet long. The explosion wrecked the plaintiff's dwelling by shattering the window glasses, knocking the plastering from the walls and twisting and bending the timbers of his house as described in the record. He also observed that there were flames on Lithia Street in the gutter, or side ditch, and by the curbstone. After the fire was over, he saw two metal drums in the ruins of the same kind as those in which they kept gasoline. These were in the cellar to what had been the warehouse. One drum had the head blown out. On the same day, after the fire had subsided, he saw the defendant fill one of its truck-cars with gasoline. The truck-car held about one hundred (100) gallons of gasoline, and was filled from one of the horizontal tanks. There were about 30,000 to 40,000 gallons of gasoline in the vertical tank. Just prior to the explosion six witnesses saw a large quantity of gasoline flowing from a little drain pipe leading from the northwest corner of the defendant's warehouse, at a point about ten or fifteen feet from the railroad embankment. This stream of gasoline was 24 to 30 inches wide in some places, and averaged a width of 12 inches and a depth of one inch. It had run down in the gutter on Lithia Street, a distance of about 75 or 80 feet, and was breaking its way along. It had a red color. After the fire was over, Mr. Scott, the

deputy insurance commissioner, found a quantity of red coloring matter in the basement of the warehouse.

Gasoline at ordinary temperature gives off inflammable vapors, which contain carbon and hydrogen, and when they combine with oxygen it explodes, if it comes in contact with fire. Gasoline could become ignited. It could ignite before it reached a certain state. It could be done by a spontaneous combustion, but that is rare. Usually it has to be ignited by flame or spark of some kind. (By reference to the record in the *Fox case,* it will be seen that the Winston train was passing the defendant's premises just as the explosion occurred. The engine had passed, and the window-panes were broken in some of the cars. Gasoline will give off inflammable vapors, even when the temperature is below zero, according to the testimony of W. M. Allen, State Oil Chemist.

The jury, upon the evidence and under the charge of the court, returned a verdict for the plaintiff, and assessed his damages at eight hundred dollars.

Judgment upon the verdict, and defendant appealed.

Wilson & Frazier, W. P. Bynum, and R. C. Strudwick for plaintiff.

Guy Stevens, Roberson & Dalton, and Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: This is one of several cases of the same kind, and was tried under the guidance of the able and learned judge who presided, upon the theory of negligence and the breach of the ordinance of Greensboro requiring that such a business as that of the defendant must be conducted under a license, which may be issued when the applicant for it has submitted to the proper city authorities its plans and specifications, and they have been approved by the board. No such thing was done by the defendant before it started in business, nor has it since been done, so far as appears in the case. The police regulations as to the erection and use of buildings and other structures for the purpose of carrying on the business of selling and distributing kerosene, gasoline, and other petroleum products is well within the governmental powers ordinarily possessed by cities and towns, as we have very recently decided. *Gulf Refining Co. v. McKernan,* 179 N. C., 314, citing *State of Missouri ex rel. Gas Co. v. Murphy,* 170 U. S., 78; *Reinman v. Little Rock,* 237 U. S., 171; *Hadacheck v. Los Angeles,* 239 U. S., 394. So that it is a fact that at the time of the terrible disaster the defendant was engaged in conducting an unlawful business, because not authorized by any license to do business at all, or it was conducting the business in an unlawful manner, endangering the lives and property of the inhabitants of this growing and prosperous city, and which of these two is

correct, if both are not, can make no material difference. The question as to whether the violation of a statute, or ordinance, especially one intended to safeguard the citizens of a town and their property, is negligence *per se,* or only evidence of negligence, has been discussed extensively by this Court in several cases, but the law of this State was finally settled in *Leathers v. Tobacco Co.,* 144 N. C., 330, where it was held that it is negligence *per se,* and as a matter of law, and the rule in regard to it, as stated by Judge Thompson in his treatise on Negligence (vol. 1, sec. 10), was adopted, and is substantially as follows: When the legislature of a State, or the council of a municipal corporation, having in view the promotion of the safety of the public, or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, or otherwise called negligence *per se;* and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill. So that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages. The jury, of course, must find the facts. The author expresses regret that "two or three authoritative courts" have held that the violation of a statute is only "evidence of negligence." He then proceeds to criticise the doctrine in vigorous terms. At sec. 11 he says: "If a specific duty is imposed upon any person by law or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty." Shearman and Red. Neg., 54. The author says that the action is in tort for negligence, as will appear from the language, and states that the violation of an imposed statutory duty is a sort of negligence *per se.* Thus, where a railroad operates its trains at a higher rate of speed than the law allows, the question whether it is guilty of negligence is not debatable. This preliminary matter the law conclusively determines against the company, and the sole question to be settled in cases of this kind is whether that delinquency is the proximate cause of the damage of which complaint is made. If it is, the negligence becomes actionable. 1 Street Foundation Legal Liability, 172. A number of illustrative cases are mentioned. The several views are stated in 21 A. and E. Enc., 478, and the cases supporting them are cited. This Court, after approving the above statement of the law, reviewed the authorities upon this question in *Leathers v. Tobacco Co., supra,* where it is said: "We have carefully examined a number of cases, and find that a majority of the courts have adopted the opinion of the text-writers. It is so held in *Perry v. Tozer,* 20 Minn., 431; *Car Co. v. Armentrual,* 214 Ill., 509; *Billings*

v. Breinig, 45 Mich., 65." In *R. R. v. Stebbing,* 62 Md., 505, *Alvey, C. J.,* speaking of a speed ordinance, says: "The ordinance is general, and is for the protection of the public generally; but the neglect or disregard of the general duty imposed for the protection of every one can never become the foundation of a mere personal right of action until the individual complaining is shown to have been placed in position that gave him particular occasion and right to insist upon the performance of the duty to him personally. The duty being due to the public, composed of individual persons, each person specially injured by the breach of duty thus imposed becomes entitled to compensation for such injury." In *R. R. v. Voelker,* 129 Ill., 540, it is said (p. 555): "A statute commanding an act to be done creates an absolute duty to perform such an act, and the duty of performance does not depend upon, and is not controlled by, surrounding circumstances. Nonperformance of such statutory duty, resulting in injury to another, may therefore be pronounced to be negligence as a conclusion of law," citing *R. R. v. Horton,* 132 Ind., 189; *R. R. v. Carr,* 73 Ga., 557; *R. R. v. Young,* 81 Ga., 397; *Messenger v. Pate,* 42 Iowa, 443; *Muller v. Street R. R.,* 86 Wis., 340; *Hayes v. R. R.,* 70 Tex., 602; *Tucker v. R. R.,* 42 La. Ann., 114; *Queen v. Coal Co.,* 95 Tenn., 459; 49 Am. St., 935. In *Salisbury v. Horchenroder,* 161 Mass., 458, the evidence showed that defendant hung a sign over the sidewalk in front of his store, in violation of an ordinance of the town. It was blown down by a gale of wind, injuring plaintiff's property. *Chapman, C. J.,* said: "If the defendant's sign had been rightfully placed where it was, the question would have been presented whether he had used reasonable care in securing it. If he had done so, the injury would have been caused, without his fault, by the extraordinary and unusual gale of wind, etc. . . . But the defendant's sign was suspended over the street in violation of a public ordinance of the city of Boston, by which he was subject to a penalty. He placed and kept it there illegally, and this illegal act of his has contributed to the plaintiff's injury." The defendant was held liable because in placing the sign over the sidewalk he violated the city ordinance, and this illegal act was held to be the proximate cause of the injury to plaintiff. It was stated to be a general rule "that the doing of a prohibited act, or the failure to perform a duty enjoined by statute or ordinance (which causes injury to another), constitutes negligence, for which the party guilty of such act or omission is liable, unless excused by the contributory negligence of the one to whose person or property it is done," citing many authorities.

To the same effect is 2 Labatt Master and Servant, 2177. He says: "By many courts it is held that a violation of such statute constitutes negligence *per se.*" After stating the other theories, he adds: "That

the former of these theories is the correct one can scarcely be doubted. A doctrine, the essential effects of which is that the quality of an act which the Legislature has prescribed or forbidden, becomes an open question, upon which juries are entitled to express an opinion, would seem to be highly anomalous. The command or prohibition of a permanent body, which represents an entire community, ought, in any reasonable view, to be regarded as a final judgment upon the subject-matter, which renders it both unnecessary and improper that this question should be submitted to a jury." The latest expression of judicial thought in England corresponds with the authorities cited. In *Groves v. Winborne,* 2 L. R., 1898, Q. B. Div., 402, *Rigby, L. J.,* at p. 412, says: "When an absolute duty is imposed upon a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence. Whether there be negligence or not, he is responsible *quacunque via data* for the nonperformance of the duty," if it causes damage. In New York the Court held, in the *Marino case,* 173 N. Y., 530, upon an appeal from a judgment of nonsuit in an action by a child employed within the prohibited age for an injury sustained, that the violation of the statute was at least evidence of negligence. In *Lee v. Mfg. Co.,* 93 N. Y. Supp., 560, *Gaynor, J.,* in a very strong and satisfactory opinion, held that in such an action, the employment in violation of the statute was negligence *per se.* He reviews the *Marino case,* and shows that to say that such violation is "some evidence" is illogical. This case was appealed to the general term, and reversed upon the authority of the *Marino case,* 101 N. Y. Supp., 78. While it may not be strictly accurate to speak of the breach of duty arising out of a violation of a statutory duty as negligence, as we have seen, it is generally so treated, as entitling the injured person to an action on the case for negligence. For practical purposes, it may properly be a convenient mode of administering the right, because it involves the question of proximate cause and contributory negligence. Our precedent, *Leathers v. Tobacco Co., supra,* authorized the court to submit the question in this case to the jury, so far as it concerned a breach of the ordinance, as a question of law, which is practically the same thing, as negligence *per se,* and the charge that, if they found, by a preponderance of the evidence, the other facts to be as the witness had testified (there being no testimony introduced by defendant), and they found that the acts of the defendant proximately caused the injury, they should answer the first issue "Yes," and proceed to assess the damages. He did this substantially, and in such a way that the defendant, at least, can have no possible objection to it. The essential facts in this respect were really not disputed. Speaking for myself, let me state that when there is a violation of a statute or ordinance, especially one of this kind, which so deeply concerns public and

individual safety, both as to person and property, it is an illegal act, which, of itself, is a tort, without reference to the question of negligence, and all that is necessary to make it an actionable wrong is to show damages, or in other words, that it proximately caused the injury, under the general rule that "wrong and damage" constitute a cause of action. There was no pretense in this case that defendant had complied with the ordinance, and it is almost amazing that for so long a time it should have engaged in such a dangerous and illegal business, without check or restraint of any kind, when the menace to life and property was so great. This Court, in its rulings and charge, was well within the law, and far more lenient and liberal with the defendant than its case deserved. Some authorities hold that facts such as those presented in this case establish a private nuisance, if not also a public nuisance. We will not pass upon or discuss this feature, but merely refer to a few authorities where it is considered. 11 R. C. L., p. 666; *Whittemore v. Laundry Co.*, 52 L. R. A., (N. S.), 930, and especially the note. We said in *Ridge v. High Point*, 176 N. C., 421: "It was a public nuisance (piling lumber in the street), as defined and understood by the law, but the court left the question of negligence to the jury, for them to find the facts, with proper instructions as to the law of negligence. It would, upon the facts, which cannot be seriously denied, appear that there was negligence on the part of both the defendants, which was the proximate cause of the death without considering the contributory negligence of the intestate, if there was any. There was a clear violation of the ordinance when the lumber was piled in Perry Street, and this was negligence *per se*, or, in other words, it was negligence as a matter of law, to be declared by the court, but it was not actionable negligence, as it may have resulted in no actual harm. In order to make it actionable, it was necessary to show that it was the proximate cause of the death, as the two must unite so as to become an actionable wrong." In our case, the defendant's acts were a flagrant, and even startling, breach of private and public duty. The situation was so threatening that the volatile gas set free by contact of the carbon and hydrogen with the oxygen of the air, needed only the slightest touch of fire to produce an explosion, which would almost have wrecked the city if it had extended to the quantity in the large tanks. As it was, the damage wrought was very extensive. The law will not excuse such carelessness, and even rashness, in dealing with this high explosive, which wrought havoc even in this instance. Many authorities could be cited in support of this proposition, but it is needless to review or examine them here and now. The defendant had no watchman on its premises to guard against an explosion, or to stop the leak, which he could have done easily. It is said in Shearman & Redfield on Negligence (6 ed.), sec. 689: "The owner or controller of dangerous goods, such as gunpowder

and other explosives, who keeps them on his premises, does so at his own peril, and he is bound to exercise great care to prevent an injury which a prudent man would reasonably foresee might result therefrom. It is not always, however, a question of due care. Whether the keeping of gunpowder or other explosives upon private premises constitutes a nuisance depends upon the locality, the quantity, and the surrounding circumstances, without regard to the question whether it was kept carelessly or negligently. It is clear, however, that a bailee of goods, of the explosive nature of which he had no knowledge, is bound to use only ordinary care in reference to them; having used that care, he is not responsible for the consequences of an explosion." Sec. 689, *supra*, and notes. We also think there is evidence that if the gasoline had been handled with care, an explosion would have been avoided as it actually had been for some time, and therefore there arose a fair presumption sufficient to carry the case to the jury, that there was negligence. 1 Shearman & Redfield on Negligence (6 ed.), sec. 60; *Ill. Central R. R. v. Phillips*, 55 Ill., 194; *Bahr v. Lombard*, 53 N. J. Law, 233 (explosion of oil pipe); *Grimsley v. Hankins*, 46 Fed., 400; 3 Shearman & Redfield on Negligence (6 ed.), sec. 689, and notes. But caution should be taken to apply this rule according to *Page v. Mfg. Co.*, decided at this term, as to the burden of proof. See, also, 1 Shearman & Redfield on Negligence, sec. 58. It was held in *Rudder v. Koopman & Gerdes*, 116 Ala., 332: "The storing of large quantities of gunpowder and dynamite in a wooden building, located within the corporate limits of a city or town, in a thickly settled or populated portion of said city or town, and in proximity to many buildings, constitutes a nuisance, rendering the owner thereof responsible for injuries resulting from its explosion, and in an action to recover damages to plaintiff's building, resulting from the explosion of gunpowder and dynamite, a complaint, which avers that the defendant stored large quantities of dynamite and gunpowder in a wooden building in a thickly settled portion of an incorporated town, in proximity to plaintiff's building, and that the defendant's building having caught fire, the dynamite and powder stored therein exploded with such force and violence as to cast fire brands upon plaintiff's building, whereby it and its contents were set on fire, and consumed, sufficiently states a cause of action, without averring specific acts of negligence on the part of the defendants in the manner or mode of keeping the dynamite and gunpowder." *Lewis v. Hughes*, 12 Col., 208 (gasoline case). *Watson v. Kentucky & Indiana Bridge and Railroad Company*, 127 S. W. Reporter, p. 146, is a case much like ours, and there the Court held that "evidence in an action for damages caused by an explosion of gas generated from gasoline running from the broken valve of the derailed tank car, held to present a question for the jury as to the

proximate cause of plaintiff's injury." The question of proximate cause is for the jury. The Court in that case further said: "If the presence on Madison Street in the city of Louisville of the great volume of loose gas that arose from the escaping gasoline was caused by the negligence of the appellee, bridge and railroad company, it seems to us that the probable consequence of its coming in contact with fire and causing an explosion was too plain a proposition to admit doubt. Indeed, it was most probable that some one would strike a match to light a cigar or for other purposes in the midst of the gas. In our opinion, therefore, the act of one lighting or throwing a match under such circumstances cannot be said to be the only efficient cause of the explosion. It did not of itself produce the explosion, nor could it have done so without the assistance and contribution resulting from the primary negligence, if there was such negligence, on the part of the appellee, bridge and railroad company, in furnishing the presence of the gas in the street." If a third party's act coöperated with defendant's in producing the damage, defendant is liable. *Grand Trunk R. Co. v. Cumings,* 106 U. S., 700; *Harton v. Tel. Co.,* 141 N. C., 455. The jury could well have found from the evidence in this case that the red gasoline ran from the defendant's warehouse by reason of its negligence, and also that it was exposed to contact with fire because of the sparks flying from the engines of the railroad companies, which were constantly passing up and down the double tracks, and on its sidings, or to the thoughtlessness or carelessness of passersby in smoking cigars, or to cigarette smokers. It does not clearly appear at what point the fire first started. To have such a place as defendant's plant unguarded in such a situation, where the gasoline ran under it, and in touch with two streets, into which gasoline could escape from its premises, was at least little short of criminal negligence. It is said in Ruling Case Law, one of the most excellent and reliable of the standard treatises, vol. 11, p. 660: "Owing to its more dangerous character, the rule is different, however, as to the storage of gasoline. Though the storage of gasoline on premises adjacent to or adjoining the premises of another be not regarded as a private nuisance *per se,* it may, nevertheless, become such, considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage, or upon whether every precaution that human ingenuity has conceived has been made use of in the construction of the tanks, considering the dangerous character of the substance, and its power as an explosive, of which the courts can well take judicial notice, and also considering the fact that accidents in the operation of the most perfect mechanism will occur. It cannot be said that to have a great quantity of such an agency stored within a few feet of one's dwelling-house is not sufficient to be an unreasonable interference with

the comfortable enjoyment of that home." The cases cited by defendant in its brief are not in point, as no statute or ordinance was violated, and there was no legal evidence of any negligence, as held by those courts, while here there are both elements. The facts fairly to be deduced from the evidence of plaintiffs show that there was palpable negligence.

In some cases the courts have found circumstances which were considered such as to make the storage of gas or oil a nuisance. Thus, it was held in *O'Hare v. Nelson,* 71 N. J. Eq., 161, that in a thickly built-up portion of a large city, where there are many frame buildings, the storage of large quantities of gasoline in a frame building, where it is liable to be ignited, constitutes a nuisance. So, a tank for the storage of gas, maintained in railroad yards in the heart of a city, and surrounded by buildings, constitutes a nuisance. *Levin v. New York C. & H. R. R. Co.,* 133 N. Y. Supp., 467. To deposit and keep excessive quantities of a highly inflammable and explosive substance, such as naptha, in an important section of London was held to be an indictable nuisance. *Reg. v. Lister,* 26 L. J. Mag. Cas. N. S., 196. Where oil stored in a tank is so located with respect to a dwelling-house as to place it in danger, and so seriously interfere with its enjoyment, it was held to be a nuisance. *McGregor v. Camden,* 47 W. Va., 193. In *Heeg v. Licht,* 80 N. Y., 579, 582, the Court, speaking of private nuisances, said: "Private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com., 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood Nuisances, sec. 1, and authorities cited. The causes which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect or maintain a nuisance to the injury of an adjoining proprietor, or his neighbors, even in the pursuit of a lawful trade," citing *Aldred's case,* 9 Coke, 58; *Crady v. Weeks,* 3 Barb., 159; *Dubois v. Budlong,* 15 Abb. Pr., 445; *Weir's Appeal,* 74 Pa., 230. A very strong view of the question of nuisance is stated by *Judge Miller* in *Heeg v. Licht, supra,* as follows: "The defendant had erected a building and stored materials therein, which from their character were liable to, and actually did, explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the

vicinity. The locality of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling-houses or buildings, which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application."

We may well conclude this opinion by referring to a case which seems to resemble this one more closely than any other, the only difference being that the case at bar contains much stronger evidence to establish a nuisance than in the cited case. It is there said: "We may grant that the storage of gasoline on premises adjacent to, or adjoining, the premises of another is not a private nuisance *per se*. It might, however, become such, considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage. *Heeg v. Licht, supra;* 29 Cyc., 1177. We may also concede that in the instant case every precaution that human ingenuity has conceived has been made use of in the construction of the tanks, as testified to by defendant's experts. Considering, however, the dangerous character of the substance, and its power as an explosive, of which, in this age of its wonderful development as a power to propel automobiles, traction engines, and airships, we can well take judicial notice, and also considering human fallibility, that accidents in the operation of the most perfect mechanism will occur, and all that it needs to change what is, when properly protected, a harmless agency, to a most dangerous explosive, is a careless person—can it be said that to have 20,000 gallons of such an agency stored within but a few feet of one's dwelling-house is not sufficient to be an unreasonable interference with the comfortable enjoyment of that home? This is a purely residence district of the city, and was such before the defendant began operating its dry-cleaning business, and it must be apparent to any fair-minded person that the location of these tanks in immediate proximity to complainant Whittemore's house would necessarily damage his property." *Whittemore v. Baxter L. Co.,* 148 N. W. (Mich.), 437.

We need not discuss the maxim *res ipsa loquitur* any further than we already have, for it is not necessary to do so.

As to the probability of the fire reaching the liquid fluid from defendant's premises, and touching off the volatile gas produced by its contact with the air, from which it received the oxygen, there can be no dispute that the evidence permitted the inference by the jury that a spark from an engine of the railroad company caused the explosion, or live ashes dropped from the cigarette or cigar of a passerby. It would not have exploded but from some such or similar cause. That it was a permissible inference is fully decided in the cases, as to sparks falling from railroad engines and igniting the combustible material on the right of way or contiguous lands, and thereby destroying timber and other property, such as *Simmons v. Lumber Co.*, 174 N. C., 225; *Moore v. Lumber Co.*, 175 N. C., 205; *Deppe v. R. R.*, 152 N. C., 79; *McRainey v. R. R.*, 168 N. C., 572; *Fitzgerald v. R. R.*, 141 N. C., 531; *Hardy v. Lumber Co.*, 160 N. C., 116. We said in the *Simmons case, supra:* "The cause of the fire is not required to be shown by direct and positive proof, or by the testimony of an eye witness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one, which cannot be established in any other way. It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inferences from the admitted, known (or proven) facts, or otherwise presumptive evidence would be excluded. We have held proof, as to the emission of sparks from locomotive, or stationary engines, to be sufficient for the purpose of showing that a fire was started by them, where no one saw the sparks dropping on the place which was burned, for the reason that surrounding circumstances tended to prove that they were the cause of the fire, by reasonable presumption or inference. In *Deppe's case, supra,* where it was contended that no witness testified that he actually saw sparks emitted from the engine and fall on the lumber kiln, the Court said, that in considering this contention it must be remembered that the fire occurred during the daytime, and the brilliance of a summer's sun rendered any sparks thus emitted invisible to the human eye. That no one saw the sparks ignite the burned property was the fact in *McNeill v. R. R.*, 167 N. C., 390, and *Williams v. R. R.*, 140 N. C., 623, in which latter case the Court comments upon a similar contention. 'No one testified that he saw the sparks fall from the engine upon the right of way,' and said in respect thereto that it is rarely that this can be shown by eye-witnesses."

The nonsuit was properly refused by the presiding judge. The evidence was ample for the consideration of the jury, and we may add, was almost as strong as it could possibly be. The defendant must have

had full knowledge of the facts, or, at least, should have had it, and nevertheless it introduced no testimony, and left the jury at liberty to infer that it either had no explanation or excuse to offer, or that the explosion could have been prevented by the exercise of ordinary care, and there was no alternative but to return a verdict against it. They were left to consider its silence as a damaging circumstance against it, for the facts in evidence required some sort of explanation from it, and it was not forthcoming. Its refusal to explain was a relevant and competent circumstance against it. *Goodman v. Sapp,* 102 N. C., 477. The result should have been expected. A party may rely upon the weakness of his adversary's proof, if he deems it safe and expedient to do so, but he takes the risk, and sometimes a great one, in taking that course. The plaintiff's testimony in this case was not only strong, but cogent and convincing. The circumstances here tended to show that the explosive gas, which had reached the flashing point, and was enveloping the stream of fluid, in its course towards the railroad, and spreading in every direction, was set off by a spark from one of the passing engines. The jury could well have drawn this inference. It was fortunate that the havoc caused by the explosion was not more extensive, considering that many residences, and a large normal college, were so close to the defendant's plant.

Here was a large plant, intended to supply the inhabitants of a flourishing city with these widely used products of petroleum, which were of a highly explosive character, when allowed to escape from their containers and become exposed to another chemical element, the oxygen of the air. That the gasoline did thus escape is beyond dispute, and yet by the exercise of the slightest care on the part of this apparently affluent company, it could have been prevented. Defendant, though, seemed to be more intent upon profits than upon safety, or upon making a small expenditure for a watchman, than upon safeguarding the people of a large city against a terrible catastrophe, involving immense loss of life and property; hence the fatality in this case, which could easily have been avoided by proper care.

Defendant was just as culpable as the gas company which permitted a live wire to dangle from one of its poles, as in *Haynes v. Gas Co.,* 114 N. C., 203, or the railroad company which permitted live sparks to fly from its defective smokestack, or live coals to fall from its defective firebox, as in *Aycock v. R. R.,* 89 N. C., 321, and in many of a like kind. It plainly violated the ordinance 412 when it failed to get a license, and also when it constructed its plant contrary to their provisions.

The charge of Judge McElroy was fair, and plainly so to the defendant, and devoid of any error; it was also exceptionally lucid and strong in its statement of the law applicable to the case.

The exceptions of the defendant are found to be without any real merit, and we therefore affirm the judgment.

No error.

NANCY E. NEWTON v. THE TEXAS COMPANY.

(Filed 8 December, 1920.)

1. Explosives—Gasoline—Negligence—Evidence—Municipal Corporations—Cities and Towns—Ordinances.

Where the defendant negligently permitted the conditions at its storage warehouse for gasoline to remain, and without a watchman, so as to menace adjoining or adjacent lands and houses from ignition of the gasoline vapor, and there is evidence that the plaintiff's house was set afire in consequence, testimony offered by the defendant that after the explosion it had received an anonymous postcard, whereon were the words, "New Year's Eve, then the explosion," is heresay and incompetent, and not a part of the *res gestae*.

2. Instructions—Evidence—Opinion—Courts—Contentions.

A requested instruction which attempts to pass upon the evidence, or withdraws a material portion of the relevant evidence from the jury, is properly refused.

3. Same—Admissions.

Where there is evidence that plaintiff's house was negligently injured by an explosion of gasoline stored in the defendant's warehouse, and caused by defendant's negligence, it is not error for the trial judge to speak of the explosion as an admitted fact, when it has been admitted.

4. Instructions—Issues—Correlating Evidence.

It is not an expression of opinion by the trial judge to narrate the related evidence in stating the contentions of the parties in his instructions to the jury, and to explain to the jury the relevancy of the evidence to the issues submitted. Rev., 535.

5. Negligence—Explosives—Gasoline—Evidence—Nonsuit.

Evidence that the defendant maintained a distributing plant containing large quantities of gasoline in tanks for its customers in a city at a street corner, without a watchman, and in violation of an ordinance, and that railroad tracks were located on one of these streets on which locomotives or trains passed frequently, and that a stream of gasoline was seen flowing from the defendant's warehouse under the railroad track shortly before the passing of one of these trains, is sufficient as furnishing a reasonable inference that either the explosion, causing damage to the plaintiff's adjacent or adjoining house, was at that time caused by fire from the locomotives, or the carelessness of passersby in the use of matches in lighting cigars or cigarettes, or otherwise; and a motion for judgment of nonsuit thereon is properly denied.

6. Same—Proximate Cause—Intervening Acts.

Where the defendant has been negligent in maintaining a plant for the storage of gasoline for its customers in a city, under such circumstances as to sustain a verdict in the plaintiff's favor, the reasonable inference therein that the ignition of the gasoline was caused either by fire from passing locomotives, or by the carelessness of passersby in the use of fire, does not affect the continuing negligence of the defendant which produces the result, nor is the negligence of such persons attributable to the plaintiff, nor does it relieve the defendant of liability as an independent or intervening cause. If defendant's negligence concurred with that of another in causing the injury, defendant is liable.

7. Negligence—Municipal Ordinances—Explosives—Gasoline.

While the municipal authorities may pass a valid ordinance for the protection of its property owners from fire, it does not protect a defendant in a civil action for damages from the effect of its violation in building and operating its plant, and the granting of a license, under the ordinance, for the maintenance of a large storage and distributing plant for the sale of gasoline, will not avoid liability on the part of the defendant violating the ordinance itself.

8. Negligence—Explosives—Evidence—Res Ipsa Loquitur—Gasoline.

The doctrine of *res ipsa loquitur* applies where the evidence tends to show that the defendant's storage plant for gasoline, in large quantities, was under the care and control of the defendant, and that under circumstances tending to show its negligence, an explosion occurred therein to the damage of the plaintiff's property, which, under ordinary circumstances, would not have happened.

APPEAL by defendant from *Shaw, J.*, at April Term, 1920, of GUILFORD.

The plaintiff sued to recover damages for injuries sustained from an explosion on defendant's premises, in the city of Greensboro, on 3 May, 1919, it being the same explosion described in *Stone v. The Texas Co.*, decided at this term. Nearly all of the questions now raised were passed upon in that case, the only practical difference between the two cases being that there was evidence in this case that defendant had applied for and obtained a license to conduct business at its plant in the city.

The jury rendered a verdict for the plaintiff, assessing her damages at $3,000. Judgment thereon, and defendant appealed.

John A. Barringer and Wilson & Frazier for plaintiff.

Guy Stevens, Roberson & Dalton, and Brooks, Sapp & Kelly for defendant.

WALKER, J., after stating the case: We will consider the assignments of error in the order of their statement in the record.

The first and third assignments, to the refusal of a nonsuit, are overruled, as there was sufficient evidence for the jury to consider as to defendant's negligence. Assignment No. 2 is untenable, as the postcard received the day after the explosion, containing the words, "New Year's eve, then the explosion," was incompetent, hearsay, and irrelevant, and no part of the *res gestae*. The judge properly excluded it. The court gave the instruction set forth in the fourth assignment, so far as it was proper that it should be given. There was evidence for the jury to consider that the ordinance of the city had been violated. But the plaintiff has more reason for an objection to the charge in this respect than has the defendant, as it was less favorable to her than it should have been.

The court substantially gave the instruction set forth in the fifth assignment of error. The court could not have given the instruction in the sixth and seventh assignments of error without passing upon the evidence, and usurping the function of the jury, and, in one respect, without withdrawing a material portion of the relevant evidence from the jury. The eighth assignment is substantially the same as the two in regard to the motion for a nonsuit, and must share their fate.

The first and second exceptions to the instructions, as set forth in assignments nine and ten, were properly overruled. The explosion was an admitted fact, and should have been considered along with the other evidence. The plaintiff could not have made a beginning in the development of her case without this fact being considered. The court was only reciting the facts and circumstances, which were competent to be considered by the jury on the question of negligence. In other words, he was concatenating such facts, and not confining the jury to any one fact. He had a perfect right to tell the jury what evidence was relevant to the issues, if he did not give an opinion, as to whether the facts were fully or sufficiently proven, or intimate his opinion upon the weight of the evidence, but he is required "to state in a plain and correct manner the evidence in the case, and declare and explain the law arising thereon." Rev., 535. It is not an expression of opinion merely to array the testimony in the case in a proper manner, and to instruct the jury as to what is and what is not evidence.

If the defendant, by its negligence, produced a situation or condition of danger by allowing gasoline to escape from its warehouse and run down a street, where it would probably come in contact with fire, sparks from a passing engine or live ashes from a lighted cigar or cigarette dropped by a passerby, and the explosion was caused thereby, we do not see why this would not be negligence as much so as the act of a railroad company in permitting a spark to escape from a defective smokestack and fall on adjoining property, thereby injuring or destroying it. If

the negligence of the defendant, combined with the act of some other person, and proximately injured the plaintiff, the defendant would be liable, though he had no connection with the conduct of the third party, and no control over him. This was held to be the law in *Grand Trunk Rwy. Co. v. Cummings,* 106 U. S., 700 (27 L. Ed., 266), and 1 Shearman & Redf. on Neg. (6 ed., by Street), sec. 39, where it is said to be universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause, for which he is not responsible, including the "act of God" or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. It is also agreed that if the negligence of the defendant concurs with the other cause of the injury, in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force, which, concurring with his own negligence, produced the damage. 1 Sh. & Redf. on Neg., sec. 39. The defendant's vessel, owing to his negligence, struck, and was driven by the wind and tide, upon a sea-wall, damaging the same. In that state of the weather and tide, it was impossible to prevent this result, after the ship had once struck: *Held,* that defendants were liable for the damage caused to the wall. *Romney v. Trinity House,* L. R. 5 Ex., 204; affirmed 7 Id., 247. An action lies by a passenger against a carrier if the injury occurred in part from an unforeseen cause, and in part by negligence (*Brehm v. Great Western R. Co.,* 34 Barb., 256). The defendant had wrongfully placed a dam across a stream on plaintiff's land, and allowed it to remain there; being swept away by a freshet, the rush of water injured plaintiff's property; defendant held liable. *Dickinson v. Boyle,* 17 Pick., 78. See also notes to Sh. & Redf. on Negligence, sec. 39, and cases cited therein. In *Grand Trunk Rwy. Co. v. Cummings, supra, Chief Justice Waite* said: "If the negligence of the company contributed to it, it must necessarily have been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." The same doctrine is fully discussed in *Ridge v. R. R.,* 167 N. C., 510, where we said: "The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. In this case there was no intermediate, or intervening, independent and efficient cause, which, operating alone, was sufficient of itself to break the connection between defendant's negligence and the injury, and the primary wrong must be considered as reaching from the beginning to the effect, and, therefore, as proximate to it,"

citing *Kellogg v. Railroad Co.*, 94 U. S., 469, 475; *Insurance Co. v. Boon*, 95 U. S., 619; *Steele v. Grant*, 166 N. C., 635; *Hardy v. Lumber Co.*, 160 N. C., at pp. 124, 125; *Wade v. Contracting Co.*, 149 N. C., 177. The rule has been stated by us as follows: "Where there are two causes coöperating to produce an injury, one of which is attributable to defendant's negligence, the latter becomes liable, if together they are the proximate cause of the injury, or if defendant's negligence is such proximate cause." *Ridge v. R. R., supra; Steele v. Grant, supra.*

Assignments twelve, thirteen, fourteen, and fifteen, relating to the ordinances, cannot be sustained. The court properly construed the ordinances, and the instruction attacked in the fifteenth assignment was more favorable to the defendant than it should have been, as the violation of a statute, or an ordinance, is negligence *per se,* or rather, to speak more accurately, it is itself a distinct wrong in law, and all that is needed to make it an actionable wrong is the essential element of proximate cause, for "wrong and damage" constitute a good cause of action if there be a causal connection between them. That the violation of a statute, or ordinance of a city or town, is negligence *per se,* or a distinct wrong in law, is the rule established by the more recent cases. *Leathers v. Tobacco Co.*, 144 N. C., 330; *Starnes v. Mfg. Co.*, 147 N. C., 556; *Ledbetter v. English*, 166 N. C., 130; *McNeill v. R. R.*, 167 N. C., 390; *Ridge v. High Point*, 176 N. C., 424. We so held in *Stone v. Texas Co.*, at this term.

The maxim *res ipsa loquitur* was considered in *Stone's case, supra,* but was not applied strictly by the judge in his charge to the jury. The defendant is contending in these cases that, while it had employed no watchman to guard its premises (which we say was the prudent course to have adopted), it had carried on its business for many years, and up to the time of the explosion, in practically the same way, using care to prevent the escape of gasoline and kerosene, and no accident had occurred. Does not this very contention make the rule, *res ipsa loquitur* apply here? If care had heretofore prevented injury, the jury might well infer that the continued use of care would likewise have done so, and that what did occur was due to its absence. But with a plant equipped with proper appliances for safety, gasoline should not have escaped, with the use of ordinary care, as it could get out of its container only through some opening. So that defendant is reduced to this dilemma, either it did not have proper safety appliances to prevent the escape of gasoline, or, if it did have them, they were not kept in proper condition, or some one of its employees negligently (or thoughtlessly, which is the same thing) left them open. If the spigots were closed, the contents of the drum, or tank, or whatever else was used for storing the gasoline, could not get out unless the containers themselves were defec-

tive, which the defendant will be slow to admit. We do not say that these are the true or necessary inferences from the evidence, but that the jury were at liberty to draw them, and well warranted in doing so, not alone, perhaps, from the accident itself, from it and all the attendant circumstances. We do not perceive, though, how the defendant could have expected, or how it could have had a well-founded hope that the jury would find otherwise than they did.

The license would not protect the defendant against the violation of the ordinance itself, treating Nos. 12 and 13 as one enactment, as the board issuing it was not clothed with authority to license its violation. The defendant did not construct its plant as provided in the ordinance, and it committed acts expressly prohibited by it. Whether its acts of omission or commission were the proximate cause of the injury to the plaintiff was a question for the jury, which has been decided against the defendant, under evidence from which such a conclusion could ligitimately be deduced. There was the gasoline (identified by the witnesses by its peculiar odor) flowing from the plant, or warehouse, down the street to and under the railroad, with several tracks and many engines passing and repassing directly over it, and one train passing just before the explosion, so close to the time when it occurred that the glass was shattered in the car windows. This exposed the highly volatile vapors, which were generated by contact with the air, to the very thing needed for the terrific explosion which followed. It was not necessary that any one should have seen sparks from the engine actually fall upon this stream of gasoline, as we have so often held in the cases where railroads have been held liable for causing fires in precisely the same way. *Deppe v. R. R.*, 152 N. C., 79; *Simmons v. Lumber Co.*, 174 N. C., 225, and other cases cited in *Stone v. Texas Co.*, at this term. We said in the *Simmons case, supra:* "The cause of the fire is not required to be shown by direct and positive proof, or by the testimony of an eye-witness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one which cannot be established in any other way. It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted, known, or proven facts." But a case more directly to the point is *Watson v. Ky. & Ind. Bridge & Rwy. Co.*, 127 S. W., 146: "If the presence on Madison Street in the city of Louisville of the great volume of loose gas, that arose from the escaping gasoline, was caused by the negligence of the appellee, bridge and railroad company, it seems to us that the probable consequence of its coming in contact with fire and causing an explosion was too plain a proposition to admit of doubt. Indeed, it was most probable that some one would strike a match to light a cigar, or for other purposes, in the midst of the gas. In our

opinion, therefore, the act of one lighting or throwing a match under such circumstances cannot be considered to be the efficient cause of the explosion. It did not of itself produce the explosion, nor could it have done so without the assistance and contribution resulting from a primary negligence, if there was such negligence on the part of the appellee, bridge and railroad company, in furnishing the presence of the gas in the street."

The most reasonable and probable solution of this case is that one of the defendant's employees, who was there the evening before the explosion occurred, carelessly left an opening in one of the tanks, or containers, from which the gasoline flowed from its warehouse into the street. There was circumstantial evidence to warrant such a conclusion. Defendant had possession, control, and management of its plant, and should have superior knowledge as to its condition to any one else. It has not given any satisfactory explanation of how the gasoline got into the street, and the plaintiff was left, as her last resort, to circumstantial evidence for the purpose of showing that the cause of it was attributable to the defendant. In numerous cases we have held that when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. Defendant replies to this that the thing which caused the injury was not under its management, but is that the fact, as the gasoline, which caused the explosion in conjunction with the fire, regardless of the source from which the latter came, was under its control and management, and it would have remained harmless if it had been properly stored, or watched and controlled. The defendant cannot, upon the evidence in the case, escape the full operation of this principle. *Stewart v. Carpet Co.*, 138 N. C., 66; *Womble v. Grocery Co.*, 135 N. C., 474; *Fitzgerald v. R. R.*, 141 N. C., 530; *Ross v. Cotton Mills*, 140 N. C., 115, and especially *Dail v. Taylor*, 151 N. C., 284, and *Cashwell v. Bottling Works*, 174 N. C., 324. "It has sometimes been held not sufficient for the plaintiff to establish a probability of the defendant's default, but this is going too far. If the facts proved render it probable that the defendant violated its duty, it is for the jury to decide it did so or not. To hold otherwise would be to deny the value of circumstantial evidence." Shearman & Redf. on Negligence, sec. 58; *Cashwell v. Bottling Works, supra.* "Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of action-

able negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Fitzgerald v. R. R., supra.*

The case was correctly tried under the guidance of the able and learned judge who presided at the hearing.

No error.

J. F. GROVES v. COMMISSIONERS OF RUTHERFORD COUNTY.

(Filed 8 December, 1920.)

1. Elections—Majority—Tie—Taxation.

It requires a majority of the qualified voters in favor of an election upon the question of adopting a special tax to carry it, and the tax cannot be declared as carried when by striking from the registration disqualified voters the result is a tie.

2. Elections—Voters—Animus Revertendi—Registration.

One who has registered for an election upon the question of a special tax, is not disqualified to vote thereat because of his temporary absence from the county to perform a contract he is obliged to perform, and has not taken his household goods, or changed his place of actual residence, but had always the *animus revertendi.*

3. Elections—Taxes—Tender—Voters—Soldiers—County Commissioners—Exemptions.

The county commissioners are without authority to exempt from taxes one abroad in the service of his country as a soldier in the army; but when he has sent the money to his father, who told the sheriff that he had the money in the bank, and was informed by the sheriff that his son had been exempted by the commissioners, and in fact the father had the tax money and otherwise would have paid it, it is unnecessary that the actual cash should have been tendered in order for the vote of the son to have been taken, and it is erroneous for the election officers to have stricken his name from the register.

CIVIL ACTION, tried before *Webb, J.,* at October Term, 1919, of RUTHERFORD, upon these issues:

"1. Was Fred Pendergrast a registered qualified voter, with a right to vote in the special school election held on the 'Edwards' Special-tax District, on 17 May, 1919? Answer: 'No.'

"2. Was W. C. Mitchum a qualified registered voter, with a right to vote in the special election held in 'Edwards' Special School-tax District on 17 May, 1919? Answer: 'No.'

"3. Was J. L. Vickers a qualified registered voter, with a right to vote in the special school election held in the 'Edwards' Special School-tax District on 17 May, 1919? Answer: 'No.'"

From the judgment rendered the plaintiff appealed.

Solomon Gallert for plaintiff.
W. C. McRorie for defendants.

BROWN, J. This was an action instituted by plaintiff, in behalf of himself and other taxpayers in the proposed special-tax school district to be established in Gilkey Township of Rutherford County, said district being known as the "Edwards" School District, numbered 14-3, to enjoin the commissioners of Rutherford County from declaring an election held in said district as having adopted the special tax voted upon at said election, and to enjoin said county commissioners from levying said tax.

At said election it appears that there were 23 voters registered, and that on election day, after the polls were opened, the name of W. C. Mitchum, who had registered, was stricken from the registration book by the judges of the election (page 21), thus leaving 22 names on the book. It appears that 12 votes were cast in favor of the special tax, but the vote of Fred Pendergrast, which was admitted to be illegal, and so found by the jury, which was cast in favor of said tax, should be deducted from said 12 votes, thus leaving only 11 legal votes having been cast in favor of said tax.

Defendants claim that the vote of J. L. Vickers, who was duly registered, should not be counted against said tax, on the ground that he had not paid his poll tax for the year 1918 on or before 1 May, 1919, and they contend that this vote should be deducted from the registered names of voters, reducing the number of qualified registered voters, as defendants claim, to 21. Plaintiff claims that Vickers' vote should be counted against said tax, because he tendered payment of his poll tax in ample time, and the sheriff refused to receive it.

Defendants claim that the name of W. C. Mitchum was properly erased from the registration book, because he was not a resident of the school district when the election was held. Plaintiff claims that the election officers unlawfully and wrongfully erased Mitchum's name from the registration book, (1) because he having been regularly registered for said election, the election officers had no right to erase his name; (2) because Mitchum was a resident of said school district, and a legally qualified voter therein; and (3) because his name had been erased without notice to him and without his knowledge, approval, or consent, after the polls had been opened, and while the election was being held.

With the votes of Vickers and Mitchum both counted as against the tax—neither of them voted, and their votes would necessarily count against the tax—the result of the election would be a tie, and the tax would be defeated, a majority of the qualified registered voters not having voted for the tax.

1. We are of opinion, upon the evidence, if it is believed, that the name of W. C. Mitchum was improperly stricken from the registration books. There was evidence tending to prove that Mitchum had not abandoned his home; that he was temporarily absent on business; that he did not move his personal property; that he took only such as was necessary; that he had taken a logging contract which would keep him absent several months.

Mitchum testified as follows: "When I moved down to Bostic it was not my intention to give up my residence in the Edwards School District, not naturally for my temporary job; I rented the land expecting to come back, and did not want to lay out; I worked on the logging job from November up until March, when shut down and contract not finished; when they were talking of shutting down, I went to Gilkey Township and went to the fellow I rented the land to and tried to buy out their grain crop, but they would not sell; after the sawmill shut down I had to go to work to support my family, but I made an effort to get back home." Mitchum is corroborated, as to his intention of leaving only temporarily, by W. H. Small, who testified: "I had a conversation with him (Mitchum) about the time he moved to Bostic; I tried to buy his land and mules; he said he did not care to sell, and I asked to buy his corn and household and kitchen furniture, and he said 'No'; that he was going to move a batching outfit; that he did not expect to be down there long, that it was not permanent."

If the evidence is believed to be true, it indicates conclusively that Mitchum did not intend to change his residence when he went to Bostic. He went to Bostic, *animum revertendi.* He was there temporarily to carry out a logging contract. He was a mere sojourner at Bostic, without the intention of making it a permanent home. He could not vote at Bostic for that reason. 15 Cyc., 291. Domicile is the place where a person lives or has his home, and to which, when absent, he has the intention of returning. *Hannon v. Grizzard,* 89 N. C., 120; *Boyer v. Teague,* 106 N. C., 576; *Norris v. Gilmer,* 129 U. S., 315; *Reynolds v. Cotton Mills,* 177 N. C., 412.

We are of opinion that the court should have instructed the jury as requested by the plaintiff.

"1. That if the jury find from the evidence, by the greater weight thereof, that the witness W. C. Mitchum left the Edwards School District for the specific purpose of carrying out a logging contract with the

defendant, G. E. Morgan, and that at the time he left said school district he had the intention of returning to said Edwards School District after he had accomplished and completed said logging contract, then the court charges you that the said W. C. Mitchum did not lose his residence in the Edwards School District, and having paid his poll tax for the year 1918, on or before 1 May, 1919, he would be a registered qualified voter in said district, and you should answer the second issue 'Yes.'"

The court directed the jury to answer the third issue "No," holding that J. L. Vickers was not a qualified registered voter. Upon this issue his Honor charged the jury as follows:

"The court charges you that if you believe all the evidence in this case you will answer the last issue 'No.' The evidence seems to be that Vickers was a soldier in the war; that he had registered, and the question of paying poll tax arose. That the county commissioners and everybody had kind feelings for every boy in service, and it was discussed by a great many of the commissioners, and some of them made an order that the boys should be exempt from poll tax. Of course they had no legal right to make such an order. Mr. Vickers, the father of the boy, came to town for the purpose of paying the tax, and the court understood him to say he went to the sheriff, and the sheriff went into the office and looked at the book and told Mr. Vickers that the county commissioners had exempted his boy from paying poll tax; and Mr. Vickers told the sheriff he had come to pay it and wanted to pay it, and had come for the purpose of paying it, and stated he had money in the bank that his son had sent him to pay it, and that he was ready and willing to pay it, and the sheriff told him the county commissioners had exempted his son. The court is of the opinion that that was not a legal tender, so if you believe all of the evidence you will answer the third issue 'No,' that he was not a qualified voter because he had not paid his poll tax prior to 1 May, 1919."

In our opinion, according to the evidence, there is a legal tender of the poll tax, and the sheriff was in error to have refused it. The father had the right to tender the poll tax for his son, who was a registered voter, but absent in the service of the Government. The father testified that he had the money to pay the taxes ready; that he had put in the money in the bank that day; that his boy had sent it to him, and that he was ready and prepared to pay it. The sheriff having refused to receive it, the father was not required to go through the ceremony of taking out the money and presenting it to the sheriff. There is eminent authority for the position that the absent soldier was exempted from the payment of poll tax in the opinion of the Attorney-General, Judge Manning, formerly a distinguished member of this Court, in an opinion of 13 April, 1920, in which he says: "This office has ruled with refer-

ence to soldiers who were in France or Germany, or in service in the various camps throughout the country at the time for listing poll tax in 1919, that they may vote without paying the poll tax for 1919. These soldiers, either by their sense of obligation to their native country, or by compulsion of the Federal Government, were, in their service to that country, placed in such a position that they could neither list nor pay these taxes. It would, it seems to us, be manifestly inequitable and unjust to deprive them of their right to vote under such circumstances."

We are indebted greatly to the learned and able brief of Mr. Gallert in the preparation of this opinion.

New trial.

J. D. BRASWELL, SHERIFF, v. COMMISSIONERS OF AVERY COUNTY.

(Filed 8 December, 1920.)

Spirituous Liquors—Statutes—Amendments—Statutory Rewards—Avery County.

From the title and otherwise, ch. 188, Public-Local Laws of 1919, relating to Avery County, and giving certain officers of the county specified rewards for the conviction of or furnishing evidence against those unlawfully manufacturing spirituous liquors, is construed as an amendment to ch. 807, Laws of 1909, upon the same subject-matter, and to further encourage the enforcement of the law; and the rewards offered in the later act are in addition to those offered in the former one.

CIVIL ACTION, tried before *Harding, J.*, at April Term, 1920, of AVERY, upon an agreed statement of facts. His Honor rendered judgment in favor of the plaintiff, from which defendant appealed.

J. W. Ragland for plaintiff.
Benbow & Caviness for defendant.

BROWN, J. This is an action brought by the sheriff of Avery County against the board of commissioners to recover $20 each for the capture and destruction of illicit distilleries in Avery County, under the provisions of ch. 807, Laws 1909.

It is admitted that under the provisions of the act of 1909, the sheriff is entitled to recover. It is claimed, however, that this act is repealed by ch. 188, Public-Local Laws 1919. The latter act is entitled "An act to amend the prohibition law, and provide for the better enforcement of the same in Avery County." It provides in section 2: "That for every conviction of any person for manufacturing spirituous liquors, the

officer who furnishes the evidence shall be entitled to fifty dollars ($50), to be taxed against the party convicted, and the said officer shall also be entitled to the still run by the party so convicted, after the same has been cut up by or in the presence of the board of county commissioners."

Section 3 provides: "That for every person convicted of selling or transporting or having spirituous liquors in his possession for sale, the officer who furnishes the evidence to convict such person shall be entitled to twenty-five dollars ($25), to be taxed against the party convicted."

We are of opinion that the act of 1919 is an amendment to the prohibition law of Avery County, and not a repeal of the statute of 1909. The title of the act shows that it was simply to provide for the better enforcement of the local prohibition law in Avery County by giving the sheriff additional compensation when through his efforts those engaged in the illicit traffic are convicted. We cannot find anything in it which deprives the sheriff of the reward for capturing and destroying stills.

Affirmed.

WILL HENSLEY v. WESTERN NORTH CAROLINA LUMBER COMPANY.

(Filed 8 December, 1920.)

Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Tools and Appliances—Order of Vice Principal—Inspection.

Evidence that defendant sent logs down the mountain side in a "chute" to its sawmill, and at a depression requiring the logs to be handled in order to get them to the next incline, the vice principal ordered the plaintiff, an inexperienced 17-year-old lad, to assist in moving the logs with a pevie, while an unruly horse drew them forward by a chain attached to the end of the log with a swamp hook; and that the use of this horse had theretofore been found dangerous for such purpose, and that the chain was too small, and broke, inflicting injury upon the plaintiff as the unruly horse surged along the toe-path: *Held*, the defense was untenable which limited the question of actionable negligence to the question of the chain being a simple tool, and as to whether the defect and danger arising from its use should have been better known to the plaintiff, and that defendant should have been notified thereof; as this disregarded the different elements of negligence arising under the other evidence in the case. As to whether it was defendant's duty to have inspected the chain, *Quaere?*

APPEAL by defendant from *Harding, J.*, at August Term, 1920, of YANCEY.

Plaintiff sued to recover damages for a personal injury, alleged to have been caused by negligence of the defendant, who was engaged in operating a band sawmill, in the manner described by the witnesses.

Plaintiff contended that the evidence tended to show the following facts:

The plaintiff, at the time of his injury, was employed by the defendant, and directed by his foreman to aid in rolling logs into a "chute" or slide built of split logs, which was used to convey the logs from the mountain slopes to defendant's band mill, which was constructed at the foot of the mountain. The "chute" was built to fit the grade of the ground, so there were, at various places, depressions where the logs would stop in the "chute." At what is known as landing No. 1 there is such a depression that the logs stop, and have to be removed by horse power or by tackle. The plaintiff, a boy of 17 years, was directed to leave the place where he was at work by his foreman, and help Riddle, the driver, in moving the logs from the depression above described. Riddle drove the horse, and young Hensley was required to take a pevie and help start the log, while the horse surged against the chain, which was attached to a swamp hook, at the end of the log, where the plaintiff was required to work. The horse was a large, strong horse. A toe-path was built at this place, made of small logs, so as to give the horse a better hold, the surface of the toe-path being very rough. The horse was wild and unruly, and did not pull true. He was so unruly that he would jump across the slide from the toe-path and would make unexpected surges against the chain, and had to be worked with double lines. One employee, who previously drove the horse at the point where plaintiff was injured, quit the work rather than undergo the danger of driving him, and he notified Jack Henderson, secretary of defendant company, that the horse was dangerous. The plaintiff was young, and a green hand, had not done that kind of work before, and was not warned of the dangers incident thereto. The chain furnished by defendant at this point, for the purpose of jerking or "bucking" the logs from the depression to a point where they would run by gravity, was a small chain, and was too small and weak for the work required. It had been made for a tackle block chain, so made with small links that it would go through the rings of the tackle blocks. It was also an old chain; had been used in a tackle block, and was badly worn, both on the outside of the links, where it was readily visible, and also inside, where it could be detected. It bore evidence of having been previously broken, and the ring or link welded and repaired. The plaintiff had never examined the chain at all, and had never helped in this kind of work before. While plaintiff was undertaking to aid in starting the log, by prizing at the end with a pevie, at the point where the chain went through a ring at the swamp hook, the driver undertook to drive the wild and unruly horse over the corduroid log toe-path, the horse backed over the singletree and made a violent and wild surge against the chain, which broke, and the large

horse was thrown forward with great force at one end of the broken chain, and the other end of the broken chain was thrown backward with equal force, where plaintiff was at work with the pevie, and hit plaintiff in the head, crushing his skull and so injuring him that a large portion of his brain had to be removed.

Defendant contended that the evidence disclosed the following facts:

That at the time of the injury complained of, it was operating a band sawmill, and the method adopted for bringing logs from the woods to the mill was to place them upon a slide made of logs from eighteen to twenty-four inches in diameter, about one-third of the log being sawed off from one side, and the logs so placed that these sawed surfaces were facing each other, thus making a hollow chute, and when these sawed logs were placed end to end it made a trough. Logs were rolled into this trough, or chute, and when the chute was not of sufficient grade for the logs to slide of their own momentum in the chute, after it had been oiled by pouring oil on the sawed surface of the logs, a horse was hitched to the log by means of a chain attached to a hook, and the hook placed in the rear end of the rear log, so that the horse would pull against the chain while walking beside the log to which the chain was attached, and beside the chute. When the logs would reach a point in the chute that they would slide by themselves, the "swamp hook" would drop out from the rear end of the log and the logs would go on down the chute of their own momentum. The plaintiff was injured while agitating one of the logs at the rear end, with a cant hook, and the horse pulling upon the chain hitched to the said log; the chain being doubled, running through an open link to the "swamp hook." The chain broke, one end of it flew around and hit the plaintiff above the ear and caused the injury. The parties differ as to the age of the chain. Defendant's evidence tended to show that he had purchased, and then had in use, the chain which broke, and which was a 3-B, 5/16 inch, steel-tested, electrically welded chain, and, according to all the evidence, this was the best chain that could be purchased in the market. This chain was a comparatively new chain, and arrived at the defendant's mill on 28 March, 1919, and the injury occurred on 8 April, 1919, so, as defendant contends, the chain could not have been used longer than from 28 March until 8 April, 1919.

The defendant raised but one question on this appeal, which is that the tool (or chain) was a simple tool; that the defendant was not required to inspect it; that if it became defective after the employees began using it, they would know this first of all, and unless the defendant was notified of the defect which occurred later, it would not be liable; that there is no evidence showing any knowledge of any defect on

the part of the defendant. The defendant abandons all exceptions in the record, except those relating to the chain, contending that the same is a simple tool.

Verdict and judgment for the plaintiff, and defendant appealed.

A. Hall Johnston and Charles Hutchins for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

WALKER, J., after stating the case: There was testimony which tended, more or less, to support the two opposite contentions. The defendant abandons all exceptions except the one in regard to the chain, and as to that it contends that it was a small tool, requiring no special inspection from the master, and being so, it was the duty of the plaintiff to discover any defect and report it to the defendant, for he was in a better position than was the defendant to know of any defect, as he handled it all the time it was in use. But this contention is fully met and overcome by testimony that the chain was too small for that kind of work, where it was subjected to a heavy strain, and was not strong enough to withstand it. One witness, an expert, testified that the chain was too small for that kind of work. He said, "I do not think that this chain was sufficient for the work required to be done, it was a tackle block chain, made small to go through the rings of a tackle block." There was also other evidence tending to show that defendant had not furnished a safe place for plaintiff to work, or a safe way for doing his work, so that the mere breaking of the chain, and the lack of proper inspection by the defendant, were not the only evidences of negligence. We do not mean to decide that it was not the defendant's duty to inspect the chain, or that it comes within the class of small tools. It is not necessary that we should do so.

The case of *King v. R. R.*, 174 N. C., 39, seems to be directly in point. It cites *Wright v. Thompson*, 171 N. C., 88, and *Rogerson v. Hontz*, 174 N. C., 27, where the Court held, as stated in the syllabus of the case, that the rule relieving an employer from liability for a personal injury caused by a defective implement of an ordinary kind to be used in an ordinary way, furnished by him to his employee for the work required of him, has no application when he knew, or should have known, of the defects by reasonable inspection, and that its use threatened substantial injury; and where an employer furnished an inexperienced employee a defective cant hook, under his protest, to unload heavy logs from a flat car, and the employee was injured shortly thereafter by reason of the breaking of the implement which he had been instructed to use, a judgment of nonsuit is improperly granted, and the issue of defendant's actionable negligence is for the determination of the jury.

In *Rogerson v. Hontz, supra,* known as the *"Cant hook case,"* the hook was insufficient, in size and strength, for rolling the heavy logs. It is well settled that the master is required to furnish tools, machinery, and implements suitable for the work to be done, and to provide a reasonably safe place and proper rules and methods for doing it.

There was evidence that defendant failed to perform the duty he owed to the plaintiff, apart from that in respect to the defect in one of the links, which was specified by the defendant's counsel as insufficient to charge him with negligence.

No error.

W. C. RECTOR, ADMINISTRATOR OF L. I. JENNINGS, v. W. W. LYDA, ADMINISTRATOR OF J. MANLY LYDA.

(Filed 8 December, 1920.)

Contracts—Debtor and Creditor—Mortgages—Purchaser—Assumption of Debt—Actions—Parties.

Under the present equitable doctrine, the mortgagee may directly sue the grantee of the mortgagor owing the debt, who has assumed the debt for a consideration, without joining the mortgagor in the action, or first foreclosing the mortgage and applying the proceeds of the sale to the debt, upon the principle that one for whose benefit a promise has been made to another upon a consideration may maintain an action upon the promise, though not a party or privy to the contract.

APPEAL by plaintiff from *Long, J.,* at May Term, 1920, of HENDERSON.

On 24 March, 1915, J. Hudson Williams executed his note and mortgage securing the sum of $2,000 to L. I. Jennings, and afterwards conveyed the land described in the mortgage to J. Manly Lyda, the latter agreeing to assume and pay, as part of the consideration of the deed to him by Williams, the mortgage debt due by Williams to Jennings, both Jennings and Lyda having since died, and being represented in this action by their administrators.

The jury having by their verdict found that the defendant, W. W. Lyda, administrator of J. Manly Lyda, is indebted to the plaintiff, W. C. Rector, administrator of L. I. Jennings, upon the note, in the sum of $2,000, the principal thereof, with interest, judgment was entered for that amount, but the court directed therein that no execution should issue until the mortgage should be foreclosed, and the amount of the deficiency ascertained for which execution should issue. Plaintiff excepted and appealed.

Staton & Rector and G. H. Valentine for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: The learned judge followed the former rule in equity, but later decisions in this, and many other courts, have held that the plaintiff mortgagee is entitled to judgment and execution against the purchaser from the mortgagor, who has assumed the payment of the mortgage debt, without any such condition. The authorities thus state the old and the new rule. The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt, he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety; and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, and this by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation, though his right is strictly an equitable one, and its exercise at law has been refused. But the broad doctrine has since been laid down, that one for whose benefit a promise is made to another may maintain an action upon the promise, though he was not a party to the agreement or privy to the consideration thereof; and it was then held in unqualified terms that whoever has for a valuable consideration assumed and agreed to pay another's debt may be sued directly by the creditor, and that a mortgagee or other incumbrancer may maintain a personal action against a purchaser from the owner of the equity of redemption who has agreed with his grantor to assume and pay off the incumbrance, if the party with whom the agreement was made was himself personally liable upon the mortgage debt. Sheldon on Subrogation (2 ed.), pp. 128-129, sec. 85. We have in recent cases held that where a contract between two parties is made for the benefit of a third, the latter may sue thereon and recover although not strictly a privy to the contract. *Mason v. Wilson,* 84 N. C., 51; *Stanley v. Hendricks,* 35 N. C., 86; *Draughan v. Bunting,* 31 N. C., at p. 13; *Threadgill v. McLendon,* 76 N. C., 24; *Voorhees v. Porter,* 134 N. C., 591, and cases in Anno. Ed., at p. 606; *Morton v. Water Co.,* 169 N. C., 468; *Withers v. Poe,* 167 N. C., 372; *Gorrell v. Water Co.,* 124 N. C., 328; *Crumpler v. Hines,* 174 N. C., 285; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Baber v. Hanie,* 163 N. C., 588.

It was said by *Judge Pearson,* in *Threadgill v. McLendon, supra,* that "the promise is binding and inures directly to the benefit of the creditor, because the promisor has received the consideration, and in justice should be made to perform his undertaking," and the same judge restates the same principle in *Draughan v. Bunting, supra,* where one bought property, and as part of the consideration for the purchase, expressly

promised to pay a debt of the seller, which is our case, and *Voorhees v. Porter, supra,* is also like it. In *Lacy v. Webb,* 130 N. C., 545, it was said: "If the State had been nothing more than the beneficiary of the bonds it could maintain this action, and 'it is not the case either of subrogation or substitution.' The party, in other words, for whose benefit the contract is made, is the real party in interest under the Code, and sues in his own right and not in another's right, to which he is subrogated by any principle of equity, and especially is this true when the money due under the contract is made payable directly to him." The doctrine stated in *Mason v. Wilson, supra,* is that if a person, for a consideration received by him from the debtor, promises to pay the latter's antecedent debt, the creditor for whose benefit the promise was made may recover directly from the promisor the amount he had undertaken to pay. "Although," says the Court in that case, "the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action," and it is added to this passage, in *Voorhees v. Porter, supra,* at margin p. 604, that "it is immaterial, as is further said by the Court, whether the liability of the original debtor is continued or not, the promise being an independent and original one, founded upon a new consideration, and binding upon the promisor." It is also said in *Mason v. Wilson, supra,* that a direct action will lie against the promissor, "when the promise to pay the debt of another arises out of some new and original consideration of benefit, or harm, moving between the principal contracting parties." This question is fully considered in *Voorhees v. Porter, supra.* The case of *Woodcock v. Bostic,* 118 N. C., 822, which asserted the equitable remedy as being the only one, has since been distinguished by the present *Chief Justice,* in *Gastonia v. Engineering Co.,* 131 N. C., at margin p. 369, along with *Morehead v. Wriston,* 73 N. C., 398, and *Peacock v. Williams,* 98 N. C., 324, and upon the ground that it did not appear in those cases that the third party had a right to any benefit under the contract, and, therefore, as to him it was *res inter alios acta.*

The modern or present principle is thus stated by an able text-writer: The doctrine now generally accepted gives him (the mortgagee) the option either to proceed directly against the purchaser on the covenant or to enforce the latter's liability in a suit for foreclosure, and if he chooses the former he may sue the purchaser in an action at law, without the concurrence of the mortgagor; and the same right accrues to the assignee of the mortgage or to any one standing in the place of the mortgagee. 27 Cyc., p. 1351. It follows that J. Manly Lyda, having assumed the obligation, and having promised to pay the debt directly to

L. I. Jennings, the creditor and mortgagee, an action will lie by Jennings' administrator against Lyda's administrator, to recover it, before there is any foreclosure of the mortgage.

We do not see, in this case, how the assignee of Lyda can be prejudiced, for if the administrator pays the mortgage debt, it relieves the land, which is the same described in both the deed and the mortgage.

Plaintiff is entitled to an unconditional judgment, which may be enforced against the administrator of Lyda as the law directs.

The judgment will be accordingly modified.

Modified and affirmed.

BANK OF DAVIE v. J. H. SPRINKLE AND C. G. BAILEY.

(Filed 15 December, 1920.)

1. Principal and Surety—Judgments—Payment—Assignment—Trusts—Trustees—Liens.

A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of statute, in order to preserve the judgment lien and enforce it for his reimbursement, is required on payment to have it assigned to some third person for his benefit, and, in case of collateral security, he is in such instances also entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he is himself bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal.

2. Same—Statutes.

The Laws of 1919, ch. 194, gives the right of a surety against whom, with the principal debtor, a judgment has been obtained, the right, upon paying the judgment, to demand of the judgment creditor that the judgment be transferred to a trustee for his benefit, providing that the lien shall be kept alive for his benefit, and that the judgment debtor so refusing shall not thereafter be entitled to execution.

3. Same—Status Quo.

Under a proper interpretation of the relevant parts of ch. 194, Laws of 1919, it is *Held*, that the refusal of the judgment creditor to transfer the judgment to some third person to preserve the lien thereof for the benefit of surety, tendering payment of the same, means from his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers to, and stands willing to, assign the judgment, as the statute requires.

4. Constitutional Law—Statutes—Judgments.

Where a statute is susceptible of more than one construction, that which will reconcile it to the organic law will be adopted; and, *Semble*, in this case a different construction put upon ch. 194, Laws of 1919, than that the judgment creditor will not lose the right to execution thereunder, if after

refusing to make the assignment of the judgment he is afterwards willing to comply, and offers to do so when the status of the parties remain unchanged, is contrary to the construction guaranteeing protection to the rights of existing judgment creditors.

5. Same—Remedy—Adequate Relief—Statutes.

While a judgment is a feature of the remdy sought in an action, and is to some extent subject to legislative regulation, the rights accruing thereunder cannot be entirely withdrawn or so impaired or interfered with as to leave the owner without adequate relief, as in this case, to destroy the issuing of an execution before the status of the parties is changed, or their rights changed or lost. Ch. 194, Laws of 1919.

MOTION to recall an execution issuing from the Superior Court of DAVIE, heard on appeal from the clerk of said county before *Shaw, J.*, holding the courts of the Fifteenth District, and by consent of parties, at Statesville, N. C., on 31 March, 1920.

From the affidavits and admissions in the cause, it appeared that at August Term, 1919, of said court, plaintiff bank recovered judgment against defendants for the sum of $4,000, and interest, subject to two small credits: (1) On a note or bond in which J. H. Sprinkle was principal and C. G. Bailey surety. That in September, 1919, the surety, C. G. Bailey, through his attorney, A. T. Grant, Jr., tendered to the president and cashier of said bank the full amount due the principal, and interest on said judgment, and demanded that the plaintiff bank, through its proper officers, assign said judgment to B. R. Bailey as trustee for the use and benefit of said surety. That the bank officials at that time declined so to assign said judgment, insisting that on said payment satisfaction of the judgment be entered. That in making said tender nothing was said about the existence of a recent act of the Legislature of 1919, chapter 194, bearing on the question and requiring such a transfer, and plaintiff bank officers were not aware of such statute, the acts of the General Assembly not having been generally circulated in the county at the time of the transaction. That the refusal to transfer was made for the reason that the bank did not desire to be involved in litigation that was probable between the principal and surety, but shortly thereafter, and before learning of the statute, and again at the hearing before the clerk, the bank, through its proper officials, offered to make the transfer as requested. And this offer was made before any change in the conditions or status of the parties which affected the lien of said judgment or in any way impaired its value as a security. That defendant Sprinkle, after the first refusal, having declined to pay or tender further, plaintiff caused the execution in question to issue on said judgment, whereupon said defendant instituted the present proceedings to obtain its recall.

The court reversed the action of the clerk recalling said execution, and entered judgment that plaintiff is entitled to process collecting amount of the judgment as provided by law. Defendant Sprinkle excepted and appealed.

E. L. Gaither and Holton & Holton for plaintiff.
Manly, Hendren & Womble and A. T. Grant, Jr., for defendant.

HOKE, J. The decisions of this State are to the effect that a surety defendant in a judgment with the principal, in order to preserve the liens and enforce the same for his reimbursement, on payment of the judgment must have it assigned to some third person for his benefit. As to collateral paper held by the creditor, the surety, on payment of the principal debt, is ordinarily entitled to the full equitable doctrine of subrogation, but if he pays the principal debt on which he is himself bound, whether by judgment bond or other, without the assignment as suggested, the original obligation is extinguished and he becomes the simple contract creditor of the principal. In many of the States it is held otherwise, the surety, on payment, becoming entitled to the full right of subrogation, arising to him by the mere act of payment. In others it has been so provided by statute. In this State, however, the only statute of the kind heretofore existent is one providing that "when a surety or his representative pays the debt of his deceased principal, the claim thus occurring shall have the same priority in the administration of the assets of the principal as had the debt before its payment," and with this exception our cases on the subject hold, as stated, that a surety who pays the principal debt on which he is himself bound without procuring an assignment to a trustee for his benefit, thereby satisfies the original obligation, and can sue only as a creditor by simple contract. *Liverman v. Cahoon,* 156 N. C., 187; *Tripp v. Harris,* 154 N. C., 296; *Liles v. Rogers,* 113 N. C., 200; *Hanner v. Douglass,* 57 N. C., 265.

This being the position as it prevailed with us, the Legislature of 1919, desiring to give to sureties, and others secondarily or only in part liable on a judgment debt, a fuller benefit of the wholesome doctrine of subrogation, enacted a statute on the subject, Laws of 1919, ch. 194, in which it was provided in effect that where persons are jointly or severally liable on a judgment, and the same has been paid otherwise than by each one paying his proportionate part, the one so paying the judgment may demand of the judgment creditor that he transfer the judgment to a trustee for the benefit of the payor, and it shall be the duty of the creditor to make such transfer, and the lien of the judgment shall be thereby preserved, etc., for the benefit of the judgment debtor paying the same, and the judgment kept alive as against any of the judgment debtors who have not paid his proportionate part, etc. The statute, in section 1,

further provides that wherever one of the judgment debtors is insolvent, or nonresident, making a new or further adjustment necessary, this may be presented by petition, and the matter heard and determined by a jury on issues submitted in the original or pending action in which the judgment shall have been entered. A second section provides that any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of the judgment creditor who shall tender payment and demand in writing that a transfer be made to a trustee to preserve his rights in the same action, shall not thereafter be entitled to execution against the judgment debtor tendering payment, etc. Considering this section in connection with the first, and the purview and general purpose of the entire statute, and in reference also to the express statement in section 2 that the purpose of the transfer is to preserve the rights of the debtor in the action we are of opinion that "the refusal to transfer" appearing in this section clearly means a final refusal or one definite and persisted in till some pecuniary rights of the surety as affected by the judgment shall have been impaired, or he has been compelled to institute suit to conserve and enforce his status and right under the judgment as contemplated and provided by the statute. This is not only the permissible and natural interpretation of the terms of the law, but there is doubt if a more stringent construction would not offend against the constitutional guarantees protecting the rights of an existent judgment creditor; and it is the recognized principle that where a statute is susceptible of more than one construction, that will be adopted which will reconcile the same with the organic law. While a judgment, being a feature of the remedy, is to some extent subject to legislative regulation, it is also well understood that the usual remedies cannot be entirely withdrawn, or so impaired or interfered with that the owner is left without adequate relief. *Edwards v. Kearzey,* 96 U. S., 595; *Bost v. Cabarrus,* 152 N. C., 531; *Mottu v. Davis,* 151 N. C., 237.

In accord with this view, the facts showing that the judgment creditor, being in ignorance of the provision of the statute, and in the exercise of his rights as he then understood them, and as they had before existed, at first declined to transfer the judgment, but shortly thereafter, before any lien had been lost, or the rights of the surety as affected by the judgment in any way impaired, offered to make the transfer, and renewed the offer at the hearing, we think his Honor correctly ruled that the creditor was not finally deprived of his remedy, and entered judgment that execution issue. And under the statute as we have construed it, we are of opinion further, and so hold, that the surety, on payment, is still entitled to the transfer of the judgment as contemplated and provided by the laws.

Affirmed.

THOMAS BURLESON v. EMILY STEWART.

(Filed 15 December, 1920.)

1. Divorce—Marriage—Annulment of Marriage—Husband and Wife—Deeds and Conveyances—Living Husband.

After a conveyance reserving an estate for life in the grantors, supposedly husband and wife, it was ascertained and decreed in a former action that at the time of the marriage the wife had a living husband, and this second contract of marriage was afterwards annulled by decree. The plaintiff was the owner of the land, and the defendant joined in his deed as his wife, and as such only was intended by the reservation of the life estate, construing the deed as a whole in the light of surrounding circumstances: *Held*, there being no one to take her estate, the title thereto remained solely in her husband.

2. Deeds and Conveyances—Reformation—Marriage—Annulment of Marriage—Mistake—Fraud—Divorce—Equity.

Where a marriage has been annulled because the wife had a living husband at the time, and the husband has made a conveyance of his own land, reserving a life estate for himself and the woman as his wife, equity will reform the deed so as to exclude the wife, either upon the ground of mistake of the husband, or for the fraud of the wife in going through the marriage ceremony knowing she then had a living husband, and the plaintiff will recover the land in his suit against her.

APPEAL by plaintiff from *Harding, J.*, at the April Term, 1920, of MITCHELL.

This is an action to recover the possession of land, and to determine the rights of the plaintiff and the defendant therein.

Prior to 4 January, 1915, the plaintiff, T. C. Burleson, was the owner of the land, and on that day he and the defendant executed a deed to George W. Burleson and three others, in which the grantors are described as T. C. Burleson and wife, Emily L. Burleson, and reserving to the said T. C. Burleson and wife, Emily L. Burleson, an estate for life therein.

In 1916 the plaintiff, T. C. Burleson, brought an action against the defendant for the annulment of their marriage, alleging that the defendant had a living husband at the time she married him, and in said action it was so found, and a decree was entered annuling the marriage.

Upon these facts his Honor held that the plaintiff and defendant were tenants in common for life in the land in controversy, and as the defendant was in possession thereof, that the plaintiff be let into possession with her, and the plaintiff excepted and appealed.

Hudgins & Watson and Charles E. Greene for plaintiff.
McBee & Berry for defendant.

ALLEN, J. This controversy between the plaintiff and the defendant does not affect the title of the grantors in the deed, who are the owners in fee of the remainder interest in the land as tenants in common.

The only question is as to the right of the defendant to a life estate, which depends upon a construction of the deed in the light of the surrounding circumstances, and, "Under the modern rule of construction, little importance is attached to the position of the different clauses in a deed, and the courts look at the whole instrument, without reference to formal divisions, in order to ascertain the intention of the parties." *Thomas v. Bunch,* 158 N. C., 178.

Under the authority of *In re Dixon,* 156 N. C., 26, approved in *Thomas v. Bunch,* 158 N. C., 179; *Baggett v. Jackson,* 160 N. C., 31, and *Beacom v. Amos,* 161 N. C., 366, the reservation in the deed would undoubtedly have given to the defendant a life estate if she had been the wife of the plaintiff, but we must look at the whole deed and give effect to the intent of the parties.

The plaintiff was the owner of the land and the defendant joined in the deed as his wife, and it is clear that the reservation in the deed was not to the defendant, but to the wife of the plaintiff, and as her marriage with the plaintiff was void, she having at that time a living husband, there was no one to take the benefit of the reservation to her according to the intent of the owner of the land, and it would therefore be void.

Again, the deed was executed either by the mutual mistake of both parties, if both believed the former husband to be dead, or by the mistake of the husband, the plaintiff, and the fraud of the wife, if she married the plaintiff knowing that her former husband was living, and in either event the court of equity would reform the deed and restore the plaintiff to his rights as owner of the land.

We are therefore of opinion that the defendant has no rights in the land in controversy, and that the plaintiff is entitled to recover possession thereof.

Reversed.

DIXON & WRIGHT v. CARSON HORNE, OWNER, C. L. PRICE, CONTRACTOR, AND WILSON LUMBER COMPANY.

(Filed 15 December, 1920.)

1. Principal and Surety—Indemnity—Bonds—Beneficiaries—Actions.

It is not required that the beneficiaries of indemnity contract should be named therein to recover thereon, when such is provided for in the bond by express stipulation, or by fair and reasonable intendment, construing together the bond and the contract it is intended to secure.

2. Same—Mechanic's Liens—Material Men—Laborers—Contracts.

A bond against liability on a contract given for the erection of a house given to the owner, is for the faithful performance of the contractor's contract, and that he will satisfy and save the owner harmless against costs and damage by reason of his failure so to do; and the contract, among other things, stipulates that the contractor shall furnish labor, material, etc., at a named price, and give bond for the faithful performance of the contract: *Held*, it included the laborers on and furnishers of material used in the house, and they, though not parties to the contract, may recover against the surety on the bond to the extent of their lawful claims.

CIVIL ACTION to recover balance alleged to be due plaintiffs for material and labor, heard before *Long, J.*, on facts agreed upon, at Fall Term, 1920, of HENDERSON.

From these facts it appeared that defendant, C. L. Price, contracted and agreed to build a house for Carson Horne, furnishing labor, materials, etc., therefor at a stipulated price, and gave bond for faithful performance of the contract, with defendant lumber company, etc., as surety, said bond containing, among other things, the following stipulation: "Now, therefore, the condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for same, and fully indemnify and save harmless the owner from all costs and damages which she may suffer by reason of failure so to do, etc., . . . then this obligation shall be void." That plaintiffs, under the contract, supplied a quantity of material used in said building, and did a considerable amount of work, stone work and other, the balance due plaintiffs being $705.40. That the pro rata amount in the hands of the owner applicable to plaintiff's claim, after notice given, etc., is $249.82, for which judgment is tendered, leaving ultimate balance due plaintiff $455.58. Upon these, the facts chiefly pertinent, there was judgment against the owner for the $249.82, and against the contractor and surety for the remainder. Defendant, the surety company, excepted and appealed.

J. F. Justice for plaintiff.
McD. Ray and A. V. F. Blythe for defendant.

HOKE, J. It has been repeatedly held in the State that the beneficiaries of an indemnity contract ordinarily can recover though not named therein, "when it appears by express stipulation or by fair and reasonable intendment that their rights and interests were being provided for." *Supply Co. v. Lumber Co.*, 160 N. C., 428; *Withers v. Poe*, 167 N. C., 372; *Voorhees v. Porter*, 134 N. C., 591; *Town of Gastonia v. Engineering Co.*, 131 N. C., 363, and *Gorrell v. Water Co.*, 124 N. C.,

328. And so stated the principle has been fully approved in the more recent cases of *Lumber Co. v. Johnson,* 177 N. C., 44-47; *Crumpler v. Hines,* 174 N. C., 283; *McCausland v. Construction Co.,* 172 N. C., 708-711. Speaking more minutely to some of the cases, and the question directly decided therein it is said in *McCausland v. Construction Co., supra:* "In case of building contracts with bonds guaranteeing the performance on the part of the contractor, it is held that in determining the question of the sureties' liability to third persons, the contract and bond shall be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285, and recoveries on the part of claimants of that character, usually laborers and material men, not expressly named, are sustained where it appears that the guarantee bond, in express terms, provides for liability to such persons, as in *Morton v. Water Co., supra; Gorrell v. Water Co., supra,* or when there is stipulation that claims of this kind shall be paid by the contractor, the case presented in *Supply Co. v. Lumber Co., supra,* and *Gastonia v. Engineering Co.,* an application of the principle approved by many authoritative decisions elsewhere. *Knight & Jillson Co. v. Arthur Castle,* 172 Ind., 97; reported also in 42 L. R. A., U. S., 573, with note by the editor. *Ocho v. Carnahan Co.,* 42 Ind. App., 157; *Brown v. Markland,* 22 Ind. App., 652; *Jordan v. Kavanaugh,* 63 Iowa, 152, and cases cited in note to *Cleveland Roofing Co. v. Gaspard,* Anno. Cases, 1916 A, 39 vol., pp. 745-758, or where the language of the instrument is sufficiently ambiguous to permit of construction, and the terms of the obligation and the attendant facts and circumstances, relevant and permissible in their proper interpretation, show by fair and reasonable intendment that claimants of that character are to be provided for; an instance presented in *Shoaf v. Ins. Co.,* 127 N. C., 308, and the cases of *Voorhees v. Porter* and *Withers v. Poe* may be referred in part to same position."

The instant case is well nigh exactly similar to that of *Supply Co. v. Lumber Co., supra,* and considering the present contract and bond in view of these authorities, and the principles they approve and illustrate, we are of opinion that they clearly extend to the claim of plaintiff, and that liability therefor has been properly adjudged against the surety.

In *McCausland's* case the surety was relieved, but that was because the bond in that case, as affected by the contract and other circumstances pertinent to its true construction, appeared to be one in strictness of indemnity toward the owner, and in which the interests of third persons, materialmen, or others, were in no way contemplated or provided for.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

PATRICK-MOSTELLER COMPANY v. JAMES R. BAKER & COMPANY, WAKEFIELD COMPANY, J. L. SMILEY & COMPANY, THE ALASKA PACIFIC HERRING COMPANY, AND BANK OF CALIFORNIA.

(Filed 15 December, 1920.)

1. Courts—Appearance—Jurisdiction—Motions.

Where a nonresident defendant enters a special appearance and denies the jurisdiction of the court, it is the court's first duty to ascertain its own jurisdiction to try and determine the case.

2. Same—Attachment—Intervenor—Ownership— Issues— Proceedings in Rem—Nonresidents.

Where proceedings in attachment are brought in an action for damages for breach of contract, and the funds attached are in a local bank, collected upon a draft sent to it by and drawn to the order of a foreign bank, it is the duty of the foreign bank, and other claimants to the fund, to intervene and assert their rights so that the issue as to ownership may be determined, otherwise this being of the nature of a proceeding *in rem*, the court would acquire jurisdiction to the extent only of the property attached, and a personal judgment against the nonresident defendant may not be properly rendered.

3. Same—Parties.

Where the proceeds of the collection of a draft payable to the order of a foreign bank has been attached in a local bank by the plaintiff as the funds of the nonresident bank, in an action for damages for breach of contract, and the issue of ownership has not been determined, and the defendant, the defaulting party to the contract, enters a special appearance and moves to dismiss for the want of jurisdiction of the court, on the ground alone that the proceeds of the draft were owned by and payable to the foreign bank, not connected with the contract, for the breach of which the plaintiff claims damages: *Held*, it was unnecessary that the foreign bank, which was not connected with the contract or its breach, should be made a party, and service by publication having been made, and the court having jurisdiction over the subject-matter by the proceedings, *quasi in rem*, the defendant's motion to dismiss, for want of the court's jurisdiction, was properly denied.

4. Attachment—Funds—Ownership—Intervenors.

It is erroneous for the trial judge to vacate an attachment regularly issued and levied on the funds in a resident bank claimed by the plaintiff to belong to its nonresident debtor, but paid upon a draft drawn to the order of a foreign bank, without having determined the issue as to the ownership of the funds attached, if the question had been properly raised by the interpleading of the foreign bank.

5. Same—Nonresidents—Bonds—Action.

The court, under the facts in this case, having vacated an attachment on the funds in a local bank derived from the payment of a draft made payable to the order of a foreign bank, all being parties to the action, wherein attachment was levied on the funds alleged to have belonged to the other defendant in an action for breach of contract, without the

determination of the issue as to ownership of the funds, and having directed that the funds be paid to the foreign bank upon its giving bond: *Held*, should the issue arise, and be determined in the plaintiff's favor, and the funds paid as allowed by the judgment, the plaintiff has a right of action on the bond required to be given by the resident bank in lieu of the funds held by it, which were released.

6. Courts — Jurisdiction — Special Appearance — General Appearance — Pleadings—Waiver.

Where, after entering a special appearance and pleading to the jurisdiction of the court, a nonresident defendant files an answer to the merits, the filing of the answer is equivalent to a general appearance, and the court may proceed to hear and determine the matter as if the said defendant had been personally served with process.

APPEAL by both parties from *Harding, J.*, at May Term, 1920, of CATAWBA.

This suit was brought to recover damages for the breach of a contract, whereby the defendants agreed to sell and deliver to the plaintiff one thousand cases of No. 1 Standard Alaska Pink Salmon, 1919 pack, 48 cans to the case, at the price of $1.50 per dozen cans, one and a half per cent off if paid for within ten days from date of shipment. Defendants delivered only 310 cases of the salmon, leaving 690 cases undelivered because of the rise in the market price from $1.50 to $2.25 per dozen cans, as plaintiff alleges. The difference in the market price, at the time of the breach, was $3 per case, making the total sum due plaintiff for the breach $2,070. The plaintiff made the Bank of California a party defendant, and asks judgment against it and the other defendants. A warrant of attachment was issued, the defendants all being nonresidents, and was levied on funds in the hands of the Bank of Hickory, they being the proceeds of a draft for $4,205, of Wakefield & Company, drawn to the order of the Bank of California, for value received, on the plaintiff, to which draft was originally attached a bill of lading for the goods shipped by defendants, except the Bank of California. This draft was sent by the latter bank to the Bank of Hickory, N. C., for collection, and was paid by plaintiffs at that bank, and the bill of lading taken up, the proceeds of the collection being the property attached.

Defendants moved to dismiss the action, because the defendants were nonresidents, and there was no personal service, but only publication for them; that the Bank of California was in no way connected with the contract sued on, and that the money in the hands of the local bank belonged to said Bank of California, and its attachment did not give the court jurisdiction. The court did not pass upon defendants' motion to dismiss, under their special appearance, until the evidence was closed, but in the meantime defendants had filed an answer, and the case proceeded to trial upon the issues submitted, which, with the answers thereto, are as follows:

"1. Did the plaintiff enter into the contract with the defendant as alleged? Answer: 'Yes (as to James R. Baker & Company and Wakefield & Company.')

"2. Did the defendant breach the said contract? Answer: 'Yes (as to James R. Baker & Company and Wakefield & Company.')

"3. What damages, if any, is the plaintiff entitled to recover? Answer: '$2,070'."

The court then signed the following judgment:

"This cause coming on to be heard, and being heard before his Honor, W. F. Harding, judge, and a jury, at the May Term, 1920, of Catawba Superior Court, and at the close of plaintiff's evidence, the defendants move for judgment as of nonsuit, and the court being of the opinion that the plaintiff has failed to make out his case against the defendants, J. L. Smiley & Company, Alaska Herring and Sardine Company, and the Bank of California. It is on motion of Councill & Yount, attorneys for defendants, J. L. Smiley & Company, Alaska Herring and Sardine Company, and the Bank of California, ordered that as to these defendants the action be dismissed, and that they recover of the plaintiff the cost of this action, to be taxed by the clerk of this court, and it is further ordered that the attachment issued in this cause be dissolved, and the money attached in the Bank of Hickory be turned over to the Bank of California, N. A., or to Councill & Yount, as attorneys for said Bank of California, the same being the amount of the proceeds of the draft on Wakefield & Company still remaining in said bank. It is further ordered that the Bank of California enter into a bond in the sum of $2,300, to be approved by the clerk of this court, and upon giving such bond, that the funds in the Bank of Hickory be turned over to the said Bank of California, and the cost of the bond to be taxed in said bill of cost."

The court then gave a separate judgment upon the verdict against defendants, Baker & Company, and Wakefield & Company, for $2,070, and costs. Both parties appealed.

Thomas P. Pruitt, E. B. Cline, and W. A. Self for plaintiffs.
Councill & Yount for defendants.

WALKER, J., after stating the case: It will be impossible to decide this case upon its true merits, at this time, because it has been tried with slight regard to correct procedure, and the court has been misled into giving judgment without ascertaining all of the pertinent facts.

When the plaintiff brought this action and caused an attachment to be issued and levied on the funds in the Bank of Hickory, because, as he alleged, they belonged to the defendant Wakefield & Company, who

drew the draft payable to the order of the Bank of California, it became the first duty of the court to ascertain its own jurisdiction to try and determine the case, as it was admitted that the defendants were nonresidents, and the defendants denied, under a special appearance, that such jurisdiction existed. Again (when the funds in the Bank of Hickory were attached, it was required of any one claiming those funds, as does the Bank of California in this case, to intervene and assert its claim, setting forth the facts upon which it based its right to them in its affidavit or petition for intervention, which could be answered by the plaintiff, and thus the facts could be found, and the court could determine as to the ownership of the funds. If there is no intervention and claim of the funds by a third party, or if there is such, and the question of ownership is finally decided in favor of the plaintiff and against the claim of such third party, the court would acquire jurisdiction to the extent of the property attached, but not beyond this, so that a personal judgment could not be rendered against the defendant for any sum in excess of the amount the property brings at a sale thereof by the sheriff under the attachment and the judgment, or order, of the court. The property represents and defines the jurisdiction of the court, and the extent thereof. *Winfree v. Bagley,* 102 N. C., 515; *Cooper v. Reynolds,* 10 Wallace (U. S.), 308 (19 L. Ed., 931); *Pennoyer v. Neff,* 95 U. S., 714 (24 L. Ed., 565). In the case last cited, the Court held that except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, the substituted service of process by publication, allowed by the law of Oregon, and by similar laws in other States where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem.* There is in that case a clear and concise statement of the purpose and nature of attachment proceedings, and their effect upon the jurisdiction of the particular court wherein they are pending, by *Justice Miller,* which was quoted from *Cooper v. Reynolds, supra,* in which the opinion of the Court was delivered by *Justice Field.* In *Winfree v. Bagley, supra,* this Court adopts the law as declared in those two cases, and quotes from *Pennoyer v. Neff, supra,* as follows: "The substituted service of process by publication allowed by the laws of Oregon (which is the same as in North Carolina), and by similar laws in other States, where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the State is

brought under the conctrol of the court, and subject to its disposition by process adapted for that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein. See, also, *Evans v. Alridge,* 133 N. C., 378. The same doctrine was thus stated, in accordance with the above cited cases, in *Goodwin v. Claytor,* 137 N. C., at p. 230: "The judgment against the garnishee seems to be expressly warranted and contemplated by the statute (The Code, sec. 364), and that against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him except in so far as it could by its process levy upon or seize his property, and in this respect the suit is to all intents and purposes in the nature of a proceeding *in rem* and not one *in personam,*" citing *Cooper v. Reynolds, supra; Pennoyer v. Neff, supra; Winfree v. Bagley, supra; Fisher v. Ins. Co.,* 136 N. C., 217; *Ins. Co. v. Stratley,* 172 U. S., 602. See, also, *Lemly v. Ellis,* 143 N. C., 200, a case having some features in common with this one.

But we conclude that the plaintiff's judgment in the case is valid, as to Wakefield & Company, and Baker & Company, and enforceable against them as a personal one, because the ground of the said defendants' motion to dismiss is that "jurisdiction was obtained by the attachment of the proceeds of a draft payable to the Bank of California, N. A., which was in no way connected with the contract, for the breach of which the plaintiff claimed damages." It did not have to be connected with the contract or its breach. The only question was whether the property, or funds, attached belonged to that bank or to the defendants against whom the judgment was rendered, and an issue as to the true ownership of this property was neither raised by proper pleading or procedure of the bank, nor was any such issue tendered by it. The bank could have intervened in the attachment proceedings and set up its title to the funds, and have had its ownership of them determined. *Wallace Bros. v. Robeson,* 100 N. C., 206; *Blair v. Puryear,* 87 N. C., 101. But the Bank of California did not formally proceed, and no trial was had with reference to its ownership. The court dismissed the action as to the defendants J. L. Smiley & Company, Alaska Herring & Sardine Company, and the Bank of California. This was right, as the bank was not a proper party to the principal action, having no connection with the contract sued on, or its breach, and the jury found in favor of the other two defendants. The court further dissolved the attachment and ordered the funds in the Hickory Bank, which had been attached, to be turned over to the Bank of California, upon its giving bond, to be approved by the clerk of the court, in the sum of $2,300. Plaintiff excepted to this judgment and appealed. We do not know why the court vacated the attachment, as it was regularly issued. If it

did so, because it supposed that the Bank of California was the owner of the funds which had been attached, and not because of any irregularity, or defect, in issuing the attachment, it was error, because there had been no trial or hearing as to the bank's title to the funds, and the order vacating the attachment was erroneous.

The ruling of the court vacating the attachment is reversed, but it is directed that the California Bank be allowed to file an affidavit, or petition, for intervention to try its said title, the plaintiff being allowed to answer, and then, that further proceedings be had in that matter according to the course and practice of the Court. The Bank of California may raise any other question touching the validity of the attachment. As Wakefield & Company and James R. Baker & Company answered, and the issues raised thereby were tried to a verdict, which was in favor of plaintiff, the judgment upon said verdict is affirmed, and plaintiff may enforce his judgment, as he may be advised, except that no part of the funds in the possession of the Bank of Hickory shall be applied thereto, or to any execution issued thereon, until the question as to the ownership of that fund, and the validity of the attachment, is finally determined, as hereinbefore indicated. If it is found that these funds, for any reason, belong to the Bank of California, or that it is entitled to have the same turned over to it, they will be paid or delivered to it, but if found not to belong to that bank, or that it is not entitled to the same, and that the defendants named in the final judgment, at last May term, to wit: Wakefield & Company, and Baker & Company, are the owners thereof, or are entitled to the fund, the plaintiff may proceed and have the funds in the Hickory Bank applied in payment of its judgment, or, if the funds have been delivered or paid to the Bank of California, it may have judgment upon the bond filed in lieu thereof by that bank, upon reasonable notice to the parties thereto, and if, after exhausting the fund or the bond, its judgment is not fully paid, it may have execution for the balance, or proceed to collect the same as the law allows. The final judgment of May term against Wakefield & Company, and Baker & Company, is held to be valid against them, upon the ground that their action in the case and their answer were equivalent to a general appearance, and besides their motion to dismiss upon the special appearance was properly denied, because the ground of the motion, as stated therein, was, and is, insufficient for vacating the attachment, but is sufficient ground for the nonsuit as to the Bank of California, it having been no party to the contract, and not implicated in its breach.

One-half of the costs of this Court, in plaintiffs' appeal, against plaintiff, and the other half against the Bank of California; and in the defendants' appeal, costs of the Court against them.

Plaintiffs' appeal, error.

Defendants' appeal, modified and affirmed.

BESSIE E. S. FLACK v. H. M. FLACK ET AL.

(Filed 15 December, 1920.)

1. Courts—Contempt—Judgments—Orders—Divorce—Marriage.

Where the court of record, having jurisdiction of the cause and the parties, enters judgment for an absolute divorce in the wife's favor, in her action, and awards the children of the marriage to her care and custody, it may adjudge the defendant in contempt, or as for contempt of court, in the exercise of its legal and equitable powers, for concealing one of the children so as to prevent the sheriff from carrying into effect the order of the court, rendered at a subsequent term, to deliver the child to the plaintiff, and commit the offender to jail until he shall desist therefrom, and give to the sheriff the information found to be within his knowledge or command, that would enable him to carry out the order of the court under the execution.

2. Appeal and Error—Divorce—Courts—Contempt—Judgments—Orders—Evidence.

Where there is no exception to the form of an order of court adjudging the defendant in contempt, or as for contempt in resisting a judgment, in an action wherein an absolute divorce has been granted the wife with the award to her of the children of the marriage, nor to the sufficiency of the findings to sustain the judgment, the action of the trial judge will not be disturbed on appeal when there is any evidence to support it.

PROCEEDINGS for contempt, or as for contempt, heard before *Harding, J.*, holding the courts of Eighteenth Judicial District, at the courthouse at Hendersonville, N. C., 6 August, 1920, the charge being that H. M. Flack, defendant, Sallie Flack, his mother, etc., in disobedience of the decrees and orders of the court made in the cause awarding the minor children of the marriage to plaintiff was willfully disobeying and obstructing and hindering the due execution of said orders and decrees in reference to Frank Flack, minor, etc., and so guilty of contempt of court, etc. On the hearing the court, on full finding of the facts, adjudged that said H. M. Flack was guilty as charged, and that he be imprisoned till compliance with the orders be shown, etc. From this judgment defendant appealed.

Smith, Shipman & Arledge for plaintiff.
McD. Ray and W. C. Rector for defendant.

HOKE, J. From the findings of fact it appears that heretofore, at June Special Term, 1920, in action duly instituted and tried in the Superior Court of Henderson County, before his Honor, B. F. Long, judge, and a jury, plaintiff was granted an absolute divorce from defendant, and the care and custody of the children of the marriage, to wit, Margaret

E. Flack and Frank Flack were awarded to plaintiff, the mother—Margaret E., being already in care and control of the mother, the order as to Frank Flack, then in care of defendant, was made and embodied in the court's decree in terms as follows: "And it is further ordered and decreed that the sheriff of Henderson be and he is hereby directed to place said Frank Flack in the custody of said Bessie E. Flack, plaintiff, and the said defendant, H. M. Flack deliver the custody of the said Frank Flack to the said Bessie E. Flack, together with the wearing apparel," etc.

(Signed) B. F. LONG, *Judge.*

That on execution duly issued from the Superior Court of Henderson County containing a copy of said decree and order placed in his hands, the sheriff of Henderson County had made diligent effort to carry out the orders and decrees of the court in reference to said Frank Flack, and had been unable to carry out or comply with the same by reason of the willful hindrance and interference of said H. M. Flack, defendant, the facts more directly pertinent as to the disobedience and misconduct of said defendant being set forth in the present judgment of his Honor in terms as follows: "That the trial of this case upon its merits was concluded on Saturday of the last week of the June Special Term, 1920; that after the jury had rendered their verdict and delivered to the court the issues set out in the record, and after the judgment had been signed, court adjourned for the term, which was sometime between sunset and dark of that day. That on Saturday morning, when the defendant H. M. Flack, and Sallie Flack left their home several miles in the country from Hendersonville, they left the boy Frank Flack, the infant son of the plaintiff and defendant, at the home of H. M. and Sallie D. Flack, asleep in bed, and came to court; immediately upon the return that day to their home, after court had adjourned and judgment had been signed, the said Frank Flack was taken, by the defendant, H. M. Flack, and his mother, or by some one acting for them and with their knowledge and consent, from the home of H. M. Flack, and they have since that time procured that infant Frank Flack to be concealed for the purpose of preventing the sheriff of Henderson County from finding the said Frank Flack, and from executing the process of the court directing him to take into his custody the said infant child and deliver it to his mother; that the said H. M. Flack and his mother, Sallie, know where the child is, or if at the moment of this hearing they do not know definitely the spot where the child is, they have information upon which they can easily ascertain the location of the child, and deliver him to the sheriff of Henderson County for the purpose of carrying out the orders of the court. That at the time the judgment was signed decreeing the custody of said child to its mother the child was at the home of H. M. Flack, the defend-

ant in this case, and when the sheriff under process of this court demanded of the defendant and his mother the custody of said child, they refused, and now continue to refuse, to deliver the custody of said child, and refused, and now continue to refuse, to give the sheriff any information upon which he may be able to locate said child and deliver it to its mother and carry out the orders and judgment of this court. Said H. M. Flack, by reason of his refusal to deliver the custody of the said child to the sheriff of said county, and by reason of his refusal to give the sheriff information upon which he may be able to carry out the process of the court, is in willful disobedience of the processes and lawful orders issued by this court, and is resisting willfully an order and process of this court."

Upon these facts the court, on the present hearing, adjudged that defendant was in contempt of court and willful disobedience of the decrees and orders in the cause and resistance thereto, and that he be imprisoned till compliance be shown, etc. And we are of opinion that there is no error in the proceedings that gives the defendant any just grounds of complaint. As incident to the trial of the action of divorce, the court, having jurisdiction of the cause and the parties, was fully empowered to make such disposition as to the care and custody of the children as the right and justice of the case might require. And as a court of record, having general jurisdiction of law and equity, and of the cause in which the original judgment was rendered, it had on the present hearing full power to enforce obedience to its orders and decrees by proceedings for contempt, or "as for contempt," a power also recognized and confirmed by our statutes appertaining to the subject. *Cromartie v. Comrs.*, 85 N. C., 215; Rev., 615, 684, 944, subsec. 7.

As we understand the record, there is no exception made to form of the order, nor is it contended that his Honor's findings are insufficient to sustain the judgment rendered, the objection being that these findings are not sustained by the affidavits and evidence submitted at the hearing. On that question our decisions hold that the "action of his Honor will not be reviewed on appeal when there is any evidence to support it." *Lodge v. Gibbs,* 159 N. C., 66, citing *Green v. Green,* 130 N. C., 578; *In re Deaton,* 105 N. C., 59; *Young v. Rollins,* 90 N. C., 125. The same position is approved in *Ex parte, McCown,* 139 N. C., 95. In that aspect of the matter, we have given the record very careful consideration, and are of opinion that the findings of his Honor are amply sustained, and his conclusions and judgment both of law and fact should be

Affirmed.

NORTH CAROLINA ELECTRIC POWER COMPANY v. FRENCH BROAD MANUFACTURING COMPANY.

(Filed 15 December, 1920.)

1. Negligence—Joint Torts—Actions—Judgments—Concurrent Negligence —Third Person—Damages.

Where the joint and concurring negligence of two parties cause an injury to a third, and a recovery has been had of one of them in an action brought against both, the one paying the judgment has no right of action over, and may not recover of the other a proportionate part of the damages.

2. Same—Electricity—Wires—Insulation—Contributory Cause.

Where a company generating electricity has supplied its customers therewith over high voltage and deadly wires, transformed at the customer's plant, to wires of harmless voltage, except for the furnisher's negligence in not insulating its wires; and the user had made the place of danger accessible by elevating a railroad track for its use at its plant with the knowledge of the furnisher, the latter may not recover of the former its proportionate part of the damages paid under a judgment in an action against it alone, formerly brought by the administrator of a deceased eleven-year-old boy whose death it has caused; and a motion as of nonsuit upon evidence of this character should be granted.

CIVIL ACTION, tried before *Long, J.*, at August Term, 1920, of BUNCOMBE, upon these issues:

"1. Did the defendant negligently create a condition about its transformer house which enabled the intestate, William Lanning, to come into contact with plaintiff's wires, as alleged in the complaint? Answer: 'Yes.'

"2. If so, was such negligence of defendant the primary cause of said William Lanning receiving injuries resulting in death, as alleged in the complaint? Answer: 'Yes.'

"3. What damages, if any, is the plaintiff entitled to recover of the defendant on account of moneys paid out in the case of Lanning, administrator, v. The North Carolina Electrical Power Company and the French Broad Manufacturing Company? Answer: '$1,031.60 with interest from 3 July, 1918.'

"4. Was the plaintiff North Carolina Electrical Power Company primarily responsible and liable for the negligent killing of William Lanning, as alleged in the answer of the defendant French Broad Manufacturing Company? Answer: 'No'."

From the judgment rendered defendant appealed.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

BROWN, J. This action was brought by the plaintiff for the purpose of recovering from the defendant the amount which the plaintiff had been compelled to pay out on account of a judgment previously rendered in the Superior Court of Buncombe County, North Carolina, in favor of J. S. Lanning, administrator of William Lanning, against the plaintiff and the defendant, because of the alleged negligent killing of said William Lanning by the negligence of the plaintiff and the defendant.

It appeared in evidence that on 14 May, 1917, William Lanning, a boy about eleven years of age, was killed at a transformer house maintained by the defendant French Broad Manufacturing Company, at its cotton mill near Asheville, by contact with three electric wires maintained by the plaintiff to furnish power to operate defendant's mill. The administrator of William Lanning brought suit against the plaintiff and the defendant, and recovered damages against both for the death of Lanning. Each of the defendants to that case had paid one-half of the judgment rendered.

In the present cause the plaintiff claims that the negligence of the defendant was primarily and solely the cause of the death of William Lanning, and in consequence the plaintiff was entitled to recover the amount it had paid out on account of the verdict and judgment against it above mentioned.

It appeared from the testimony that the defendant maintained a cotton manufacturing plant situated on the east side of the French Broad River, a short distance east of a public highway, following the course of the river. That on the west side of the defendant's mill, and on its premises, was a transformer house built of brick, about 10 feet wide from 10 to 14 feet in height and about 22 feet long; and that the roof of the transformer house on the west side, prior to the building of the fill hereinafter mentioned, was about 10 feet from the ground. That the plaintiff for many years had maintained three high-power electric wires which conducted current into the defendant's transformer house at the north end; that these wires came down from a cross-arm on a pole to another cross-arm, about 18 inches from the transformer house, and were there fastened to the cross-arm; and then extended practically on a level into the transformer house at a point about 14 inches from the top of the roof; that these wires were bare and uninsulated, and were situated about 11 feet from the ground; that some 4 or 5 feet below these wires were low-tension electric wires which came out of the transformer house and were extended into the defendant's mill; that these low-tension wires carried a current which was not dangerous, but the high-tension wires of the plaintiff constantly carried a deadly current.

It further appeared in evidence that several months prior to the death of young Lanning, the defendant began the construction of a railroad

sidetrack along by the west side of its mill, and immediately west of the transformer house. That in building this railroad it was necessary to make a fill along the side of the transformer house, and that this fill had been commenced several hundred feet north of the mill, and built on from time to time, and extended along by the transformer house, and at the time of the death of young Lanning the fill had been raised to a point about 4 or 5 feet from the roof of the transformer house on the west side, and that the plaintiff's high-tension transmission wires were within 5 or 6 feet of the earth after the fill was made. It further appeared that the defendant's officers and agents, and particularly its superintendent, Sam Johnson, knew of the building of this fill, and that there was some evidence that young Lanning had gotten from the top of the transformer house on to the plaintiff's uninsulated wire. There was further evidence to the effect that the high-tension wires were not insulated; that there was no fence or guard of protection of any kind to keep persons from coming in contact with the wire; that the superintendent of the plaintiff knew there was no protection to the wires, and knew of the public highway nearby; that there was a village near the place, and many children in the neighborhood; and that the superintendent and other employees of the plaintiff company frequently passed the defendant's mill. It further appeared in evidence that the plaintiff maintained a steam electric station immediately north of the defendant's mill, about 400 feet distant therefrom, and that standing in the front doorway of the plaintiff's electric power station one could see the fill at the defendant's mill, and see the work going on there.

There was abundant evidence to the effect that plaintiff's wires could have been covered, or some guard or protection put over them so as to render it practically impossible for one to come in contact with them.

The witness Woodcock, an expert, testified that these wires of the plaintiff, conveying 6,600 volts were uninsulated and exposed, and that as they came within 12 or 14 inches of the top of the transformer house, it was usual and ordinary with electric companies to put protection around such wires to guard them, and that it could have been done; that this could have been done without reference to any embankment or anything of that sort. On the trial before his Honor, Judge Stacy, in response to the first issue, the jury found that William Lanning was killed by the negligence of the North Carolina Electrical Power Company; under the second issue the jury found that he was killed by the negligence of the French Broad Manufacturing Company. The damage was assessed at $2,000. In the judgment rendered it is declared that William Lanning was killed by the joint and concurrent negligence of both companies. One-half of the judgment was paid by the plaintiff and the other half by the defendant.

We are of opinion that the motion to nonsuit should have been sustained. We doubt very much whether there is any evidence of negligence upon the part of the defendant, or any breach of duty which it owed to William Lanning. The construction of the railroad track and the embankment was essential to the prosecution of the defendant's business, and there is no evidence that it was done negligently or needlessly, or that it could have been done in any other way. The fact that it made it easier for boys to get on top of the transformer house does not necessarily make it negligence, but we assume that the verdict of the jury was correct and that William Lanning was killed by reason of the negligence of the plaintiff and the defendant. This verdict therefore established the fact, binding upon both parties, that both were guilty of negligence, which concurred in causing Lanning's death. Upon the entire evidence we are of opinion with Judge Stacy in his judgment that such negligence was joint and concurring. This being so, there can be no recovery over upon the part of the plaintiff for the part of the judgment paid out by it. The principle seems to be well settled that "Ordinarily if one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury."

There can be no question that the plaintiff and the defendant owed to William Lanning the duty to protect him as far as it was reasonably possible from danger from coming in contact with those highly charged wires. As the wires belonged to the plaintiff, and it had control of them, it was unquestionably as much its duty, if not more, to guard them and render them harmless as it was the duty of this defendant. Therefore, assuming that they are equally culpable, there can be no recovery upon the part of the plaintiff.

In the case of *Central of Georgia Ry. Co. v. Macon Ry. & Light Co.*, it is well said that: "The negligence of two persons may be truly concurrent, even as among themselves, though the negligence of the one began antecedently to the negligence of the other, and may, in a greater or less degree, have induced it; and in such cases no right of contribution or indemnity exists between the wrongdoers. Where two separate persons owe to a third person the same concurrent duty as to a particular thing, and by reason of the negligent failure of each and both of them to perform that duty the third person is injured, and he sues only one of those who owed him the duty (basing his right of action solely upon the tortious state of affairs brought about by this joint and common neglect of duty), and recovers damages, no action over arises in favor of the person thus subjected to the sole liability against the other person who owed the same duty."

This question is very ably discussed by *Mr. Justice Day* in *Union Stock Yards v. R. R. Co.*, 196 U. S., 217: "A railroad company delivered a car with imperfect brakes to a terminal company; both companies failed to discover the defect, which could have been done by proper inspection; an employee of the terminal company, who was injured as a direct result of the defective brake, sued the terminal company alone and recovered. In an action brought by the terminal company against the railroad company for the amount paid under the judgment: *Held*, that as both companies were wrongdoers, and were guilty of a like neglect of duty in failing to properly inspect the car before putting it in use, the fact that such duty was first required of the railroad company did not bring the case within the exceptional rule which permits one wrongdoer, who has been mulcted in damages, to recover indemnity or contribution from another, on the ground that the latter was primarily responsible."

Taking the finding of the jury, as we must, to be conclusive that William Lanning was killed by the negligence of both plaintiff and defendant, there is nothing in this record which tends to prove that they are not *pari delicto* as to each other, or which takes the case out of the general rule that when two parties, acting together, commit a wrongful act, the party who is held responsible cannot have contribution from the other because both are equally culpable or *particepts criminis* and the damage resulting from their joint wrong.

The principle is laid down and fully discussed by *Holmes, C. J.*, in *Glynn v. R. R.*, 175 Mass., 510. In concluding his opinion in the case of *Union Stock Yards v. R. R., supra, Mr. Justice Day* says: "Both the railroad company and the terminal company failed by proper inspection to discover the defective brake. The terminal company, because of its default, has been held liable to one sustaining an injury thereby."

We do not think the case comes within this exceptional class, which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another. In the case under consideration, the plaintiff and the defendant owed a similar duty to William Lanning, that is, to protect him from injury from these dangerous wires. There doesn't seem to be any reason that there is any difference or degree in such duty. The jury has found that both failed to discharge such duty. We see nothing, therefore, to take the case out of the general rule. This is the principle which seems to be well established by the decisions of this Court. In *Hodgin v. Public Service Co.*, 179 N. C., 449, under the instructions of the Superior Court the jury found the public-service company primarily liable, but this Court set aside the finding and held that upon the facts the injury was caused by the concurring negligence of both defendants, and that there was no primary liability. In *Ridge v. High Point*, 176 N. C., 421, this question is fully considered and the

primary liability of one of the defendants, the furniture company, was denied by *Mr. Justice Walker,* who said: "We cannot see why in any phase of the evidence the defendants (town of High Point and furniture company) were not jointly liable to the plaintiff for the death of her intestate, which was plainly caused by their united and wrongful act."

The same learned judge also considered this question in *Doles v. R. R.,* 160 N. C., 319, and declared, in substance, that where two companies are jointly negligent there is no right of indemnity, and that the law cannot recognize equities as springing from a wrong in favor of one who was concerned in committing it. Where two or more persons have participated in the commission of a wrong the general rule undoubtedly is that a right to contribution will not arise in favor of the one held responsible by the injured party. 38 Cyc., 493; *Churchill v. Holt,* 131 Mass., 67; *Gregg v. Wilmington,* 155 N. C., 24; there is an elaborate discussion of the subject in the case of *Tacoma v. Bonnell,* Anno. Cases 1913 V. p. 934.

A large number of cases are cited, and it is held that where the injury is the result of the concurrent negligence of two persons neither has a remedy over against the other. It is also stated in the body of the decision in *Tacoma v. Bonnell, supra,* that: "The answer in this case shows that the city was guilty of negligence in maintaining its primary and secondary wires in a dangerous condition when they might readily have made them safe so that injury would not result if the wires should come in contact. If the city had not been negligent in this respect, the accident could not have occurred, even though the defendant in this action was negligent in causing the wires to come in contact. The concurring negligence of both parties, therefore, caused the injury. Under the authorities cited the parties were *in pari delicto,* and neither may recover against the other."

See, also, *Robertson v. Trammell,* 83 S. W., 258; *R. R. Co. v. Vance,* 41 S. W., 167; *Sparrow v. Bromage,* 83 Conn., 27; 19 Anno. Cases, 796; *Forsyth v. R. R.,* 87 Pac., 24; *Telephone Co. v. Mansfield Water Co.,* 179 S. W., 389; *Mills v. Boston & Maine R. R.,* 218 Mass., 593; the decision in this last case is very apposite. The Court says: "The plaintiff relies upon the well recognized exception to the general rule that there can be no contribution between joint tort feasors, to the effect that a plaintiff may recover over against other joint tort feasors, where, although he has been negligent as to third persons in failing to perform a duty cast on him by law, he nevertheless has acted in good faith and has not participated in any wrongful conduct, has shown all the caution which the defendant had a right to expect of him, and has relied upon the defendant to perform his active legal duty of due care, whose decisive and definite act of failure in this respect has exposed the plaintiff to liability to a third person arising from inference of law, without

moral guilt on the plaintiff's part and without his sharing in the wrongful cause of the injury. It relies upon his branch of the case in *Jacobs v. Pollard,* 10 Cush., 287, 289; *Lowell v. Boston & Lowell Railroad,* 23 Pick., 24, 32; *Gray v. Boston Gas Light Co.,* 114 Mass., 149; *Boston Woven Hose & Rubber Co. v. Kendall,* 178 Mass., 232. It is manifest, however, from the allegations of the plaintiff's declaration that this principle cannot apply, because judgment has been recovered against it for causing the death of its employee, which could only have been assessed in the substantial amount alleged by reason of some degree of direct culpability on its part. For the reasons pointed out in the earlier part of this opinion, such a verdict for that cause could not have been recovered against the plaintiff if, as between it and the present defendant, it was free from any wrongdoing. It follows that the principal which the plaintiff invokes as the ground of its right to recover has no application to the facts disclosed by its declaration."

Another very pertinent case is *Central of Georgia R. R. Co. v. Macon R., etc., Co.,* 71 S. E., page 1076, where it appeared that the defendant company maintained wires in the railway company's yard to supply light. An electric wire was fastened on the coal chute, the apron of which was lowered by a steam cable. The wire sagged against the cable and because the insulation either had become worn or was originally inadequate, the current leaked from the wire to the cable, an employee of the roalroad company coming in contact with the cable received a shock which killed him; this employee sued the railway company for damages and recovered; the railroad company then brought suit against the electric light company for indemnity or contribution. A judgment of nonsuit in the case was affirmed on appeal.

This decision seems to us to be conclusive of the matter here involved.

It is useless to multiply authorities to support a principle so generally recognized.

There is only one ground of negligence imputed to the plaintiff in the *Lanning case,* and that is a failure to properly guard its dangerous wires. This was a primary duty which could not be shifted to this defendant, and which the plaintiff failed, according to the verdict of the jury in the *Lanning case,* to discharge. The failure to discharge this duty was the concurrent cause of Lanning's death, to say the least, and there is no reason why the sole liability should be imposed upon this defendant. The liability of the plaintiff to the defendant upon the counterclaim, in which the defendant seeks to recover from the plaintiff the half of the judgment paid out by the defendant, is foreclosed by the verdict of the jury on the fourth issue. We find no assignment of error which brings before us the duty of reviewing the rulings of the court upon that issue.

The motion of the defendant for judgment of nonsuit is allowed.

Reversed.

S. B. HEMPHILL v. LILLIAN W. GAITHER.

(Filed 15 December, 1920.)

1. Arbitration and Award—Arbitrators—Named in Alternative—Fraud.

Where, under a writing agreeing that I., C., or N. go upon the land and locate and establish the dividing line in dispute between the parties, the submission to arbitrate is to any one of the three designated persons; and where one of them acts, going upon the land for the purpose, with the parties to the agreement, and with their acquiescence establishes the line, they are concluded by the award so made, in the absence of fraud, irregularity, or conduct upon the part of the arbitrator which will avoid the award.

2. Same—Burden of Proof—Evidence—Instructions.

The burden of proof is on the defendant in the action to show fraud in an award set up in the complaint, and, upon conflicting evidence, a peremptory instruction thereon to answer the issue as to the plaintiff's being estopped in his favor, is reversible error.

CIVIL ACTION, tried before *Webb, J.*, at June Term, 1920, of BUNCOMBE, upon these issues:

"1. Is the plaintiff estopped by the report of J. M. Carver from claiming that part of said land shown on the court map by the lines 1 to 2, 2 to 3, 3 to 4, 4 to 5, 5 to 6, and 6 to 1? Answer: 'No.'

"2. Is the plaintiff the owner of the land described in the complaint and shown on the court map by the lines A to B, B to C, C, to D, D to E, and E to A? Answer: 'Yes'."

From the judgment rendered the defendant appealed.

Mark W. Brown for plaintiff.

Fortune & Roberts, Frank Carter, George A. Shuford for defendant.

BROWN, J. The complaint alleges a cause of action for the removal of a cloud from the title of land, but the controversy had to do only with a strip some ten or twelve acres in extent claimed by both parties under their contentions as to the proper location of the common boundary of their adjoining holdings. The answer alleged *inter alia* the defense of estoppel by arbitration and award. This defense was attacked in the plaintiff's reply by allegations of mistake and fraud in both the submission and award.

The court instructed the jury that upon all the evidence the plaintiff is not estopped from asserting his rights in this case, and if the jury should believe all the evidence they should answer the first issue "No." To this instruction the defendant excepted.

We are of opinion that the exception is well taken.

It is first claimed that the arbitration is void on its face. The submission was in writing and reads as follows:

North Carolina—Buncombe County.

Whereas, a disagreement has arisen between the parties hereto as to the location of the dividing line between the said parties, and whereas the said parties are desirous of settling said disagreement and location said line.

Now, therefore, it is agreed by the said parties that O. L. Israel, J. M. Carver, or C. H. Neil, County Surveyor, shall go upon the lands of the said parties and locate and establish the dividing lines between said parties and that the line so established by said surveyor shall be the permanent line between said parties. Witness our hands and seals, this the ..... day of May, 1918.

S. B. HEMPHILL, [SEAL.]
LILLIAN GAITHER, [SEAL.]

Witness: TELITHA HEMPHILL.

It appears that the two arbitrators, Neil and Israel, did not act, but that Carver did. The submission was not to all three, but to either one. It appears in evidence that Carver acted and that both parties were present and recognized his right to act.

We are of opinion that the submission was not void on its face.

The submission to arbitration being sufficient in form as well as the award made in pursuance thereof, it follows that it is binding upon the plaintiff and is sufficent to prevent a recovery unless successfully assailed for some fraud, irregularity or conduct upon the part of the arbitrator which will avoid the award. The burden of proof was upon the plaintiff to produce this evidence and to satisfy the jury of its truth. The defendant offered evidence in support of her plea. It was testified by the arbitrator and three other witnesses that the award was duly made and that the result was reached by the arbitrator was freely accepted by both parties and that the plaintiff expressed himself as satisfied therewith. The evidence was not all one way and the peremptory instruction of the Court was erroneous. *Smith v. Holmes,* 167 N. C., 561.

There must be another trial.

New trial.

GOLDIE HENNIS v. CECIL F. HENNIS.

(Filed 15 December, 1920.)

1. Summons— Service— Process— Clerks of Court—Courts—Findings— Appeal and Error—Actions.

Where the clerk of the court has refused defendant's motion to dismiss plaintiff's action for divorce, made on the ground that the summons had been issued less than ten days from the time set for its return, finding the fact to the contrary, which was affirmed by the trial judge on appeal, such findings are not reviewable in the Supreme Court on appeal thereto, and the action of the lower court will be affirmed.

2. Divorce—Marriage—Alimony—Attorney and Client—Attorney's Fees.

Where the allegations of the complaint are sufficient under the terms of our statute, Rev., 1566, and are found to be true and sufficient by the judge of the Superior Court, in the wife's action for divorce, *a mensa et thoro*, the court may leave open the charges made by each of the parties against the other, and award alimony *pendente lite*, including reasonable attorney's fees, taking into consideration the circumstances of the case.

3. Same—Appeal and Error—Court's Discretion.

The question of the amount allowed, in proper instances, by the Superior Court judge to the wife, in her action for divorce *a mensa et thoro*, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused.

APPEAL by defendant from *Long, J.*, on 2 August, 1920, from BUNCOMBE.

This is an action for divorce, which comes here by appeal from an order made upon motion by the plaintiff for alimony and counsel fees.

Plaintiff alleged willful abandonment of her by the defendant without just cause, cruel treatment, failure to support, and other matters in aggravation, and, among them, that he left her without any means for her support, and that she had none of her own.

Defendant denied all her allegations, except the one as to their marriage, and charged the plaintiff with adultery.

The judge left open the charges made by each of the parties against the other, but, for the purpose of passing upon the motion, found the following facts: "The court finds the allegations in the complaint to be true, and to the extent that plaintiff is entitled to a divorce *a mensa et thoro*, unless otherwise found hereafter. Exactly how much property the defendant has, the court is unable to say with definite certainty, but the court does not find that he has property of considerable value; that he is a man who can earn, and ought to earn, a good salary; and the court finds that he himself abandoned his wife and without providing her with adequate support, and that she is in need of funds for her own support and for funds to employ counsel in the litigation now pending

between herself and her husband." The court thereupon ordered that defendant pay to plaintiff $100 on 12 October, 1920, to meet her immediate necessities, and $50 on the twelfth day of each month thereafter, all as alimony *pendente lite,* and $150 as counsel fees in this litigation. Defendant appealed.

George S. Reynolds and Marcus Erwin for plaintiff.
J. H. Folger for defendant.

WALKER, J., after stating the case: The defendant moved to dismiss the action upon the ground that the summons was issued less than ten days before the time set for it's return, but this matter was first heard by the clerk, who found as the fact that the summons was issued ten days before 22 January, 1920, which was the return day, and thereupon he overruled the motion to dismiss, and defendant appealed to the Superior Court, where the judge affirmed the action of the clerk, and afterwards, the defendant, having failed to further appear and file answer, allowed him time to plead, and the defendant afterwards filed his answer. There was no error in this ruling of the court. We must take the facts, as found by the clerk, and affirmed by the judge, to be true, as they are not reviewable here. *Coharie L. Co. v. Buhmann,* 160 N. C., 385.

The court having found that the allegations of the complaint are true, we can discover no error in it's order providing for alimony *pendente lite* and counsel fees. The case comes directly and expressly within the terms of the statute, Revisal of 1905, sec. 1566, which are, that where it shall appear to the court that the facts set forth in the complaint are true and entitle her to the relief demanded therein, and it further appears that she has not sufficient means wherein to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties. The plaintiff applies for divorce *a mensa,* and sets forth sufficient facts in her complaint which, if finally found to be true, will entitle her to the relief for which she prays, and the judge finds her allegations to be true, and that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof. This entitles her to alimony, as ordered by the judge. *Lea v. Lea,* 104 N. C., 603; *Lassiter v. Lassiter,* 92 N. C., 130; *Allen v. Allen,* (at this term); and also *Medlin v. Medlin,* 175 N. C., 529, where this question as to alimony is learnedly and exhaustively discussed by *Justice Hoke,* and previous erroneous decisions corrected or overruled.

The amount to be fixed for alimony and expenses of suit is within the sound judgment and discretion of the court, and the order in respect

thereto is not reviewable by this Court in the absence of gross abuse, which does not appear in this record. *Moore v. Moore,* 130 N. C., 333 (*S. c.,* 131 N. C., 374); *Barker v. Barker,* 136 N. C., 316; *Allen v. Allen, supra.*

The law may prove to be harsh in some cases, for it may turn out that the husband was wholly in the right, and the wife wholly in the wrong, but he must submit to this apparent injustice with patience, hard though it may be, for the law so declares.

No error.

ALLEN BROTHERS v. RALEIGH SAVINGS BANK AND TRUST COMPANY, EXECUTOR OF B. GRIMES COWPER, DECEASED, ET AL.

(Filed 24 December, 1920.)

1. **Waiver — Contracts — Writing — Expenditures for Improvements on Lands—Principal and Agent—Division of Profits.**

   Under a contract for the sale of lands for a present consideration paid by the sellers to the owner, with provision for an expenditure of a certain sum for improvement, to be increased on mutual agreement between the parties, in writing, the question of the waiver of the writer is one of personal privilege to be exercised by the owner, and to be shown as a matter of fact by the evidence, that he intended to relinquish this right by words or by acts calculated to induce the seller to believe that the owner had abandoned his right to require a written agreement as to such increased expenditure.

2. **Same—Parol Agreements—Acts and Conduct—Consideration.**

   A contract for the sale of land, after expressing a present consideration to be paid the owner, provided for an expenditure of $20,000 for improvements before a distribution of profits between the owner and his selling agents, and such further sum for development of the lands if agreed upon in writing. A parol agreement was made as to a further and much larger expenditure for such improvements, to the total amount of $204,000, with the knowledge and acquiescence of the owner: *Held,* a waiver by the owner of the requirement of a writing for the further expenditure, which must be paid before the distribution of the contemplated profits, allowing the owner to retain as a priority the sum of money paid him as the consideration for making the original contract of sale.

3. **Same—Executors and Administrators—Personal Representatives.**

   The waiver by the owner of lands, requiring a consent in writing, for improvements on the land by his selling agents, beyond a certain sum specified in the contract, is binding upon his executor, or personal representatives, after his death.

CIVIL ACTION, instituted in the superior Court of WAKE by Allen Brothers, a copartnership, composed of Daniel Allen, Frank Allen, and

W. G. Allen v. The Raleigh Savings Banks & Trust Company, executor of the estate of B. G. Cowper, and Mary Grimes Cowper and Bryan Grimes Cowper, it being agreed by all parties that matters of law and fact might be determined by the court, the matters at issue were heard by *Kerr, J.*, at chambers at Warrenton, North Carolina, on 14 November, 1920, and upon motion of the counsel for the plaintiffs, judgment herein filed, was signed by the court. From the action of the court in signing the judgment tendered by the plaintiffs the defendants appealed.

The following is the judgment rendered:

This cause, coming on to be heard, and being heard by *Honorable John H. Kerr, Judge,* holding the courts of the Seventh Judicial District, there being present Bryan Grimes Cowper and John H. Boushall, trust officer of The Raleigh Savings Bank & Trust Company, one of the defendants herein, representing the defendants to this action, and Albert L. Cox, counsel for the plaintiff, and Daniel Allen, of Allen Brothers, the plaintiff herein; and it appearing to the court and being found as a fact by the court that all parties to this action consent to all matters of law and fact being determined by the court, the parties hereto waived trial by jury, it is by the court found as a fact that B. G. Cowper and Allen Brothers had consented and agreed together to change and amend sections 4, 8, 14, and 19 of the contract entered into on 12 August, 1919, by and between B. G. Cowper and Allen Brothers, so as to eliminate from said contract any limit upon the funds to be expended in the development of the lands described in said contract, and that in lieu of the said limit of $20,000 prescribed in the said sections above recited, that such improvements should be made and such moneys expended in the development of said property as might be found necessary by the parties to said contract. And it is further found by the court as a fact that said sections 4, 8, 14, and 19 were eliminated by the said B. G. Cowper and Allen Brothers, in so far as they limited the expenditures of moneys for the development of the said land, and that by and with the consent of B. G. Cowper, $204,000 has been expended in improving and developing the lands of B. G. Cowper, described in said contract, and that said moneys were so expended under an agreement between the said B. G. Cowper and the said Allen Brothers, that the expenditures so made should be a charge against the property, and should be paid before any distribution of profits was to be had, as contemplated in accord with the terms of the contract.

The court finds further that B. G. Cowper is dead, and that under the terms of his will the said Raleigh Savings Bank & Trust Company has qualified and is acting as his executor, and is empowered to carry out

the provisions of said contract, above referred to, and that Mary Grimes Cowper and Bryan Grimes Cowper, its co-defendants, are the only heirs-at-law and devisees under the will of the said B. G. Cowper, deceased.

It is therefore ordered, adjudged, and decreed that the contract originally made between the plaintiff and B. G. Cowper be reformed, so as to eliminate therefrom the limitation of $20,000 on the costs of developments and improvements as shown in paragraphs Nos. 4, 8, 14, and 19 of said contract, and to permit settlement on the basis of the expenditures actually made and to be made in the development of the said lands referred to. (Signed) JOHN H. KERR,

Judge Holding Court Seventh Judicial District.

A. L. Cox for plaintiffs.
John H. Boushall for defendants.

BROWN, J. It appears from the findings of fact that on 12 August, 1919, B. G. Cowper and the plaintiffs, Allen Brothers, entered into a contract with reference to the development of property belonging to the said Cowper, known as Fairview Farm, a copy of which contract will appear as an exhibit attached to the complaint in this action.

In this contract it was provided that the limit of expenditures for the development of the property should be $20,000, unless a larger expenditure was approved in writing by both parties. During the lifetime of the said B. G. Cowper and subsequent to the execution of the contract, much more than $20,000 was spent in the development of the said property, this being done with the knowledge and consent of the said B. G. Cowper, as was found as a fact by the court below. The requirement that consent to the increase of the expenditures should be put in writing was not complied with, prior to the death of the said Cowper.

It was found as a fact by the court below that the increased expenditures were consented to by B. G. Cowper, and it was directed that the contract be reformed to such an extent as to permit the consideration of the actual cost of expenditure for the improvements in the division of the proceeds of the sale of the property mentioned in the contract.

The written contract referred to contains the following clause: "That should owner, (Cowper) and seller, (Allen) decide that it would be advisable to make additional expenditures in the development of said property in excess of the $20,000 hereinbefore provided for, such additional development may be made upon mutual consent in writing and the additional cost of said development shall be taken care of in the same manner as is hereinbefore provided for discharging said $20,000."

The only point presented by this appeal is as to whether there could be and was a waiver by the testator B. Grimes Cowper of the stipulation

in the contract that consent to the increased expenditures for developing the property should be in writing.

We have no hesitation in holding that the stipulation could be waived and the judge of the Superior Court has found as a fact that the testator personally knew of and consented to the increased expenditures as being necessary for the proper development of the property. In law such conduct constituted a waiver and the testator would be estopped from afterwards objecting to the increased expenditures. The law would not allow him to perpetrate a fraud, and doubtless he would not have desired to do so.

To constitute a waiver it must appear that there was an intention to relinquish the right or there must be words or acts calculated to induce the plaintiffs to believe that the testator had abandoned his right to require a written agreement as to such expenditures.

Waiver is usually a matter of personal privilege and must be made by the person whose rights are affected. Waiver is a matter of fact to be shown by the evidence, 40 Cyc. 267; *Parsons v. Lane,* 97 Minn. 98.

The usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right. The binding effect of a waiver is founded upon the doctrine of estoppel.

The court finds as a fact that "Sections 4, 8, 14, and 19 of the contract were eliminated by said B. G. Cowper and Allen Brothers, in so far as they limited the expenditures of moneys for the development of the said land, and that by and with the consent of B. G. Cowper $204,000 has been expended in improving and developing the lands of B. G. Cowper, described in said contract, and that said moneys were so expended under an agreement between the said B. G. Cowper and the said Allen Brothers, that the expenditures so made should be a charge against the property and should be paid before any distribution of profits was to be had." This, of course, means that the $1,000 purchase price has priority.

No one will be permitted to take advantage of his own wrong. The testator consented to these greatly increased expenditures and the land received the benefit of them. His acts are binding on the executor and devisees and they must abide by them.

The judgment of the Superior Court is

Affirmed.

EARL BUTNER, BY HIS NEXT FRIEND, L. B. BUTNER, v. BROWN BROTHERS LUMBER COMPANY.

(Filed 24 December, 1920.)

1. Employer and Employee—Master and Servant—Third Persons—Minors—Infants—Safe Place to Work—Negligence—Evidence—Nonsuit—Trials—Invitation.

Among other machinery in its woodworking plant, the defendant had an edging machine of standard kind in good order, with the cogwheels moving the carriage covered by metallic hoods in the usual manner, protecting the employees working thereat in the manner therein required of them, under the rules of the company, children were forbidden to come into the mill, with notices placed in the mill to give sufficient notice thereof; that plaintiff, a bright lad of eleven years of age, was sent to the mill by his father to get some of the edging placed on the outside of the mill, forbidding the son to enter the mill, which had also been forbidden him by the supervising officers of the mill; that upon the invitation of a worker at the edging machine, a lad of about sixteen years of age, and in the absence of other employee, the plaintiff entered the mill to get his edging from around the machine, and his clothes caught in the cogs, causing the injury alleged, while he was in a dangerous position not required by the operation of the machine: *Held*, in the absence of evidence sufficiently definite to show an abrogation of the rule, the invitation and direction of the employee, having a definite work to perform as a laborer at the edger, was not within his authority to bind his principal, the defendant, and the evidence is insufficient to show negligence on the part of the defendant; and a motion as of nonsuit thereon should have been granted.

2. Same—Duty of Employer.

The duty of an employer to furnish his employee a safe place to work at a power-driven machine, in this case an edger in a woodworking plant, does not extend to an outsider who has entered the shop, forbidden, whose clothing has caught in the cogs of the machine, causing the injury for which he seeks damages in his action.

CLARK, C. J., dissenting.

CIVIL ACTION, tried before *Harding, J.*, and a jury, at August Special Term, 1920, of YANCEY.

The action is to recover damages for physical injuries caused by alleged negligence of defendant company in not properly safeguarding its machinery and in permitting plaintiff, a child twelve years of age, or little over, to go about same whereby he was caught in the cogs of certain portions of the machinery and received painful and permanent injuries to plaintiff's great damage. There was denial of liability by defendant and on issues submitted, the jury rendered a verdict for plaintiff assessing his damages. Judgment on verdict and defendant company excepted and appealed.

Charles Hutchins and A. Hall Johnson for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

HOKE, J. On careful consideration, we are of opinion that no liability has been established against defendant company, and the motion for nonsuit should have been sustained. There was evidence tending to show that in March, 1918, plaintiff, a bright boy, then about 12 years of age, had his arm caught in the cog-wheels of an edging machine in the lumber mill of the defendant company and had it crushed so that it had to be amputated, that this machine was in the shape of a long table, on which there was a carriage propelled by a gearing of cogwheels at the side of the table and on this carriage the lumber was moved forward through the machine, cutting off the edges as the term imports. The foreman usually stands at the front, feeding the machine or guiding the lumber as it goes through, and at the other end another man or boy with the duty of tailing the edger, and when the lumber has passed through it goes on to the trimmer table, about 20 feet beyond, and the edgings are thrown into the hog or off to the side of the machine so as to keep the same clear. That the machine in question was a standard machine in good order and the cogwheels which moved the carriage were covered by metallic hoods going two-thirds of the way down in the usual manner of such coverings and affording ample protection to any employee engaged in operating the machine or working about it, and the only way to get caught, as stated by several witnesses, was to "come up under it." There was also full testimony on the part of the defendant that by the rules of the company and its managers children were forbidden to come within the mill, notices to that effect being placed generally about in the mill in places likely to give warning, and they were never allowed in the mill except when they slipped in. That on the occasion in question, Corliss Rishell being the edger or foreman in charge of the machine, and Joe Rishell, an ordinary laborer, about 16 or 17 years of age, acting as tailer, the plaintiff was sent by his father to the mill to get some of the edging for the purpose of doing repairing about his lot, and which were to be obtained on the outside of the mill where they were usually placed when sold or given away, and both father and son testified that the father had instructed the plaintiff on no account to go in the mill for the edgings. And speaking to the fact of plaintiff being in the mill and about the machine at the time, Corliss Rishell, the foreman as stated, but now in the employment of others in the State of Pennsylvania, testified as follows: "In March or April, 1913, this boy, Earl Butner, came to Brown Brothers' sawmill at Eskota where I was working. He came after some edgings. I told him particularly and emphatically not to come in the mill while it was being operated. There was no

room for him there. He was in the way. I told this boy, plainly and emphatically, and he knew what I said and understood me, that he was not allowed on the mill, and should not be there while the mill was running. He obeyed my orders at first for a period of about ten minutes. Then when I was away from my regular place for a few minutes, he came back in and went in under a string of live rolls and got his arm hurt. The first thing I knew of this was that I heard him holler. I thought at first that his coat was caught, and I went over to see if I could help him out. We then discovered the accident and had him relieved as quick as possible. The boy could not possibly have gotten injured in the cog gears if he had been standing up. These cog gears were protected by metal coverings. The boy got down under them in violation of the instructions that I had given him." This testimony, however, was denied by the plaintiff, who after saying that his father had told him not to go in the mill, testified that he went in on the invitation of Joe Rishell, the tailer. The circumstances more directly revelant being given in his own language as follows: "The day I lost my arm I went in to get some strips at the edger machine where Joe Rishell was working; he was between 16 and 17 years old. I was going down the road and Joe Rishell came to the door of the mill and motioned for me to come up and I could not hear what he said for the mill was going. He told me to go in and get the strips out, that he was busy and could not help me turn but would help after a while if he got time, and I went in there. The way I went the edger was 50 feet from the door. I know where the edger machine was for I had been in there before; I do not know that I had ever seen Joe Rishell at the edger machine before but I had seen other men there. The edger was running and to get the strips I had to go in between the roller bed and the hog. Joe Rishell told me to go in there and get them, and I went in there and threw out 8 or 10 strips and went to pull out another one and it hung, and I jerked at it and my arm came back and caught in the cogs and ground it off." From this the testimony chiefly relevant and controlling as we view the case, it appears that the machine, a standard one, was in good shape, that the cogwheels were covered two-third of the way down the usual way and affording protection to the employees called on to operate or work about it in the course of their employment, that the plaintiff, at the time, was in the mill against the will of the owners or of any employee who had authority or duties give him a position of any significance and certainly without their knowledge or consent. The boy himself testifying that he didn't see any of the owners or Corliss Rishell, the foreman, that morning, and under such conditions, if responsibility for the injury could be fixed upon the defendant at all, it must be by reason of the invitation or direction of Joe Rishell, the laborer, for the plaintiff to come in and get the edgings for himself. Joe Rishell, as

shown, was a lad 16 or 17 years old, an ordinary laborer in the mill who had a definite task given him to do—that is to keep the machines clear of lumber passing through and the edgings that were cut from it. So far as appears, he had no authority to invite anyone into the mill contrary to the rules of the company, nor did he have any right to dispose of these edgings to outsiders, and in such case our decisions are to the effect that liability may not be imputed to the owners and proprietors by reason of his speech or conduct on this occasion, the same being entirely outside of the course and scope of his employment. In *Dover, Admr.,* 157 N. C., p. 324, a lad 10 years of age was invited or permitted by the driver of a team, an employee, to ride with him. In a runaway the boy was killed and recovery against the owner of the team was denied. The decision being as follows: "The master is not responsible for the negligent acts of the servant employed for the ordinary duty of driving a team of mules hitched to a wagon for the purpose of hauling lumber, in causing an injury to one whom, in the absence of the master and without his knowledge, express or implied, he had permitted to ride on the wagon loaded with lumber; for such acts are beyond the scope of the servant's employment, and not done in furtherance of the duties owed by the servant to the master." A similar application of the principle had been previously made in *Marlowe v. Bland,* 154 N. C., 140, where the proprietor directed a hired man to cut and pile the corn stalks in a field on his farm, and having given this specific direction, went off with a load of lumber, the employee having cut and piled the stalks as directed, concluded he would burn them, and the wind rising, the sparks were carried to a nearby woods of another owner, setting the same on fire and doing considerable damage. Here, too, the liability on the part of the employer was denied, the court in the opinion saying in part: "As a general proposition, the duty of a hired man is to do what he is told, and in this instance he was directed to do a definite, specific thing, importing no menace to any one, and after completing the work that was given him to do, he goes on of his own motion and does something else, engages in an act which is not infrequently a source of danger to neighbors, and does it under circumstances amounting to a negligent wrong and causing substantial pecuniary injury"; and the decision denying recovery was stated as follows: "When the master has given direction to his servant, a 'hired man,' to cut and pile cornstalks in his field, which was done by the servant, and then, without direction from the master, and in his absence, he set fire to the stalks, which caused sparks to be carried by the wind, which set fire to and destroyed plaintiff's property, the doctrine of *respondeat superior* does not apply, the thing the master ordered his servant to do being harmless in itself, and there being no express or implied authority given the servant to burn the stalks, which alone caused the damage complained of." Similar rulings has been

made in many other cases with us on the subject, and the authorities elsewhere are in very general support of this position. *Sawyer v. R. R.*, 142 N. C., 1; *Vassor v. R. R.*, 142 N. C., 68; *Daniel v. R. R.*, 136 N. C., 517; *Howe v. Newmarch*, 94 Mass., 49; *Stone v. Pugh*, 115 Tenn., 688; *Schulwitz v. Lumber Co.*, 126 Mich., 559; *Kiernan v. Ice Co.*, 74 N. J. L., 175; Wood on Master and Servant, sec. 279; 26 Cyc., pp. 1528-1533. We are not unmindful of evidence on the part of the plaintiff tending to show that children were often seen playing in defendant's mill, and that one witness testified that he had seen children 'getting out strips just where Earl got hurt.' So far as playing in the mill is concerned, there was no evidence that they ever played in this particular locality, which was somewhat inaccessible, being protected by the placing of the machines and, furthermore, and as a complete answer to any such position, the plaintiff was not injured while he was playing, but on his own testimony, says he was in there at work on the invitation of Joe Rishell. And as to the testimony of children being seen there getting out strips, the custom was shown to be for the strips, or edgings, to be thrown on the outside and the statement of the exception referred to is entirely too indefinite and infrequent to fix the employer with knowledge that their customs and rules were being departed from and violated, in the present instance, and even if the cogs should have been more completely covered in the performance of defendant's duty towards its employees, as suggested further for plaintiff, such a duty would not arise to plaintiff, who was in the mill at the time contrary to the rules and without the knowledge of the owners, and against his father's instructions, working about the machine, on the invitation of a laborer who had no right to give it, and whose position and duties, as we have endeavored to show, were not such as to render his employer in any way liable for his acts on the facts as presented.

This will be certified that the judgment and verdict be set aside and the cause dismissed as on the motion of nonsuit.

Reversed.

CLARK, C. J., dissenting: It needs no authority to sustain the proposition that on a motion for nonsuit the Court should consider the evidence only in the aspect most favorable to the plaintiff and with the most favorable inferences that the jury can draw from the evidence, for reason that the jury whose sole province it is to weigh the evidence, or to draw inferences therefrom, might take that view.

Applying this familiar and just rule, the defendant company operated a large band sawmill which, besides the large band saw, had four sets of saws running—seven saws in one set, four in another, eleven in another, and one in the other. There were two sets of live rolls and two others. Nearby was the mill village where the employees of the mill

lived close around the mill. In this village there were forty young boys, and it was the custom of the boys to play in the mill and around the saws, cogs, and rolls above mentioned, and it was not only the custom for the children to play in the mill, but to go near the dangerous machinery and get strips of wood that had been sawed off and carry them home. The defendant not only permitted the children to play in the mill and to come there for strips, but also employed children at work in the mill under the statutory age, among them this plaintiff, as was testified to by the president of the defendant. One of the witnesses for the defendant (McMahan) testified that he had seen children in the mill, had never seen them ordered out; that he had seen them come in, pick up and carry away strips; that it was not unusual for children to go between the machines, and that there were no printed notices for the children to stay out. Another witness testified that he had worked in the mill, that he repeatedly saw children there; that no one ran them out; that there were no orders to keep them out; that they came to get strips and "when these were not thrown out for them, they would go where the plaintiff got hurt; I have gone there myself, and have seen other children go there for strips." He added that he was under 14 at the time of the trial and that he had worked in the mill two years previously. Dan Hunnicutt testified to the same effect; also Carl Robertson, who testified that he was an employee in the mill when he was 13 years old.

The plaintiff, a boy 11 years of age at the time of the injury, went to the mill that day to get some strips which the mill superintendent had agreed with the plaintiff's father to have thrown out. The plaintiff testified, and his testimony must be taken as true on this motion, as well as the above, that the mill was running, and that the man who was running the edger where these strips were thrown off, called him in and told him to go and get the strips out, that he was too busy and could not help him. And he (the plaintiff) being used to going into the mill, did not think that there was any danger in going where he was told, and went in to get the strips; that the strips were lying beside the machine, and as he stooped down to pick them up his sleeve was caught in the cogs and his arm being drawn in, was ground off above the elbow; that they had to stop the machine and take it apart to get him out; that he was sent to the hospital, where his arm was amputated near the shoulder.

He also testified that he had been in the habit of playing in the mill for a long time and that he had been going there a long time to get strips; that nobody had ordered him out of the mill; that he and the other children were allowed to play there, and liked to do so, and that no one had ever warned him of any danger being incident to the machinery there operated.

The cogwheel in which the plaintiff's arm was cauaght was a bevel gearing about 6 inches in diameter and the president of the defendant testified that the covering came down half way on the side.

There was a conflict of testimony as to who was running the edger that day. The defendant introduced the deposition of Corliss Rishell that he was running the edger, and instead of letting the plaintiff in, he told him to stay out. But the plaintiff and his father testified that Joe Rishell was running the edger and Joe does not testify to the contrary, but this is immaterial for under this motion the testimony for the plaintiff must be taken as true that Joe Rishell was running the edger, and that he told the 11-year-old child to come in and get the strips and (as the plaintiff testifies) that he and the other boys were accustomed to play there, that he had not been warned of any danger and had repeatedly gotten strips at that place, that he had never been ordered out of the mill, and that he and other children had been allowed to play there.

Whether the above evidence was true, or that of the defendant, which was only contradictory in part, was a matter which the plaintiff was entitled to have the jury decide and the court on this motion for nonsuit was compelled to take as true and properly refused the motion for nonsuit. This case is very much similar to *Ferrell v. Cotton Mill,* 157 N. C., 528, where *Judge Walker* clearly stated the principle applicable to this case.

This little child of 11, with his fellows living immediately around the mill in the company's houses and playing in the mill for months without any objection, had been to the exact spot where the little plaintiff had lost his arm, he had not been warned of any danger, and when he was told by the edger to go there and get strips which the edger said he was too busy to get himself, since this would require the stopping of the machine, he was not even a technical trespasser. The entire conduct of the defendant was negligent, and there was no negligence whatever on the part of the plaintiff, taking, as we must, the evidence for the plaintiff to be true, and the jury found it to be true.

Besides the above, which was sufficient, it was the grossest negligence for the defendant to case only the upper half of a 6-inch bevel gearing, revolving rapidly, leaving the lower half of this dangerous instrumentality entirely uncovered. The draft made by the saw or between the door and the window, or by some other cause would readily and naturally drive some of the little child's clothing into this rapidly revolving and unprotected gearing.

The negligence of the defendant is further enhanced by the fact that not only the children of its employees in the adjacent houses were allowed to play in the mill but in open defiance of law, the defendant employed some of these very children, including the plaintiff, to work therein when under the age prescribed by law.

It is difficult to see how the trial judge could have directed a nonsuit on this evidence, which shows habitual and continued negligence of the defendant and the absence of any negligence on the part of the plaintiff.

If the defendant had evidence which could overthrow the above testimony for the plaintiff, the jury did not believe it, and it was not within the jurisdiction of the judge to do so. Very many cases are authority which forbade the judge to direct a nonsuit, among them *Ainsley v. Lumber Co.*, 165 N. C., 122, and *Starling v. Cotton Mills*, 168 N. C., 230. This child, 11 years old at the time, must go through life with one arm gone. He gave his account how it happened. The jury said he told the truth; can we say the contrary?

ERSKINE MOTORS COMPANY v. CHEVROLET MOTOR COMPANY.

(Filed 24 December, 1920.)

1. **Removal of Causes—Federal Statutes—Partnership—Corporations—Parties—Nonresidents—Diversity of Citizenship—Torts—Contracts—Breach.**

   Where one of the plaintiffs to a suit is a nonresident, as also the defendants, it may not be removed to the Federal Court by the defendants on the ground of diversity of citizenship; and this applies when the action is for damages for breach of contract, brought by several members of a partnership, who form an incorporated company after the occurrence of the breach of contract sued on.

2. **Same—Courts—Jurisdiction.**

   Upon a motion to remove a cause from the State to the Federal Court, on the ground of diversity of citizenship, where it appears that the defendants were nonresidents, and the plaintiffs were a partnership, with one of its members a nonresident, and the action is for breach of contract, the mere fact that one of the plaintiffs signed the contract as "president" does not preclude the State court from inquiring into the fact of incorporation, and retaining the cause for a determination of this question.

3. **Removal of Causes—Federal Statutes—Partnership—Corporations—Diversity of Citizenship—Courts—Jurisdiction.**

   A partnership, by holding itself out as a corporation, does not thereby convert itself into one, and on petition to remove the cause to the Federal Court, for diversity of citizenship, wherein this question arises, the question of the plaintiff's fraud in making a misjoinder of parties to retain the jurisdiction of the State court, is one for the determination of the State court, and the cause is not at once removable to the Federal Court as a matter of the defendant's right under the Federal law.

APPEAL by defendant from *Long, J.*, at August Term, 1920, of BUNCOMBE.

One of the plaintiffs, Erskine Motors Company, is a partnership composed of J. V. Erskine and M. A. Erskine, who are residents of North Carolina, and J. M. Erskine, a resident of Tennessee, and one of the defendants is a resident New Jersey, and the other is a resident of Georgia.

On 1 December, 1919, the copartnership entered into a written contract with the defendant to recover damages for the alleged breach of which this action is brought. On 9 February, 1920, after the breach of said contract by the defendants, the members of said copartnership formed a corporation under the same name and thereafter did business as a corporation. The copartnership did not assign or transfer to the corporation any rights, or claims for damages, against defendants under said contract or on account of the breach thereof.

This motion, by the defendants to remove the action to the Federal Court was denied and the defendants appealed.

Mark W. Brown for plaintiff.
Merrimon, Adams & Johnston for defendants.

CLARK, C. J. This action could not have been originally brought in the U. S. District Court under secs. 28 and 51 of the Judicial Code because one of the plaintiffs is a nonresident of North Carolina and both defendants are nonresidents of this State.

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority *of which the District Courts of the United States are given original jurisdiction by this title,* which may be now pending or which may hereafter be brought in any State Court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district." 5 Fed. Stat. Anno. 16.

It is provided in 5 Fed. Stat. 52 and 486 that "Where the jurisdiction is founded only on the fact that the action is between citizens of different States, the suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 23 R. C. L., 624, sec. 21.

Citizensip can not be predicated of a partnership, and Federal jurisdiction of a suit by or against a partnership, so far as it depends on diverse citizenship, is determined by the citizenship of the individual members. 5 Fed. Stat. Anno. 97; 23 R. C. L., 651; sec. 50. *McLaughlin v. Hollowell,* 228 U. S. 278; *Fletcher v. Hamlet,* 116 U. S., 408; *Grace v. Ins. Co.,* 109 U. S., 278.

It is not denied that the individual members of the Erskine Motors Company were doing business as a copartnership until after the contracts were made and breached, and that no corporation was in existence until after such breach. In *Fore v. Tanning Co.,* 175 N. C., 584, and in *Patterson v. Lumber Co., ib.,* 90, it is held that "where a plaintiff has sued a

resident and a nonresident defendant for a joint wrong, the cause of action as a legal proposition must be taken and construed as the complaint presents it and, in such cases, on motion to remove to the Federal Court, by reason of the alleged fraudulent joinder with a resident defendant the right of removal does not arise on the general allegations of bad faith or fraud on the part of the plaintiff, however positive, but the relevant facts and circumstances must be stated with such fullness and detail and be of such kind as to clearly demonstrate or compel the conclusion that a fraudulent joinder has been made."

Again it has been said in *R. R. v. Lloyd,* 239 U. S., 500; 23 R. C. L., 758, "In no case can the right of removal be established by a petition to remove which amounts simply to a traverse to the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face. *R. R. v. Cockrell,* 232 U. S., 146. It is only in cases wherein the facts alleged in the petition for removal are sufficient to fairly raise the issues of fraud that the State Court is required to surrender its jurisdiction."

Where the basis of the charge is that no cause of action was stated against one joined as a resident, this does not justify a charge that it was done with fraudulent intent, for whether there was a cause of action stated against them is a question of State law. Where a declaration was amended after a petition to remove has been denied the amendment was unnecessary, and merely made the original cause of action more precise. On the question of removal the court cannot consider anything beyond the inquiry whether there was a *bona fide* intention to obtain a joint judgment and whether there was colorable ground for such judgment as the record stood when the removal was denied. It is not a question whether a flaw in the declaration could be found on a special demurrer, *R. R. v. Schwyhart,* 227 U. S., 193.

It is not claimed by the defendants that the plaintiffs were incorporated before the contracts were made and breached, but they rely upon the ground that because one of the members of the copartnership signed his name as "President" to the original contract that he and his associates are estopped to deny incorporation. A corporation cannot be made either by a declaration, or by the exercise of corporate acts, and there is no bona fide claim in this case that either was done. 7 R. C. L., 104, sec. 81; R. C. L., 352, sec. 332.

One contracting or dealing with a company as a corporation is estopped from denying its corporate existence, but its corporate existence is not proven by the fact of dealing with it designated by a corporate name, for that admits only that the association is acting under such name. 7 R. C. L., 107, sec. 82. Neither a person or an organization can escape *liability* when it has contracted as a corporation, but that is not the point here where the plaintiffs are seeking to perform their contracts

and the defendants are denying liability. It is not the case of the estoppel of either party, but a question as to the *right of removal* dependent upon the fact whether at the time the contract was made and broken the plaintiffs were incorporated or a copartnership. It is a question of residence or nonresidence.

A copartnership does not make itself a corporation by holding itself out as such when it is not, and it does not thereby confer jurisdiction upon the Federal Court if in fact it was not a corporation and, as in this case has not assigned its property and claims to be a corporation that was formed after the contract sued on was broken. *Anderson v. Watts,* 138 U. S., 694. The refusal of the motion to remove is

Affirmed.

L. A. RECTOR v. NORTH CAROLINA ELECTRICAL POWER COMPANY.

(Filed 24 December, 1920.)

Negligence—Actus Dei—Floods—Evidence—Trials.

In the building of a dam and power house to generate electrical power on its own land and premises, the defendant is not responsible for damages caused to the plaintiff's land on the stream below, by a rain storm or cloud burst of magnitude theretofore unknown at the place, especially when it appears that the dam remained intact after the storm, and there was no negligence in its construction or in other acts of the defendant relating thereto; and evidence of the extraordinary character of the storm was competent.

APPEAL by plaintiff from *Webb, J.,* at April Term, 1920, of MADISON.

Appeal by the plaintiff from a judgment of nonsuit. In 1911 the defendant company constructed a concrete dam 32 feet high across the French Broad River, two miles below Marshall, and built a power house for the generation of electric power. The defendant bought from the owner 3½ acres from the upper end of a tract of land on the south side of the river just below its dam and powerhouse. The plaintiff bought the remainder of said tract just below the defendant's purchase. In building the dam and powerhouse the defendant cut away and removed from its own land sundry ledges of rock, thick shrubbery and heavy timber for the construction of the tail race from the powerhouse, and piled some of the removed stone on their own land below the dam. The defendant, also, in building the dam, raised the Southern Railroad track on the other side of the river, below the dam, and built a concrete wall extending up the river over 600 feet from the dam on that side.

On 15 July, 1916, there was a severe storm and cloudburst, raising the water on that and the next day several feet above what it had ever

been before. The plaintiff claims that the damage from the flood which washed away a part of the surface of the land below the dam was due to the negligence of the defendant.

The court, at the close of the evidence, directed a nonsuit from which the plaintiff appealed. The plaintiff also excepted to the admission of evidence showing that the freshet was of abnormal size.

John A. Hendricks, and J. C. Ramsey for plaintiff.
Guy V. Roberts and Mark W. Brown for defendant.

CLARK, C. J. We think that the nonsuit was properly granted and there was no error in the admission of the evidence, which was conclusive, that this freshet was the largest over known in that section and "the memory of man runneth not to the contrary." There was no evidence of negligence in the construction of the dam and powerhouse, or in clearing away the ledge of rock and shrubbery for the construction of the tail race, or in piling the rock on the defendant's own land, nor that so doing was the cause of washing the plaintiff's land, nor if it had been, was it negligence not to have foreseen that there would be a freshet so abnormally high that it would divert the water—if it did so.

The dam was not broken, and no more water came over it and went over the plaintiff's land below than would have come down the river, and it would have gone over the plaintiffs land to exactly the same depth if there had been no dam. It was the hydraulic force of the great volume of water rolling down the river which washed the plaintiff's land and there is no evidence of negligence on the part of the defendant which would have justified submitting the case to the jury.

The great sun, 1,300,000 times larger than the globe upon which we live, brooding over the tropical waste of waters with untempered heat, rarified the atmosphere over the summer seas of the West Indies, at the same time drawing up by evaporation water which formed clouds above. The heavier air of the colder regions, north and south, impelled by the force of gravity, rushed in to fill the vacuum. The counter movement of the winds, and the precipitation of the water, caused a hurricane which passed up the Atlantic coast. This, by some unknown cause, was diverted near Charleston and Savannah northwesterly to the mountains. When over the upper reaches of the French Broad and the Catawba and neighboring streams, the electricity between the stormclouds and the earth caused a cloudburst. It could not be called a rain, but literally "the windows of Heaven were opened and the waters descended."

The defendant, or any other mortal power, was not responsible for the damage caused by the abnormal height of the flood, nor responsible for negligence in not providing against, if it could have been foreseen, the damage which would be done by so unprecedented a flood.

The writer of this opinion was marooned at Morganton by this same flood, which cut off communication on all sides by rail and wire and by public road for several days, and saw the flood that filled the valley of the Catawba, which was 22 feet in height above all precedents, and swept away every bridge across the river for more than 100 miles. It was doubtless the greatest flood in that and neighboring rivers since the Ice Age when the melting glaciers filled the valleys and dug the channels beneath them as beds for the present rivers.

This is the only case which has come to this Court, and probably the only action that has been brought anywhere, to fasten upon any human agency responsibility for the destruction by waters without similar record in historic times.

We think the judge properly held that the defendant was in no wise responsible for the damage done to the plaintiff's land.

Affirmed.

JOHN HUGH MURPHY AND EUNIC ST. CLAIR MURPHY v. MRS. FRANK REED ET AL.

(Filed 24 December, 1920.)

Wills—Trusts—Powers of Sale—Deeds and Conveyances—Executors and Administrators — Qualifications —Pleadings —Dismissal of Action — Motions.

It appeared in the allegations of the complaint that a testatrix devised her land in trust to the same person whom she named as executor under her will, giving the one so nominated the power to sell or dispose of her property in furtherance of certain trust powers declared. The will was duly probated and recorded, but the person so named not having formally qualified as executor, performed his duties as trustee in a manner free from criticism, and accordingly made conveyance of parts of the land to the defendants, the plaintiffs claiming this land as the heirs at law of the testatrix on the ground that the trustee, not having qualified under the will as executor, was without power or authority to act as trustee: *Held*, it was not essential that the person named as executor and trustee should have qualified as executor in order to perform the duties required of him as trustee, and upon the allegations of the complaint, the action was properly dismissed.

CIVIL ACTION or proceedings, heard on the pleadings on motion by defendant to dismiss, before *Webb, J.*, at June Term, 1920 of BUNCOMBE.

The preliminary records and entries were not presented, there being formal admission made that the court had properly acquired jurisdiction of the cause and the parties. On consideration of the pleadings and the facts admitted therein, the court entered judgment dismisssing the cause and plaintiffs excepted and appealed.

Wells & Swain for plaintiffs.
Locke Craig and Marcus Erwin for defendants.

HOKE, J. Plaintiffs, the children and heirs at law of Hugh Murphy, deceased, and grandchildren of Clara Patton Murphy, also deceased, have instituted this action against the defendants, alleging in effect that as heirs at law and potential beneficiaries under the will of Clara Patton Murphy they are owners of one undivided sixth of the lands of the testatrix devised by her will, and are entitled to be declared as owners of said interest and to an accounting against defendants, who are children of said testatrix, and are, and have been for many years, in possession of said lands, claiming the sole ownership of the same under the will of their mother, and further disposition of said lands purporting to be under the provisions of said will. The will duly proven and recorded in Buncombe County at the instance of Thomas Patton the executor and trustee named therein, is set forth in the complaint as follows:

"First: I nominate and appoint my cousin, Thomas W. Patton, sole executor of this my last will and testament.

"Second: For purposes hereinafter set forth and in solemn trust for that purpose, I give, devise and bequeath to my executor, Thomas W. Patton, all of my property, real and personal or mixed, of every kind and description, wherever situated, and I do herein confer upon my said executor, Thomas W. Patton, full authority to mortgage, sell or otherwise dispose of any part or parts of all of said property and at any time or times, and if sold, either by public or private sale, as to him, in the exercise of his full discretion may appear best calculated to promote the interest of all concerned.

"Third: I declare the following to be my purpose and object in making this, my last will and testament, and impose the execution and performance of each of said objects in its order, upon my said executor, so far as my estate shall enable him to comply therewith:

"A. All my just debts shall be paid.

"B. I instruct my executor that so far as he may be able to do so, with the residue of my estate, after paying my debts he shall provide a comfortable support for my husband, John H. Murphy, and for my two daughters, Lucille and Mary, during the natural life of my said husband, and it is my wish that these three persons shall live together so long as my husband shall live.

"C. After the death of my said husband, I desire that whatever portion of my estate may then remain unexpended shall as soon as possible be turned into money and divided and paid over as follows: One-third thereof to my daughter, Lucille, one-third to my daughter, Mary, and

remaining one-third in equal portions, share and share alike, to my five grandchildren, three of whom are the children of my daughter, Lulu McDowell, deceased, and two are the children of my son, Hugh Murphy, deceased."

It further sufficiently appears from the complaint that the said Thomas W. Patton, having, as stated, caused said will to be duly proven and recorded in Buncombe County without taking out letters of administration or further qualifying as executor, entered upon his duties as trustee in the management, control and ownership of the real estate and under deeds from him and pursuant to encumbrances placed thereon by him in carrying out his duties as trustee in providing a support for the two daughters and surviving husband of the testatrix, the defendants have acquired title to the property and are in possession, asserting ownership under said deeds, etc. It is not alleged in the pleadings that Thomas W. Patton, in thus providing a support for the surviving husband and the two daughters, undoubtedly the primary object of the testatrix's bounty, was unfaithful or even that he acted unwisely in the exercise of the duties committed to him "in solemn trust," nor is it alleged or claimed that the two defendants have acted improperly in the matter or that they are in any way undeserving, but on the pleadings as now constituted, the plaintiffs rest their claim on the sole ground that said executor and trustee was without power to dispose of the realty or otherwise deal with it unless and until he had been qualified as executor, and this being true, we are of opinion that no cause of action is stated in the complaint and that the suit has been properly dismissed. From a perusal of the will it appears that the property is conveyed to Thomas W. Patton as executor "in solemn trust" with power to mortgage, sell or otherwise dispose of any part or parts or all of said property, at any time or times, and if sold either by public or private sale as to him in the exercise of his full discretion may appear best calculated to promote the interest of all concerned. Apart from the right of creditors, the primary purpose of the will is to provide a support for the husband and the two daughters and enable them to live together during the life of the husband. These are duties entirely collateral to the office of executor and not within the range of its usual and ordinary powers. So far as the realty is concerned, from the express terms used and from the nature of the duties themselves they appertain to the position of trustee and of a highly personal and confidential kind and in such case the authorities are very generally to the effect that it is not essential to qualify as executor in order to perform the duties of trustee. *Pomeroy v. Lewis,* 14 Hho. Is., 349; *Tainter v. Clark,* 54 Mass., pp. 220-227; *Crouse v. Peterson,* 130 Cal., 169; *Dunning v. Bank,* 61 N. Y., 497; *Moody Lessee v. Fulner et al.,* 68 Penn. Rep., pp. 1-30; *Launing v. The Sisters of St. Francis,* 35 N. J., Eq., 392; 11 R. C. L. pp. 22-23. In

some of these cases, as in *Dunning v. Bank, supra,* the question was presented whether the duties of trustee when collateral to the office of an executor could be properly exercised by an administrator *cum testamento annexo,* the decision being against the exercise of the power. The effect of these decisions on that precise question has been very much modified with us by statute extending the powers of such an administrator. Rev., 82 and 3146, as interpreted in *Creech v. Grainger,* 106 N. C., 213, and other cases. But in our opinion, neither the statute nor the decisions thereon affect the application of the principal to the facts of this record, where, as stated, in addition to his ordinary and usual duties the executor has conferred upon him as trustee large discretionary powers in the control and disposition of the real estate, has entered without objection on the performance of these duties, when there is no claim of any breach of trust or bad management on his part and no administrator *cum testamento annexo* has ever been appointed nor any facts in evidence which tend to show a necessity for such appointment.

On such facts we think his Honor correctly ruled that the plaintiffs do not state a maintainable cause of action and the judgment dismissing the suit is approved.

Affirmed.

JOHN A. TATHAM, ADMINISTRATOR OF CHARLES P. TATHAM, v. ANDREWS MANUFACTURING COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 24 December, 1920.)

1. Negligence—Railroads—Wrongful Death — Evidence — Questions for Jury—Trials.

In an action to recover for the wrongful death of the plaintiff's intestate, an employee of a lumber manufacturing company, against his employer, and also against a railroad company, there was evidence tending to show that the plaintiff, with others, was engaged in "pinching" a carload of lumber along the railroad track to a point where lumber was piled so near the track as likely to be torn down by contact with a passing train, and that without signal or warning, and under circumstances that should have made the employees on the defendant's railroad train aware of the intestate's danger, they backed upon the car upon which the plaintiff's intestate was at work, to carry it away, in such manner as to cause the pinch bar being used by the plaintiff to be driven against his throat, causing injury and death: *Held,* sufficient upon the issue of defendant railroad's actionable negligence to take the case to the jury.

2. Same—Employer and Employee—Master and Servant—Joint Torts—Nonsuit.

In an action for the wrongful death caused by the alleged negligence of the intestate's employer and a railroad company, there was evidence tending to show that the foreman or boss of the employer had full opportunity

to be aware of the danger of the codefendant's train as it approached to connect with and take away a car of lumber, on which the intestate was engaged, in "pinching" or moving it upon the track to place it in position for the purpose, and, when the intestate heard the train approaching he started to desist, but was told by his foreman in charge of this work to keep at work, for the car "won't come on you," and in consequence the injury and resulting death was cause: *Held*, sufficient upon the issue of actionable negligence of the defendant employer; and there also being such evidence as to its codefendant, the railroad company, it was sufficient to be submitted to the jury upon the question of their joint tort, and a motion as of nonsuit was properly denied.

3. Evidence—Statutes—Dying Declarations.

Ch. 29, Laws of 1919, allowing as evidence dying declarations in actions brought to recover damages for the wrongful or negligent acts of another, Rev., 59, is a constitutional and valid change of the rules of evidence, and permits in evidence such declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the *res gestae*, and uttered when the declarant was in actual danger of death, and full apprehension thereof, and when the death accordingly ensued.

4. Instructions—Evidence—Appeal and Error—Objections and Exceptions.

An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the evidence, as required by Rev., 535, and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission.

CIVIL ACTION, tried before *Bryson, J.*, and a jury, at April Term, 1920, of CHEROKEE.

The action is to recover damages for the alleged wrongful killing of the intestate, an employee of the manufacturing company and by the concurring negligence of the two defendants, the manufacturing company and the railroad company, while he was engaged as such employee of the manufacturing company on their yards at Andrews, N. C., in August, 1917. On issues submitted there was a verdict for plaintiff against both the defendants assessing the damages. Judgment on the verdict, and defendants excepted and appealed, assigning for error the refusal to nonsuit on defendants' motion, and other specified objections.

Felix E. Alley, J. N. Moody, and Thurman Leatherwood for plaintiff.
Martin, Rollins & Wright for defendant Southern Railway Company.
Merrimon, Adams & Johnston for defendants.

HOKE, J. Considering only the testimony that makes in favor of plaintiff's claim, the accepted position on a motion to nonsuit, there are

facts in evidence tending to show that on or about 15 August, 1917, plaintiff's intestate, as an employee of the manufacturing company, with others, was engaged in pinching a car loaded with lumber along the railroad track in the yards of the manufacturing company with a view of setting the car past a stack of lumber which was piled or packed so near the track that it touched on the loaded car, and making it likely that if this latter was pulled past by the engine it would tear down the pile of lumber. That while so engaged, the intestate, using a pinch bar for his work, the engine of defendant railroad company with two other cars ahead came down the track for the purpose of connecting with the loaded car and taking it out of the yard. That the agents or employees of the railroad company in the operation and control of the engine knew or had every opportunity to know in the exercise of ordinary care that the intestate and others were then engaged in trying to move the loaded car along the track, having stopped the engine for a few moments, and without signal or warning of any kind ran the cars and engine against the loaded car, pushing it backwards two or three feet, causing it to strike the pinch bar with which intestate was then working, and drive same against the throat of intestate, inflicting fatal injuries from which he died the following day. As against the manufacturing company, it further appeared that the foreman or boss of the hands engaged and who stood towards them in the position of vice principal was present directing the work. That he was standing by with full opportunity to warn the approaching engine's crew and failed to do so, or to do so with adequate or proper emphasis; and further, there was direct testimony to the effect that when the intestate heard the railroad engine approaching, he started to desist, saying that the train was coming, and was told by the foreman "to work on, that the car won't come on you."

From this and other pertinent facts there was ample evidence to sustain the verdict finding that the death of the intestate was caused by the negligence of both defendants concurring at the time of the injury, and we must hold that defendants' motion for nonsuit was properly overruled. *Snipes v. Mfg. Co.*, 152 N. C., 41; *Davis v. Shipbuilding Co.*, at present term, citing *Thompson v. Oil Co.*, 177 N. C., 279; *Howard v. Oil Co.*, 174 N. C., 651; *Ridge v. R. R.*, 167 N. C., 510.

True that the foreman of the manufacturing company testifies that he did tell the railroad conductor, when his engine was stopped near the car, "that he would have to give them a little more time, as they were going through as fast as they could," but of it he conceded that this was an adequate effort to comply with his assurance to intestate "that the car won't come on you," in so far as the evidence tends to exculpate the manufacturing company, it is not properly considered on defendants' motion to nonsuit, and furthermore, under the charge of his Honor as

to this feature of the evidence, the jury in their verdict have rejected the evidence, and necessarily found that no warning was given to the railroad employees by the foreman.

"On the trial, and under a recent act of the Legislature, the dying declaration of the intestate as to the cause of death and the immediate circumstances attendant on the killing were received in evidence. This statute, Laws 1919, ch. 29, provides that in actions under sec. 59 of the Revisal (for death caused by wrongful act, neglect, etc., of another), the dying declaration of the deceased as to the cause of death shall be admissible in evidence in like manner and under the same rules as the dying declarations of the deceased in criminal action for homicide are now received in evidence." These declarations in criminal prosecutions for homicide extended to the "act of killing and the circumstances immediately attendant on the act and constituting a part of the *res gestae.*" *S. v. Laughter,* 159 N. C., 488; *S. v. Watkins,* 159 N. C., 480; *S. v. Jefferson,* 125 N. C., 712; *S. v. Shelton,* 47 N. C., 360; Lockhart on Evidence, p. 145; and by correct and necessary interpretation such declarations are now admissible "in like manner" in the civil cases specified. The statute is well within the constitutional power of the Legislature to change the rules of evidence, assuredly, so as to the trial of civil causes. *S. v. Barrett,* 138 N. C., 630; *Wilkerson v. Buchanan,* 83 N. C., 297; Cooly on Constitutional Limitations (7 ed.), p. 409; Black on Constitutional Law, p. 604, the requisite conditions for the reception of such declarations are fully met; that is, they were declarations as to the cause of the killing, including the circumstances immediately attendant on the act, the declarant was at the time in actual danger of death, the statements were made in full apprehension by him of such danger, and the death ensued. And on the record no valid reason can be urged against the admissibility of the evidence.

It is contended for defendant that such declaration should not be allowed to avail the plaintiffs unless they carry conviction beyond a reasonable doubt, but this cannot for a moment be entertained. Both the common-law principle and the statute where the same applies provide only for the admission of the declarations as evidence, and the weight to be allowed them is for the jury, as in other cases. Lockhart on Evidence, sec. 145. It is further insisted that the court failed to state the evidence in the cause and declare and explain the law arising thereon as required by the statute, Rev., 535, but in our opinion the exception is without merit. His Honor gave to the jury a clear and comprehensive charge on the law applicable, stating the position of the respective parties as to every feature of the case. In doing this he necessarily gave the substance of much of the evidence relevant to the different issues. The testimony chiefly pertinent is so direct in kind,

and restricted in amount, that the jury could not have been misled or confused in their deliberations, and on authority, if defendants thought a fuller statement of the evidence was required, they should have then brought the omission to court's attention, and not having done so, the objection is held to have been waived. *Davis v. Keen,* 142 N. C., 496.

On careful consideration we find no reversible error, and the judgment for plaintiff is affirmed.

No error.

J. M. REECE v. WORTH WOODS.

(Filed 24 December, 1920.)

1. Evidence—Deceased Persons—Statutes.

The intent and meaning of Rev., 1631, is to prevent a party to a suit from testifying as to a transaction against the estate or interest of the other party, when the latter is dead and unable to testify in his own behalf.

2. Same—Deeds and Conveyances—Delivery—Husband and Wife.

Where the title to lands in dispute depends upon whether the deed to a party had been surreptitiously taken from the grantor and wife, under whom he claims, and to be delivered only when a certain part of its consideration had been performed, and had had the same wrongfully registered, it is competent for the wife, after the death of her husband, to testify to the facts of its nondelivery, the defendant, the grantee in the deed being alive and present, and capable of testifying in his own behalf, and such not being within the intent and meaning of our statute on the subject, Rev., 1631.

3. Same—Probate Officers—Corroborative—Substantive—Res Gestae.

Where there is evidence that a grantee in a deed from husband and wife, surreptitiously took it from the *feme* grantor, when it was being held by her pending the performance of condition made a part of the consideration, in an action involving the validity of this deed upon the ground stated, it is competent for the wife, after the death of her husband, to give evidence as to the facts; and also for the probate officer to testify as to declaration of the alleged grantors made at the time the deed was acknowledged before him as to their intent and purpose in making such acknowledgment, such declaration being competent as accompanying an essential fact in the *res gestae.*

CIVIL ACTION, tried before *Bryson, J.,* and a jury, at Special Term, 1920, of CHEROKEE.

The purpose of action is chiefly to have declared void and set aside a deed from W. L. F. Woods and wife to Worth Woods on the ground that said deed, though appearing on the registration book, was never in fact delivered. There are also allegations in the complaint that the

plaintiff being the real owner and in possession of the land, the defendant has wrongfully committed trespass thereon to plaintiff's damage. At the close of the testimony, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

J. N. Moody for plaintiff.
Witherspoon & Witherspoon for defendant.

HOKE, J. On the trial it appeared that plaintiff is in possession of the land in question claiming to own same under a deed from W. L. F. Woods and wife, Laura, dated 22 February, 1919, duly proven and registered said deed containing a stipulation by way of condition subsequent that the grantee would maintain said grantors during their lives, and on their deaths, see that they were properly buried, etc. It also further appeared that defendant claimed the land under a deed purporting to have been made by said W. L. F. Woods and wife, acknowledged by the grantors before a justice of the peace, E. A. Voyless, on 1 February, 1912, and placed upon the registration books on 6 December, 1912, and that W. L. F. Woods died on 24 February, 1920. Plaintiff contending, as stated, that the deed under which defendant claimed had never been delivered, introduced Laura Woods, the surviving widow, and one of grantors in said instrument, and proposed to prove by said witness, in effect, that the deed was never delivered to defendant, that it was prepared and acknowledged before a justice of the peace with a view to its execution, and was not to be delivered till Worth Woods executed a bond for the support and maintenance of grantors while they lived; that finding such stipulation was not in the deed, and no bond had been prepared, the witness took charge and control of the deed, and put it in her bureau drawer, where it stayed unregistered for about six months; that defendant then lived with the grantors, and on one occasion after the deed had been acknowledged witness and her husband went to Murphy on a visit, leaving defendant at home, and soon after getting to Murphy, she met defendant, who had also come to town; that witness remained two days at Murphy, and some time after she returned home she found that the deed in question had been taken from the bureau drawer without her knowledge or consent, and that later she learned that the same had been registered. On objection, the pertinent portion of the proposed testimony was excluded by his Honor on the ground, as argued before us, that the husband being dead, the surviving widow was incompetent to testify under sec. 1631, Revisal, but in our opinion the ruling cannot be upheld. The section of the statute referred to was enacted to prevent a party to a suit from testifying as to a transaction against the estate or interest of the other party, when the latter is dead and

unable to give his version of the matter. The inhibition operates, and is intended to operate as to adverse parties to the transaction. In the case here presented the transaction is between the husband and the wife on the one side and the defendant, the alleged grantee, on the other, the latter being alive and present, and the proposed evidence of the surviving wife is neither within the terms or purpose of the law. The pertinent decisions construing this section are all in support of this view. *Lehew v. Hewett,* 138 N. C., 8; *Johnson v. Townsend,* 117 N. C., 338; *Peacock v. Stott,* 90 N. C., 518. In *Lehew v. Hewett, supra,* the action was by a surviving husband against a grantor to correct a deed made by defendant to deceased wife of plaintiff, where the agreement was that it was to be made to the wife for life, and then to the husband, the husband was held competent to testify to the agreement with defendant as to how the deed should be made, the ruling being stated as follows: "In an action to correct a deed made to the plaintiff's wife, who is dead, the plaintiff can testify as to what took place between him and the grantor, who is living; and the fact that his wife's estate is affected by the evidence does not render it incompetent under section 590 of the Code." Apart from this, the proposed evidence as to the deed being in the control of the witness, kept in her drawer and unregistered, and that it was taken therefrom and put on the registry without her knowledge or consent, would seem to be receivable as independent facts not coming within the provisions of the law. *In re Bowling,* 150 N. C., 507-510; *McCall v. Wilson,* 101 N. C., 598. Again, plaintiff offered to prove by the justice of the peace, who took the acknowledgment of the alleged grantors, their declarations at the time tending to show that no present delivery was contemplated, nor until a satisfactory agreement was executed for their support, and on objection this evidence was also excluded. The defendant here was relying, in part, and to a great extent, on the recognized principle that where a deed has been acknowledged and registered a delivery is presumed until the contrary is clearly made to appear. *Linker v. Linker,* 167 N. C., 651; *Helms v. Austin,* 116 N. C., 751. The acknowledgment then becomes one of a series of facts constituting the *res gestae. Fraley v. Fraley,* 150 N. C., 501, and the declarations of the parties in doing the act, characterizing the same and expressing their real intent at the time is relevant and receivable as substantive evidence. *Stanford v. Grocery Co.,* 143 N. C., 419; *Merrell v. Dudley,* 139 N. C., 59. And in any event these declarations of Mrs. Woods would be competent to corroborate her direct testimony in so far as same had been admitted.

For the errors indicated, the plaintiff is entitled to a new trial, and this will be certified that the judgment of nonsuit be set aside, and the cause be further proceeded with in accordance with this opinion.

New trial.

W. R. MITCHELL v. MRS. IDA PARKS ET AL.

(Filed 24 December, 1920.)

Wills—Devise—Estates—Per Capita—Intent.

Nothing appearing in the will to the contrary, a devise to testator's wife of one-third of his lands for life, and at her death, "all of this property shall go to the heirs of N.," and to "the bodily heirs of J.," carries the land to the "heirs of N.," and the "bodily heirs of J.," upon the termination of the life estate devised to the wife, *per capita* and not *per stirpes;* and this interpretation is especially applicable when construing the will as a whole, and in its connected parts, the language of the testator manifestly imports this intent.

APPEAL by defendant from *McElroy, J.*, at Spring Term, 1920, of STOKES.

Special proceedings for partition among the parties of a tract of 162½ acres, which was allotted, under the will of Rolley Brim to Katharine Brim, the widow of Rolley Brim, and the rights of the parties depend upon the construction of item 2 of his will, which, with some other sections, is as follows:

"Item 2. I give and bequeath to my wife two good beds and one cow. . . . Also I bequeath to her one-third of all my real estate, including my homestead, after all my debts are paid, during her widowhood. At my widow's death all this property shall go to the heirs of Nancy Ann Mitchell (dec.), wife of Jerry Mitchell, and to the bodily heirs of Jemima Edna Boaze, the wife of Abraham Boaze.

"Item 4. I give and bequeath to the heirs of my daughter Nancy Ann Mitchell, now (dec.) wife of Jerry Mitchell, one-half of the remainder of my estate to hold forever.

"Item 5. I give and bequeath to the heirs of Jemima Edna Boaze (wife of Abraham Boaze) the remainder of my estate to hold forever.

"Item 6. I devise that the heirs above named under my said will shall not have the right to sell or convey any real property conveyed under my said will within a period of twenty years after my death. After the period of the said twenty years, they may sell or convey the same at will.

"Item 7. If any of the above named heirs should die (within the said period of twenty years) without issue of them of their own body, all the rights and heirship shall cease as to the real property of my estate."

The court held, and so adjudged, that under item 2 of the will the division must be made *per stirpes* and not *per capita.* Defendants appealed.

W. R. Badgett and N. O. Petree for plaintiffs.

J. D. Humphries, Sams & Sams, and McMichael, Johnson & Hackler for defendants.

WALKER, J., after stating the case: The question before us calls for a construction of item 2 of the will, and its meaning must be determined by a consideration of the entire instrument in order to ascertain what was the intention of the testator. It is generally held that a devise or bequest to the children of two or more persons, whether expressed as to the children of A. and B., or to the children of A. and the children of B., or to other relatives of different persons, usually means that such children or relatives shall take *per capita* and not *per stirpes,* unless it is apparent from the will that the testator intended them to take *per stirpes.* But a devise or bequest to the heirs of several persons will usually go *per stirpes.* 40 Cyc., 1495. The text is sustained by the authorities cited in the note. *Alder v. Beall,* 24 Md., 123 (11 Gill & Johnson); *Bassett v. Granger,* 14 Md., 348; *Preston v. Brandt,* 96 Mo., 552; *Guild v. Allen,* 28 R. I., 430; *Ross v. Kiger,* 42 W. Va., 402-412. It was held below in *Alder v. Beall, supra,* a case very much like ours, that, under a devise and bequest in these words, "The residue of my estate, real and personal, to be equally divided between the children of my sister, Anna Latimer, and their heirs forever, and the children of my sister, Penelope Beall, and their heirs forever," the personal estate of the testator should be divided among the legatees *per stirpes,* giving half to the children of each sister, and this was affirmed by the appellate Court. *Dyer v. Dyer,* 1 Minvale, 414. It is said in Schouler on Wills, 1 vol., sec. 537, that the use of the words "heirs" or "bodily heirs" or "heirs and assigns," and such like expressions, signify, at least *prima facie,* that the gift was to take effect *per stirpes* and not *per capita.* And this distinguishes the case at bar from those relied on by the counsel in his learned argument before us where the expression was "to children," or "to children to be equally divided between them," or "to children naming them," as in *Culp v. Lee,* 109 N. C., 675; *In re Brogden* (at this term). The cases we have cited, taken at random from those in other jurisdictions, are fully supported by our own decisions, such as *Lowe v. Carter,* 55 N. C., 377, where the provision was, "It is my desire that the personal property belonging to my estate be sold, and the proceeds of the said sale be equally divided between the bodily heirs of my three daughters, viz.: Elizabeth Russell, Sarah Carter, and Catharine King," this Court held that the division should be *per stirpes,* which strongly supports our view; and in *Gilliam v. Underwood,* 56 N. C., 100, the testator, in the fourth item of his will, directed as follows: "After settling up all of my just claims, if anything remains it shall be equally divided between my daughter Lucy, my son John's children, and my son Berry Underwood," held the division should be *per stirpes.* The words were, in *Lockhart v. Lockhart,* 56 N. C., 205: "It is my will, after paying my just debts, that all my property of every kind and description, not disposed of in

the above items of this will, be equally divided between the children of my deceased son, Jno. J. Lockhart, and my sons Benjamin F. Lockhart and Joseph G. Lockhart," and the Court held that the division was *per stirpes,* and that the children of John J. Lockhart, deceased, took as a class and not *per capita.* See, also, *Bivins v. Phifer,* 47 N. C., 436; *Henderson v. Womack,* 41 N. C., 437; *Martin v. Gould,* 17 N. C., 305; *Spivey v. Spivey,* 37 N. C., 100; *Lee v. Baird,* 132 N. C., 766; *Roper v. Roper,* 58 N. C., 16; *Burgin v. Patton, ibid.,* 425. The case last cited closely resembles this one in its facts. Our case, we think, is stronger for a *per stirpes* division than any of those we have cited.

It will be observed that throughout the will the testator uses the word "heirs" to describe those who shall take his estate, and in the seventh item he provides that if any of "the above named heirs" should die "within the said period of twenty years without issue of their own body, all the rights and *heirship* shall cease as to the real property." He evidently intended not a single class taking among themselves, but those who should take by classes or families in the quality or character of heirs; and, besides, in items four and five he actually divides the estate into halves, one of which should go to Nancy's children and the other to Jemima's, which, of course, is a division *per stirpes.* This tends to show that he was of the opinion that in item 2 he had used words sufficient to create a division *per stirpes,* though his language is somewhat obscure, or less clear and definite than it is in items 4 and 5. He meant that it should be divided in the same way both as to the 162-acre tract and the remainder of his estate. This, of course, is said regardless of the great weight of authority as to how such language should be interpreted, it being *per stirpes.*

We are, therefore, satisfied that we have reached the right conclusion as to his "true intent and meaning," and we accordingly affirm the judgment.

Affirmed.

McKINLEY McMAHAN v. CAROLINA SPRUCE COMPANY.

(Filed 24 December, 1920.)

1. Employer and Employee—Master and Servant—Duty of Master—Safe Place to Work—Negligence—Contributory Negligence—Evidence—Questions for Jury—Trials.

The master's duty is to furnish his employee a reasonably safe place to work, which the latter may assume he has done, and where the omission of this duty by the former causes an injury to the latter, without negligence on his part, he may recover in his action such damages as he may thereby have sustained, which under conflicting evidence is a question

for the jury, upon both the issues as to negligence and contributory negligence, and a motion for judgment as of nonsuit upon the evidence will be denied.

2. Same—Simple Tools.

Evidence that a minor employee, without instructions from his employer, in the course of his employment, was required to help put a hand-car upon the rails of defendant laid upon a platform or dock, which had been derailed by the rotten condition of the planks upon which the rails were laid, causing them to spread; that insufficient help was furnished to do this, in the usual manner, by lifting the car upon the rails, and required the plaintiff to go around a pile of lumber to get planks with which to again place the car upon the rails in furtherance of his work, and that the injury complained of was caused, while he was in the exercise of due care, by his stepping upon planks piled by the defendant improperly and out of their place, on the platform or dock, the principle as to "ordinary tools" has no application, and such evidence is sufficient to take the case to the jury upon the issue of the defendant's actionable negligence.

3. Employer and Employee—Master and Servant—Physicians and Surgeons—Negligence.

Evidence that the employer selected a physician to attend employees injured while engaged in the course of their duties, and paid for such services by assessment among the employees, is sufficient to sustain a verdict for damages caused by the malpractice of the physician, so selected and paid, to an employee so injured, when the employer has been negligent in not properly selecting the attending physician.

4. Same—Notice—Evidence.

Evidence that a physician, selected by the employer to attend an employee injured in the course of his employment, failed to place the broken bones of the arm of the employee in proper alignment, but left them overlapping each other, without a union between them, thus shortening the arm, leaving it two inches shorter than it should have been, and very crooked and ugly in appearance, and practically useless, is sufficient, upon the question as to the malpractice of the attending physician, to take the case to the jury, with other evidence that the employer had previous notice of his incompetency as a physician or surgeon.

5. Same—Substantive Evidence.

Evidence that at the trial of another action, to which he was a party, the employer acquired knowledge of the incompetency of a physician or surgeon whom he thereafter retained to attend an employee who received an injury in the course of his employment, is sufficient as to the defendant's notice of such incompetency, upon the question of his negligent selection of him, though not substantive evidence as to whether he was, in the present case, chargeable with malpractice.

6. Appeal and Error—Findings—Depositions—Evidence.

The findings of the trial judge that a witness, testifying by deposition, was sick and unable to attend court, and had been duly served with subpoena, are conclusive on appeal, where there is evidence to support them and the deposition was properly admitted in evidence.

7. Contracts—Negligence—Release—Infants—Evidence.

Where a release has been obtained from an employee, discharging his employer from liability for a personal injury, alleged to have been caused by negligence, a family record containing the ages of employees, including that of the plaintiff, showing that he was a minor at the time of signing the release, is competent in corroboration of other evidence to the same effect, upon the question of the validity of the release.

8. Employer and Employee—Master and Servant—Physicians and Surgeons—Malpractice—Evidence—Res Gestae.

It was competent for the plaintiff to testify in his own behalf as to what the physician said at the time he treated his arm, as to its condition and appearance, and as to what a knot near the elbow signified, which turned out afterwards to be a wrong diagnosis, this being in the nature of declarations accompanying the acts of the physician in treating the arm, and therefore a part of the thing done (*pars rei gestae*).

9. Contracts— Negligence— Release— Fraud— Evidence— Employer and Employee—Master and Servant.

Upon allegations of fraud in the procurement of a release from damages for a personal injury resulting from malpractice of a physician in setting a broken arm of defendant's employee, and for which the defendant is responsible, evidence that the defendant, and the physician employed by him, misrepresented the condition and effect of the injury and its probable consequences, which was calculated to and did mislead the plaintiff in taking a small sum of money in giving a release, altogether disproportioned to any reasonably adequate sum, is sufficient to be considered upon the issue as to the validity of the release.

10. Same—Physicians and Surgeons—Malpractice.

Where the employer is responsible in damages for malpractice of his physician in charge of an injured employee, and there is evidence that he afterwards had called in another physician, who properly treated the case, recovery can only be had for the injury and damage occasioned by the malpractice of the first physician; and where the judge clearly and properly so charged the jury, and the jury has so confined the damages, his reference to the second physician called in is not prejudicial, but harmless.

11. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Objection to an alleged misstatement by the judge of the contention of a party should be made promptly in order to be available by exception on appeal.

APPEAL by defendant from *Harding, J.*, at August Term, 1920, of YANCEY.

Plaintiff states two causes of action, in the first of which he alleges negligence of the defendant in failing to furnish a safe place to work. The defendant required the plaintiff to work on a lumber dock, which was about twelve feet above the ground on a frame of studding, which had been floored and a steel rail track laid on top of this flooring, upon

which track a lumber car or truck was operating. Defendant had been shipping lumber from packs alongside of this dock, and had carelessly piled up a lot of lumber and packing strips in a loose way on top of this lumber dock and by the side of the track. The timber in this dock had been permitted to rot, which caused the track upon the same to spread, and the lumber truck to drop down between the rails. In order to get the truck back on the track, it was necessary to prize the same up with timbers, requiring the plaintiff to go around the car on the dock, and to do so he was required to pass over this lumber or packing strips, which slid off to the ground, taking the plaintiff with it, a distance of about twelve feet, when both the bones in his left arm were broken. Plaintiff also alleges an insufficiency of hands to do the work which required him and his coworker to use the scantling for prizing the car back on the rails.

In the second cause of action the plaintiff alleged that he was injured by the malpractice of defendant's doctor, who failed to treat his arm properly and with ordinary skill, and failed to use the right kind of splint, and thus permitted the bones of his arm to become lapped and out of alignment, and thereby his arm was left badly misshaped and was rendered practically useless.

Defendant pleaded a release by the plaintiff, which the latter alleged was fraudulently procured. The other questions in the case will fully appear from the verdict, which, with the answers thereto, is as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the first cause of action, as set out in the complaint? Answer: 'Yes.'

"2. Did the plaintiff by his own negligence contribute to his own injury? Answer: 'No.'

"3. What damage, if any, is plaintiff entitled to recover for and on account of his injury, as alleged in the first cause of action? Answer: '$2,500, less $165.'

"4. Was the signature of the plaintiff and the execution of the contract of release set up in defendant's answer obtained from the plaintiff, McKinley McMahan, through fraud, undue influence, or misrepresentation of the defendant? Answer: 'Yes.'

"5. Was the plaintiff at the time of signing the said release a minor, under the age of 21 years? Answer: 'Yes.'

"6. Did the defendant engage and employ Dr. D. J. Smith as its physician to treat the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"7. Did the defendant negligently furnish an unskilled and incompetent physician and surgeon to give such treatment? Answer: 'Yes.'

"8. Was the plaintiff injured by the negligence of the defendant in failing to properly treat plaintiff's injury, as alleged in the complaint? Answer: 'Yes.'

"9. What damages, if any, is the plaintiff entitled to recover as the result of negligence, as alleged in the second cause of action? Answer: '$4,000.'"

Judgment was entered on the verdict, and the defendant appealed.

Watson, Hudgins, Watson & Fouts for plaintiff.

W. C. Newland, S. J. Ervin, Merrimon, Adams & Johnston, and Charles Hutchins for defendant.

WALKER, J., after stating the case: It will be convenient to consider the exceptions in the order of their statement in the record, though they are not so stated in the defendant's brief.

As to the first cause of action, we think there was sufficient evidence of the defendant's negligence for the jury. The defendant was required to exercise due care in furnishing a reasonably safe place for plaintiff to do his work, and this, it is alleged, was not done, as its platform or dock was decayed so that the rails spread and the hand-car fell between the rails. On the day of the injury the car, because of the rotten condition of the dock, fell between the rails, and it was necessary for plaintiff to secure a scantling from the other side of the track in order to prize it back to its place. To do this he was required to go around the car, and while he was walking toward the place where he saw the scantling, he stepped on a pile of lumber which had been taken from the stack and was crossed. It should not have been there, and, besides, it was improperly piled, being crossed instead of straight. He was short of help and had to hurry with his work in order to keep the mill clear of lumber where it would be in the way if allowed to accumulate. He stepped on the lumber and it slipped and slid off and threw him violently to the ground, because it was piled improperly. It should have been piled straight instead of crossed, and should have been in the stack and not on the platform. The question of negligence was properly submitted to the jury by the court, under the rule of the prudent man, and also the question of plaintiff's contributory negligence, and they found against the defendant.

This case does not fall within that class where the employer is allowed to do simple work in his own way, without the necessity of any instructions from his employer, because it is presumed in such a case that the work is safe if properly done by the employee, by the exercise of his own common sense and judgment, there being no complication in the work requiring special instructions from the employer as to how he should

do it. But this rule does not apply if the employer has not furnished a reasonably safe place to do the work, and the employee has been injured by his default in this respect, while in the exercise of due care himself. Whether the master has performed his duty and the servant has performed his, are questions manifestly for the jury to decide. If in this case the defendant furnished a rotten platform or dock for its servant to work on, and insufficient help for him to do the work properly and safely; if in consequence of defendant's failure in this respect, plaintiff was compelled to go around the car on a walk, where lumber was wrongly and carelessly piled, and while in the exercise of care himself, the plaintiff stepped on the pile of lumber which slipped from under him and caused him to be thrown from the platform, and the jury found these to be the facts, and that the injury was proximately caused in this way, and by defendant's failure of duty, the verdict was correct in fact and in law. We must hold that there was some evidence from which the jury could infer the necessary facts showing defendant's negligence, and the same may be substantially said of the defendant's contributory negligence. His Honor put both questions to the jury according to our approved precedents. It was more a question of fact than one of law. The master's duty to furnish a reasonably safe place for the servant to work and proper machinery and other appliances with which he may perform it, is unquestionable. "Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, . . . the question whether it was such a place, or whether the failure to warn him of the danger was the proximate cause of the injury should be submitted to the jury. Where more than one inference can be drawn, as to the negligence, or the proximate cause, it is for the jury to determine" which inference is the correct one. *Holton v. Lumber Co.*, 152 N. C., at p. 69. Cases bearing on this question are *Steeley v. Lumber Co.*, 165 N. C., 27; *Nelson v. Tobacco Co.*, 144 N. C., 420; *Dunn v. Lumber Co.*, 172 N. C., 129; *Marks v. Cotton Mills*, 135 N. C., 290; *West v. Tanning Co.*, 154 N. C., 44, and other cases which are cited in *Steeley v. Lumber Co., supra.* There was no error in submitting the first cause of action to the jury, especially when the principles of law applicable to the case were so lucidly stated in the charge.

As to the second cause, for malpractice in treating the plaintiff, there can be no question that there was some evidence which tended to establish the charge of unskillfulness in the method of treatment, and a failure to exercise proper care and to make a proper diagnosis. There was undoubtedly sufficient evidence that defendant knew of the incompetency of the physician. The particular allegation is that Dr. Smith, assisted by Dr. Aldredge, failed to place the broken bones in proper alignment, but left them overlapping each other, and without a union between them,

thus shortening the arm about two inches, and leaving it "very crooked and ugly in appearance, and practically useless." As said in *Woody v Spruce Co.*, 178 N. C., 592 (*S. c.*, 176 N. C., 643), "The defendant owed the duty to the plaintiff, after it had undertaken to secure a doctor for him, to see that he was one of reasonable skill and ability." There was evidence that Dr. Smith was employed and paid from the wages of the employees, upon the assessment plan, to treat them, and the rule just stated, as to defendant's duty in the premises, is the correct one. The evidence of a prior suit to which defendant was a party, and in which he was informed of the physician's lack of skill, was sufficient to charge it with notice of the same on the question of negligence. It was not competent as substantive evidence of the physician's incompetency, nor of negligence itself, but only of notice to the defendant that he was considered as unskillful. *Fowle v. R. R.*, 147 N. C., 491; 4 Chamberlayne on Mod. Law of Ev., sec. 3230. The information came to the defendant under oath, and therefore was most solemnly imparted to him; and the jury found that he was incompetent before this transaction. With these facts within its knowledge, the defendant should have proceeded more cautiously. Some latitude is necessarily allowed in proof as to notice or knowledge. It was held in *Woody v. Spruce Co., supra,* that while the company was under no obligation to furnish a physician to its employees, when it assumed to do so, the duty arose to exercise due care in selecting him and in continuing him in its service. Several of the exceptions to testimony are so plainly untenable that we forbear any discussion of them.

The deposition of Mrs. McMahan was competent. The judge found as facts that she was sick and unable to attend court, and had been duly served with a subpoena. These findings are binding upon us. *Williford v. Bailey,* 132 N. C., 403; *Branton v. O'Briant,* 93 N. C., 103; Pell's Revisal, sec. 1645, subsec. 4. There were no written exceptions to the deposition filed. *Davenport v. McKee,* 98 N. C., 500, at p. 507, and cases cited.

As to the paper containing the ages, including that of the plaintiff, it was, at least, corroborative and was properly admitted on that ground, if for no other reason. It was offered to prove the age of plaintiff, and the want of capacity to execute the release. On the question of fraud in procuring the release, the court's instructions to the jury were fully sufficient, and conformed to our precedents, and the same may be said of the general charge on the second cause of action.

The testimony of plaintiff as to what he told Dr. Smith as to the condition of his arm, when the doctor examined it and changed the splints put there by Dr. West, was clearly admissible as part of the *res gestae,* and also as explanatory of his physical condition, the statement having

been made to his physician at the time the latter was trying to discover what was that condition. He called the doctor's attention to the knot on his arm bone, and was told that it was not serious, but merely a callous formation on the bone, and that it would be all right, which proved to be untrue; the doctor advised him that he could go back to his work, whereas the arm became so bad, and was so crooked and disfigured, that he was ashamed to exhibit it, even to the doctor who treated it. There was evidence that the arm was not treated according to the approved methods of surgical science, and did not receive the proper attention, and for these reasons it was left in its present condition, and will never improve or return to its normal shape. The court, in the charge, expressly confined the testimony in regard to the Woody suit against the defendant to the question of notice, or knowledge of Dr. Smith's incompetency, and positively instructed the jury not to consider it as substantive evidence of the fact.

The motion to nonsuit was properly overruled. Upon such a motion the testimony must be taken as true (*Reid v. Reese,* 155 N. C., 230; *Woody v. Spruce Co.,* 176 N. C., at p. 643), and when so regarded, there was ample evidence to support the verdict. In this connection we may well repeat that plaintiff's testimony of how he was hurt, if believed, shows that the lumber on the dock was so carelessly piled as to cause it to give way when he stepped on it, and besides, that kind of lumber did not belong there, but should have been in the stack, and that he did the best he could under the circumstances, not being aware of the trap that was there, though not intentionally set for him. These and other facts of like import, taken in connection with the rotten platform, and the shortage of helpers, made a case of negligence for the jury to find. Plaintiff properly contended that he had the right to assume that his employer had so piled the lumber as not to be unsafe to him while in the performance of his duties, and that he had not needlessly exposed him to danger. *Cochran v. Young-Hartsell Mills Co.,* 169 N. C., 57. The master produced the situation which required the plaintiff to walk over the pile of lumber and was negligent in doing so, but having done it, the servant had the right to assume that he could safely walk to the place where he was required to go for the scantling, or whatever he needed, to prize the car back, especially as there was a lack of necessary help to do the work, according to plaintiff's testimony, which we must believe to be true on the motion of nonsuit. *Pigford v. R. R.,* 160 N. C., 93.

There was evidence of fraud in procuring the release and of a want of consideration. There was actual misrepresentation here, notably as to plaintiff's condition, which was calculated to mislead him and cause him to surrender his right of recovery for a mere song, almost nothing as compared with the extent of his injuries and his real damage. *Causey*

v. R. R., 166 N. C., 5, at p. 10, where it is said (quoting from *Hume v. U. S.*, 132 U. S., 611): "It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept, on the other." The charge was plainly correct as to the burden of proof. *Woody v. Spruce Co.*, 178 N. C., 592, 593 (*S. c.*, 176 N. C., 644). No damages were claimed after 1 December, 1917, and the judge instructed the jury not to award any, which resulted from any treatment of Dr. Smith after that date, as the defendant was protected against any such award of damages by its contract with the plaintiff. The charge was correct as to the other damages, when the entire charge is considered.

We are of the opinion that the jury did not give any damages because of anything Dr. West did, as it appears that his treatment was satisfactory according to plaintiff's own testimony, and from all that appears, he was competent and capable. The injury done was attributable to Dr. Smith's advice and treatment of the arm. The plaintiff testified that its appearance was good when he returned from the hospital, and the arm was straight. The splints were removed by Dr. Smith and twice replaced with others by him, and it was then and thereafter the damage was caused. We can see nothing to lead us to believe that any part of the recovery was due to Dr. West's conduct, or treatment, and therefore the reference to him, even if improper, was not prejudicial, and was practically harmless. It is not ground for a reversal. *S. v. Bailey*, 179 N. C., 724. Besides, the issues themselves restricted the inquiry to damage caused by Dr. Smith's incompetency. The jury surely understood its scope.

We have examined this case with great care, and close attention, and can find no reversible error. The objections to the judge's statement of the contentions fall within the usual rule that any error therein, if any, was not called to the judge's attention, as it should have been, in proper time so that he could correct it. *Sears v. R. R.*, 178 N. C., 285; *Hall v. Giessell*, 179 N. C., 657. The numerous exceptions have extended this opinion beyond our expectation.

As we find no error, it will be so certified.

No error.

MAGGIE BAILEY v. CITY OF ASHEVILLE.

(Filed 24 December, 1920.)

1. **Municipal Corporations—Cities and Towns—Streets and Sidewalks—Defects in Sidewalks—Negligence—Subsequent Repairs—Identification—Evidence.**

In an action to recover damages of a city for a personal injury, caused to the plaintiff by the defendant's negligently having its meter box in a dangerous condition, with its top several inches below the level of the sidewalk, covered up or concealed by weeds or straw, so that the plaintiff did not see its imperfect condition and stepped therein to her injury, evidence is competent, when wholly confined to the location of the water meter box in question, a relevant matter in dispute, that the defendant made changes in the condition of this box after the occurrence of the injury complained of in the suit, but not as evidence of negligence.

2. **Municipal Corporations—Cities and Towns—Streets and Sidewalks—Defects—Negligence—Notice.**

Municipal corporations are required to keep their streets and sidewalks free from dangerous defects therein for the safety of those entitled to use them, and are responsible in damages to those who may be injured, when such damages are the proximate cause, and the municipalities have had sufficient previous notice thereof, either actual or implied from its neglect of its duty of supervision, for such length of time as should have put them upon sufficient notice to repair in time or to guard against the injury, or to be reasonably inferred by the jury from the facts in evidence.

3. **Same—Evidence—Questions for Jury—Trials.**

Where there is evidence that a municipal corporation for several months had permitted its water meter box to become dangerous to pedestrians on its sidewalk, had had the meter read by its employee once each month, the last time being about five days before the injury for which damages are demanded in the action; that the top of the box was several inches below the grade of the sidewalk, and not discernible for the grass and leaves: *Held*, sufficient upon the issue of the defendant's actionable negligence; and as to whether it had, or should have had by proper supervision, notice sufficient for it to have remedied the defect and avoided the injury.

APPEAL by defendant from *Long, J.*, at the October Term, 1920, of BUNCOMBE.

This is an action to recover damages for personal injury.

The negligence complained of is that the defendant placed a water meter box on one of its sidewalks two or three inches below the surface, with an insecure covering, and permitted dirt and leaves to accumulate thereon.

On 27 October, 1917, the plaintiff, while running down Black Street in said city stepped on the top of a water meter box, the top, which had been displaced, or partially removed, flew up and her leg went into the box, causing the injury.

Black Street, where the injury occurred, is a graded but unpaved street, the plaintiff lived on the south side and she had crossed over on the north side of the street. There was no paved sidewalk, the entire street, including the portion used as a sidewalk, being of a loamy clay soil. The street ran east and west, and the street inclined considerably down grade towards the west to the depot, to which point the plaintiff was running when injured.

It is alleged in the complaint, and admitted in the answer, "That at the point where water connections are made on Black Street by the defendant"; "that said meters were constructed by sinking a terra-cotta twelve-inch pipe down into the ground over the meter, and placing a flat iron cap fitting over the top of the pipe and in the opening in the iron cap is fitted into a groove, an iron lid (somewhat like a stove lid and eye)."

The defendant moved for judgment of nonsuit, which was refused and defendant excepted.

There is also an exception to the admission of evidence which is referred to in the opinion.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

W. P. Brown and J. D. Murphy for plaintiff.
George Pennell and Marcus Erwin for defendant.

ALLEN, J. We have been much impressed by the earnest argument of counsel for the defendant, but upon careful consideration of the record we find no error which would justify a new trial.

Two exceptions are relied on. The first is to the reception of evidence showing that the defendant made changes in the condition of the water meter box after the plaintiff was injured, which would have been erroneous under the authority of *Lowe v. Elliott,* 109 N. C., 581; *Myers v. Lumber Co.,* 129 N. C., 252; *Aiken v. Mfg. Co.,* 146 N. C., 324, cases relied on by the defendant, if the evidence had been admitted on the question of negligence, but this was not done, and, on the contrary, the court carefully restricted the evidence to the identification of the box and place of injury, for which purpose it was competent.

When the evidence was offered and objected to the court said: "The rule would be this: If you offer evidence tending to show that the meter box was at a certain place, and that place is disputed, you can offer evidence to identify the particular place. Of course, its condition at a subsequent time could not be used as a cause of action either, only the condition of the place at the time of the alleged injury would be competent; but as to the identification of the place in evidence, that you may offer.

"I will let her go on and state whether or not there was a hole there, only for the purpose of identity. The court rules that the cause of action is founded upon the conditions existing at the time alleged in the complaint; then the plaintiff's action must stand or fall by conditions that existed at that time—but as to the contest between the plaintiff and defendant as to whether or not there was a meter hole at the place at the time alleged in the complaint, the evidence as to subsequent conditions is admitted for the purpose only—that is, whether there was in existence at the time of the alleged injury such a meter box or place as that described in the complaint. This evidence is only for identification of such place, and the jury are instructed that it is admitted for no other purpose."

The other exception is to the refusal to nonsuit the plaintiff upon the ground that there is no evidence of negligence.

The duty of the municipal corporation in reference to streets is stated as follows in *Bailey v. Winston,* 157 N. C., 259: "A city or town or village must keep its streets in good condition and repair so that they will be safe for the use of its inhabitants or of those entitled and having occasion to use them. If they become unfit for use by reason of defects which could not be anticipated and consequently guarded against, under ordinary circumstances, the municipality should have some notice of the defect, either actual or else implied from the circumstances; and in this connection it must be said that it is the duty of the city (and of course these principles apply generally to all forms of municipalities) to exercise a reasonable and continuing supervision over its streets, in order that it may know they are kept in a safe and sound condition for use. Sometimes notice of their defective condition is actual or express, again it is constructive or implied, where, for instance, the defect has existed for such a length of time as to show that the city has omitted or neglected its plain duty of supervision; and still again, it may be inferred by the jury from the facts in evidence. This principle is illustrated and was applied in *Fitzgerald v. Concord, supra,* where it is said, approving 1 Sh. and Red. on Negligence, sec. 369: 'Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and for practical purposes the opportunity of knowing must stand for actual knowledge. Hence, when observable defects in a highway have existed for a time so long that they ought to have been seen, notice of them is implied, and is imputed to those whose duty it is to repair them; in other words, they are presumed to have been discovered by the exercise of reasonable diligence.' . . . 'On the question of notice implied from the continued existence of a defect, no definite or fixed rule can

be laid down as to the time required, and it is usually a question for the jury on the facts and circumstances of each particular case, giving proper consideration to the character of the structure, its material, the time it has been in existence and use, the nature of the defect, its placing,' and other considerations not necessary to be stated."

Is there evidence that the defendant failed to perform this duty?

The meter box was placed on the sidewalk and, as stated in the brief of appellant, the "defendant admitted control and duty to maintain both the meter box and the street."

The evidence of express and implied notice to the defendant of the condition of the box was plenary, as one witness testified that the box had been in the same condition as when the plaintiff was injured six or eight months, and an employee of defendant read the meter monthly, the last time being five days before the injury.

There was also evidence that the box was so placed that it made the sidewalk unsafe and dangerous.

One witness testified as follows: "Now, tell the jury, if you please, the condition of that hole with reference to the surface of the sidewalk? It was somewhat lower, three or four inches lower. I should say, and was hardly discernible. I walked over it and didn't see it until it was pointed out to me. Why was it that you couldn't see it? On account of grass that had grown up about the sides of it, and probably there were leaves over it."

There was other evidence tending to prove that the box was two or three inches lower than the general surface of the sidewalk, that grass had grown around it, that dirt and leaves covered it, or nearly so, and that the covering of the box was insecurely fastened, which was sufficient to support the verdict.

No error.

JAMES SHULER ET AL. v. BURNHARDT LUMBER COMPANY.

(Filed 24 December, 1920.)

1. Limitation of Actions—Judgments—Estoppel—Adverse Possession.

A judgment in an action involving the disputed title of land will not estop the losing party from showing his title by twenty years adverse possession since the rendition of the judgment, under known and visible metes and bounds.

2. Same—Evidence—Questions for Jury—Trials.

Evidence that the *locus in quo* had been in the possession of a party, claiming title by adverse possession, and that he had used the lands for the purposes to which they were adapted, for more than twenty years,

under known and visible metes and bounds, and, in this case, that he had cleared and cultivated some of it every year, and had continuously for the required period, taken from the tract rail timber, board timber, locust pins, and tan bark, is sufficient to take the case to the jury; and a motion for a judgment as of nonsuit upon the evidence will not be sustained.

APPEAL by plaintiff from *Bryson, J.*, at June Term, 1920, of GRAHAM.

This is an action to recover damages for a trespass on lands embraced in grant No. 10391, entry No. 1178, as shown on the court map. The grant was issued to J. B. Caringer and W. T. Shuler on 12 December, 1890. Plaintiffs are the heirs at law of W. T. Shuler.

At date of this grant, and up to his death, W. T. Shuler, father of plaintiffs, and his wife, Rachel Shuler, were living on tracts 1058 and 4559 (Whitaker land), adjoining the above mentioned grant. All of the above lands were covered by grant No. 3140, entry 3029, issued to A. T. Davidson, dated 3 February, 1868, and under which the defendants claim. At November Term, 1895, of the Graham Superior Court, a judgment was rendered in a suit pending between A. T. Davidson and the heirs of W. T. Shuler, present plaintiffs, adjudging that Davidson was the owner of grant No. 3140, located as shown on the Crisp plat. There was evidence tending to show that at that date the plaintiffs had one field, which lapped over on entry No. 1178, shown on the map as field No. 1, and since that date have kept said field in cultivation and enlarged same, and have made two other fields on the said entry, to wit, Nos. 2 and 3. Field No. 3 has been cultivated for about 23 years by the Shulers, they claiming all the land as their own, and that the plaintiffs had claimed the same up to known and visible lines and bounds, using same adversely, for 23 years.

The court was of the opinion that the plaintiffs were estopped by the judgment of 1895, and therefore could not claim the land. Judgment of nonsuit was entered accordingly, and plaintiffs appealed.

T. M. Jenkins and R. L. Phillips for plaintiffs.
W. M. Bell and T. A. Morphew for defendants.

WALKER, J., after stating the case: The first question presented is, "Did the judgment in favor of A. T. Davidson, entered November, 1895, estop the defendants there (plaintiffs here) from acquiring title by adverse possession? We are of the opinion that the following cases are clear authority against this position: *Wilson v. Brown,* 134 N. C., 400; *Reynolds v. Cathens,* 50 N. C., 438; *Eddleman v. Carpenter,* 52 N. C., 617; *Scarboro v. Scarboro,* 122 N. C., 234. The Court, in *Reynolds v. Cathens, supra,* held that the possession of a grantor in a deed, who holds over, after his deed was delivered, may be adverse. *Judge*

Pearson in his opinion, said: "In respect to the possession of Sarah Wilkie the vendor, under whom both parties claim, we are unable to see any principle of law which prevents it from being adverse to the lessor of the plaintiff. She was not his tenant for years, at will or at sufferance, nor did she enter under or obtain possession from him. As far as the case disclosed, she continued in possession without any understanding or permission on the part of the plaintiff's lessor, notwithstanding the deed she had executed, the legal effect of which was to give plaintiff's lessor right of possession, but in defiance of which she maintained and continued her possession. It would, consequently, seem that this possession was adverse." In *Johnston v. Farlow,* 35 N. C., 84, it was held that the old deed was not color, but that case recognizes that the possession can be adverse even after the deed was made. Of course, if after the execution of a deed with covenants a man can acquire title by adverse possession, he certainly can after a judgment which gives the right to a writ of possession. It was held in *Wilson v. Brown, supra,* that the possession of a person, which continues after his land is sold under execution and deed made to the purchaser, is adverse to the purchaser, but the original deed to him is not color of title after the sale.

These plaintiffs claim title by adverse possession under known and visible lines and bounds for twenty years, since the rendition of the Davidson judgment. Rev., 384.

The second question is, Was the evidence of the plaintiffs, taken in its strongest light for them, sufficient to justify a finding by the jury that they had held open, notorious, continuous, and adverse possession, under known and visible lines and bounds, for twenty years, since the date of the judgment, November, 1895?

An examination of the testimony of James Crisp, surveyor, shows that this tract of land is a well marked tract. The evidence of James Crisp, Ed. Shuler, and James Shuler all shows that these plaintiffs had used these lands for the purposes to which they were adopted, from the date of the judgment down to the bringing of the action on 15 January, 1920. Some of the acres had been cleared and cultivated every year, rail timber, board timber, locust pins, and tan bark had been taken from the land all these years.

It is admitted in defendants' brief that there was evidence to establish the contentions of plaintiffs, as to adverse possession, and we are of the opinion that there was sufficient evidence to fairly raise a controverted question for the jury, and therefore it was error to grant the nonsuit. Plaintiffs were claiming 20 years adverse possession, and not under color.

New trial.

E. N. HOOPER v. TALLASSEE POWER COMPANY.

(Filed 24 December, 1920.)

Official Bonds—Deeds and Conveyances—Mortgages—Registration—Statutes—Purchasers.

The mortgage or deed in trust permitted by Rev., 265, to be given in lieu of an official bond, is, as to proper registration, to be regarded as a mortgage, or deed in trust, and accordingly registered as the law requires, construing the statute strictly, as required; and its entry upon the records in the clerk's office as a bond, alone, without recording it in its proper place as a mortgage, is insufficient to give notice to, or priority of lien, over a deed of a subsequent purchaser of the land.

APPEAL by plaintiff from *Ray, J.*, at the September Term, 1919, of GRAHAM.

This is an action to recover land, in which there was a judgment for the defendant, and the plaintiff appealed.

J. M. Moody for plaintiff.

R. L. Phillips and S. W. Black for defendant.

ALLEN, J. The State issued grants to J. J. Colvard, covering the land in controversy, under whom both plaintiff and defendant claim.

Colvard, described in one part of the record as treasurer of Graham County, and in another as tax collector, executed a mortgage to the clerk of the Superior Court in lieu of an official bond, as is allowed under Rev., 265, and it is under this mortgage the plaintiff claims.

Thereafter the said Colvard conveyed the land to J. W. Adams, who is admitted to be a purchaser for full value, by deed which was duly registered, and it is further admitted that the defendant has a connected chain of title from Adams.

The mortgage was copied in the official bond book kept in the office of the register of deeds, and there was no other registration until after the purchase by Adams from Colvard, nor was the mortgage indexed in the general index of deeds and mortgages, or in the bond book.

The question therefore presented on this phase of the title is whether copying in the official bond book is a legal registration, because if it is the plaintiff has the older and better title from Colvard, while if the mortgage was not registered according to law, the title is in the defendant through the deed to Adams, as it is "Settled beyond controversy that as against purchasers for value an unrecorded mortgage has no validity, either by way of passing the title or creating a lien, equitable or otherwise." *Wood v. Tinsley,* 138 N. C., 510.

The statute (Rev., 265) permits the execution of a mortgage or deed in trust in lieu of an official bond, but the "Statute is exceptional in its provisions, and must be strictly observed" (*Eshon v. Comrs.*, 95 N. C., 76), and the instrument when so executed is still a mortgage or trust deed and not a bond, and must be legally registered before it can prevail against the registered deed of a subsequent purchaser.

The purpose of the registration laws "Is to give notoriety as to the existence and extent of mortgages and deeds of trust" (*DeCourcy v. Barr*, 45 N. C., 187); no notice, however clear, will supply the place of registration (*Hinton v. Leigh*, 102 N. C., 31), and registration means more than copying on a book in the register's office, as is shown by numerous cases holding that a mortgage transcribed on a book kept for that purpose was not registered so as to affect a subsequent purchaser, if the probate was defective, the Court holding "that what was not done in due form was not done at all in contemplation of law." *Todd v. Outlaw*, 79 N. C., 239, and citations.

In some States where registration is required in a particular book, it is held that copying in the wrong book is no registration, and in a Vermont case that, "The record of a mortgage will not impart notice to subsequent purchasers or creditors, where it has been made by the officer intrusted with the duty of recording deeds, on the back leaf of a book which had been filled by the records of prior deeds, for twelve years past, and had since that time ceased to be used for recording purposes, and where moreover the names of the parties to the mortgage were not entered in the index to the records." 19 R. C. L., 426.

These authorities and others proceed upon the idea that as the law fixes a subsequent purchaser with notice of all incumbrances properly on the registration books, although he may overlook them after diligent investigation, it is but fair and just, for the protection of the purchaser, that the incumbrance should be legally on a book kept for the registration of instruments.

The purchasers should not be required, in addition to examining indexes, to search every book in the office of the register of deeds, although bearing labels having no relation to deeds and mortgages.

The register is required to keep a record of "vital statistics," and he is the custodian of the minutes of the commissioners, which are preserved in regularly bound volumes.

Must the purchaser look through these records, and if he fails to do so and the register has by mistake copied a mortgage on one of them, is the purchaser bound as by a duly registered mortgage?

We think not, and the same reasoning would make it unnecessary to examine a bond book, in which it could not be reasonably expected that a mortgage would be found.

Ely v. Norman, 175 N. C., 294, on which the plaintiff relies, instead of being an authority against this position, strongly supports it.

In that case the defendant executed a lien on crops to secure advances, and in the same instrument conveyed a tract of land as security for the debt. The instrument was registered in a book for agricultural liens, but it was indexed and cross indexed so that it could be easily found, and the Court held that it was legally registered.

It is pointed out in the opinion that our statutes do not require registration "in any special book or one of any particular kind of description," but the Court adds, "Undoubtedly they should put in a book recognized and used in the office for recording instruments," which is substantially a decision of the present question, because the mortgage under which the plaintiff claims was not "in a book recognized and used in the office for recording instruments."

We are therefore of opinion the mortgage under which the plaintiff claims was not registered according to law, and that the plaintiff's title must fail.

We do not put our decision on failure to index and cross index, recognizing the correctness of the principles announced in *Fowle v. Ham,* 176 N. C., 12.

There are other irregularities in the title, which we need not consider, as the one decided settles the controversy.

Affirmed.

W. O. HOWARD ET AL. v. JAMES E. SPEIGHT ET AL.

(Filed 15 September, 1920.)

Appeal and Error—Failure to Docket Appeal—Second Term—Dismissal—Motions—Rules of Court.

The requirement of Supreme Court Rule 17, that the appellee may docket the certificate and, on motion, have the case dismissed, if not docketed by the appellant in time to be heard at the call of the district at the term of the Supreme Court next ensuing that of the trial, applies only to that term; and where the appellant has docketed his case after that term the case will, on motion, be dismissed at the following term of the Supreme Court (Rules 5 and 16), and the failure of the appellee to have previously moved to dismiss is not a waiver of his right.

APPEAL by defendant from *Devin, J.,* at November Term, 1919, of EDGECOMBE.

Motion to dismiss. This was an action for partition at November Term, 1919, of Edgecombe. By consent, the cause was heard at chambers, 15 December, 1919, and notice of appeal given, bond being fixed at

fifty dollars. The "case on appeal" was settled by the judge 9 January, 1920. The appeal was not docketed here at spring term, nor until 3 August, 1920. At the beginning of the call of the district at this term, the appellee moved to dismiss because not docketed at the spring term as required by Rule 5 of this Court.

W. O. Howard and James Pender for plaintiffs.
F. C. Harding, F. W. Gaylord, and R. W. Winston for defendants.

CLARK, C. J. The motion to dismiss must be allowed, Rules 5 and 16 of this Court, 174 N. C., 828, 831.

The settled practice of this Court under the above rules is thus summarized in *Porter v. R. R.*, 106 N. C., 479:

1. Appeals in causes tried before the commencement of a term of this Court must be docketed (as the rule now stands) "At such term, seven days before entering the call of the docket of the district to which they belong and stand in their order for argument."

2. If not docketed in such time, the appellee may docket the certificate under Rule 17, and have the appeal dismissed.

3. If the appellant does not do this, and the appeal is docketed *at such term* of this Court, which begins next after trial below, though after the perusal of the district to which it belongs, the appellee cannot move to dismiss, unless he does so before the appeal is docketed. *Bryan v. Moring*, 99 N. C., 16. *But the neglect of the appellee to move to docket and dismiss extends no further, and if the appeal is docketed at a term of this Court after the one at which it is required to be filed, the appeal will be dismissed on motion.*

In *Porter v. R. R., supra,* and in other cases since, the appellant has insisted, as in this case, that as the appellee did not move to docket and dismiss when the district was called at the term of this Court beginning next after the trial below, this was a waiver, and the appellant could docket at this term. This was expressly overruled in *Porter v. R. R., supra; Hinton v. Pritchard,* 108 N. C., 412, and in four other cases at that term, and in every case since.

In *Johnston v. Whitehead,* 109 N. C., 209, the Court says, in addition, that if the appellant had lost his appeal without negligence on his part, it was his duty to apply for a *certiorari* at or before the time the appeal should have been docketed, *i. e.,* at the first term after the trial below, and that not having done so, such application cannot be made at this term; and also that when the appeal was docketed at this term no notice of a motion to dismiss is required, though in this case such notice was given.

Among many cases affirming the above rulings are: *Sondley v. Asheville,* 110 N. C., 90; *S. v. James,* 108 N. C., 792; *Pipkin v. Green,* 112

N. C., 356; *Pittman v. Kimberly,* 92 N. C., 563; *Graham v. Edwards,* 114 N. C., 230; *Paine v. Cureton, ib.,* 607, and a very large number of others, all to the same effect, and none to the contrary. Besides, there have been many cases dismissed under the above authorities without written opinion, as the ruling is so well settled.

As was said in *Burrell v. Hughes,* 120 N. C., 278, "There are *some* matters at least which should be deemed settled, and this is one of them." This Court has repeatedly called attention to the fact that appellees have their rights as well as appellants, and that "a delay of justice" is condemned by Magna Carta equally with a "denial of justice." Shakespeare quotes the "delays of justice" among the greatest "ills that flesh is heir to." The appellant not having spoken when he could have been heard, ought not now to be heard when he should be silent.

If the failure to docket this appeal at spring term here had been due to negligence of counsel, this would not protect the appellant, who at the very least should have applied for a *certiorari,* when the district was called at that term. *Vivian v. Mitchell,* 144 N. C., 473, and numerous cases there cited, and citations to that case in Anno. Ed. *Lindsey v. Knights of Honor,* 172 N. C., 820. In *Barber v. Justice,* 138 N. C., 21, it was held that this vicarious negligence of counsel would not excuse appellant from paying attention to the appeal. *Roberts v. Allman,* 106 N. C., 391.

Dismissed.

H. A. OLIVER v. WILTS VENEER COMPANY.

(Filed 22 September, 1920.)

Evidence—Questions for Jury—Instructions.

In this action to recover damages for the alleged negligence of his employer in causing an employee a personal injury, it is held that the case was properly submitted to the jury, under correct instructions, and defendants' exceptions to the evidence were without merit.

APPEAL from *Lyon, J.,* and a jury, at April Term, 1920, of WASHINGTON. From judgment for plaintiff, the defendant appealed.

The following are the issues passed on by the jury:

"1. Was plaintiff, H. A. Oliver, injured by the negligence of defendant, Wilts Veneer Company, as alleged in the complaint? Answer: 'Yes.'

"2. Did plaintiff, by his own negligence, contribute to his injury, as alleged by defendant? Answer: 'No.'

"3. Did plaintiff, H. A. Oliver, execute the release, as alleged by the defendant, Wilts Veneer Company? Answer: 'No.' "

The jury assessed plaintiff's damages at $6,000.

From the judgment rendered the defendant appealed.

Majette & Whitley for plaintiff.

Z. V. Norman and Small, MacLean, Bragaw & Rodman for defendant.

PER CURIAM. The plaintiff was injured while wiping oil off a shaft in the veneer plant of defendant, the sleeve of his jumper catching in the cogs, causing his arm to be drawn between the cogs and severely mashed.

The motion to nonsuit was properly overruled, there being abundant evidence justifying his Honor in submitting the issues to the jury.

There are 56 assignments of error, 39 of them being to the evidence and the remainder to the charge. We think that there is no merit in the exceptions to the evidence, and that, taking the charge as a whole, it is a full, clear, and fair presentation of the issues to the jury.

No error.

PLANTERS STORES CO. v. ANNA BULLOCK ET AL.

(Filed 29 September, 1920.)

Judgments—Appeal and Error—Reformation of Judgment—Supplies Furnished—Mortgages, Chattel—Collateral Security—Husband and Wife.

When a man and his wife have executed a chattel mortgage as collateral security for supplies furnished the husband during 1915, she is liable only for the supplies furnished for that year, and not the preceding one; and where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly.

APPEAL by plaintiff from *Bond, J.*, at the September Term, 1920, of VANCE.

This is an action on a note for $500 secured by chattel mortgage.

The defendants admitted the execution of the note and mortgage, but contended that they were given as collateral to secure an account for supplies for 1915.

The male defendant owed a balance on account for 1914.

There was a verdict and judgment for the defendants, and the plaintiff appealed, relying principally on the position that there is no evidence to support the claim of defendants.

T. T. Hicks for plaintiff.
J. C. Kittrell and Thomas M. Pittman for defendants.

PER CURIAM. The evidence is meager, but we cannot say there is none in support of the contention of the defendants.

It appears, however, from the record that there is error in the amount recovered by the defendant, and the judgment must be reformed.

The total account for 1914 and 1915 is $652.39, of which $410.16 is for 1914, and $242.23 for 1915.

The female defendant is, on the verdict, only liable for the account of 1915.

The total payments made are $315.22, but of this sum $125 should be applied to the account of 1914, because the proceeds of the sale of a horse conveyed by mortgage to secure that account, which would leave $190.22, to be applied to the account of 1915, leaving $52.01 due on that account, which, when deducted from the two sums of $290 and $40.69, aggregating $330.69, recovered by the defendant, gives as the true amount of the judgment $280.68.

Let the judgment be reformed accordingly.

The costs of the appeal will be divided.

Modified and affirmed.

L. D. POWELL & COMPANY v. W. W. ROGERS.

(Filed 29 September, 1920.)

Justices' Courts—Appeal—Motions—Recordari—Dismissal.

When the appellant from a judgment of a justice of the peace has properly given his notice of appeal, paid the fee, but has not moved in time for a *recordari* in the superior court, a motion to dismiss should be allowed.

APPEAL by plaintiff from *Devin, J.*, at the April Term, 1920, of HERTFORD.

This is an action begun before a justice of the peace, and heard on appeal before *Devin, J.*, and a jury.

In the trial before the justice of the peace, had on 20 June, 1917, judgment was rendered against the defendant for the sum of $188.75, with interest thereon from that date, and costs. Defendant in open court gave notice of appeal to the Superior Court, and paid the justice his fee for making the return. The justice of the peace filed his return to notice of appeal in the office of the clerk of the Superior Court on

16 November, 1917, and the appeal was docketed in the Superior Court for a special term beginning 7 January, 1918.

At a term of court held in Hertford County, beginning 30 July, 1917, and more than ten days after the trial and judgment by the justice of the peace, defendant failed to apply for a writ of *recordari* in order to perfect his appeal; nor was such application made during a term beginning 15 October, 1917. The next term of court held in said county was a special term, beginning 7 January, 1918, at which term said appeal appeared on the docket. . . . At that term plaintiff moved to dismiss the appeal, as appears in the record, which motion was continued until the next term. The motion to dismiss was heard before *Kerr, J.*, at the following term, held in February, 1918, when said motion was denied, and the case continued for trial in the Superior Court.

To this ruling plaintiff excepted.

Upon trial in the Superior Court, verdict and judgment was rendered for the defendant, and plaintiff appealed.

W. D. Boone for plaintiff.
No counsel for defendant.

PER CURIAM. The judgment is reversed on the authority of *Davenport v. Grissom,* 113 N. C., 38, and *Bargain House v. Jefferson,* at this term. The appeal from the justice must be dismissed.

Reversed.

CLARENCE ROTEN ET AL. *v.* OWEN J. PARKER ET AL.

(Filed 6 October, 1920.)

Instructions—Verdict Directing—Appeal and Error.

Held, in this case, a verdict directed upon the evidence, if found to be true, was a correct instruction.

CIVIL ACTION, tried before *Kerr, J.*, at April Term, 1920, of ONSLOW, upon this issue:

"Are the plaintiffs the owners and entitled to the possession of the lands described in the complaint? Answer: 'No.'"

From the judgment rendered the plaintiffs appealed.

Duffy & Day and Cowper, Whitaker & Allen for plaintiffs.
McLean, Varser, McLean & Stacy, Frank Thompson, and I. M. Bailey for defendants.

PER CURIAM. At the conclusion of the evidence the court instructed the jury, if they believed the evidence and found the facts to be as testified to, they would answer the issue "No."

Upon a careful examination of the evidence in this case we fail to see that the plaintiff made out even a *prima facie* title to the land in controversy.

No error.

ELLA R. VANN v. SOUTHERN RAILWAY COMPANY.

(Filed 13 October, 1920.)

Parties—Railroads—Government Control—Director General of Railroads.

Under the Federal Control Act the Director General of Railroads, is, in effect, a receiver, and an action will therefore lie against him, as such, for damages for the actionable negligence of an employee of a railroad under Government control and the railroad company is also properly joined as a party defendant.

APPEAL by defendant from *Daniels, J.*, at May Term, 1920, of WAKE.

This was an action by R. T. Vann and wife, Ella R. Vann, against the Southern Railroad and Walker D. Hines, Director General of Railroads, and the Southern Express Company, for personal injuries sustained by Ella R. Vann by the alleged negligence of the defendants, caused by the falling of a tongue of a truck operated at the union station in Raleigh in March, 1918. The husband of the plaintiff, R. T. Vann, entered a nonsuit, and the court directed a nonsuit as to the express company. Verdict for plaintiff; appeal by the defendants.

Jones & Bailey and R. N. Simms for plaintiff.
William B. Snow for defendants.

PER CURIAM. There were divers exceptions assigned as error, but they were all abandoned in this Court, save exception 4, that the court overruled the motion of the Southern Railroad Company to dismiss the action as to it "upon the ground and because of its nonliability by reason of Federal control," which motion was in writing, and is set out in the record.

It is not necessary to discuss this point, as it was fully considered and decided in *Clements v. R. R.*, 179 N. C., 225, as to the same defendant in which we affirmed the decision in *Hill v. Director General*, 178 N. C., 609, that the Director General was in effect a receiver, and therefore the action will lie against him under the act of Congress, and that the defendant, the Southern Railroad Company, was properly joined as a

codefendant under the rulings in *Logan v. R. R.*, 116 N. C., 940; *Harden v. R. R.*, 129 N. C., 354, and the uniform decisions of this Court since.

The decision in *Clements v. R. R., supra,* and other cases cited above, and the reasons therefor, were reviewed and reaffirmed in *Gilliam v. R. R.*, 179 N. C., 508.

Upon the authority of the above cases, and for the reasons therein given, we find in this appeal

No error.

STATE v. SILLS.

(Filed 20 October, 1920.)

APPEAL by defendant from *Daniels, J.*, at May Term, 1920, of FRANKLIN.

This is an indictment for seduction. The defendant was convicted, and appealed from the judgment pronounced on the verdict.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. M. Person for defendant.

PER CURIAM. We have examined the record, and are of opinion there is evidence to support each element of the crime charged, although letters of the prosecutrix in evidence tend to discredit her.

No error.

S. W. CARROLL v. VICTORY MANUFACTURING COMPANY.

(Filed 20 October, 1920.)

Appeal and Error—Docketing Transcript—Appeal Dismissed—Rules of Court.

It is the personal duty of appellant to see that the transcript of his appeal is docketed seven days before beginning the call of the docket of the district in the Supreme Court to which it belongs, etc., Rule 5, which neglect of counsel or delay of the clerk of the superior Court will not excuse; and no later time is given because two districts are heard in one week.

APPEAL by defendant from *Allen, J.*, at April Term, 1920, of CUMBERLAND.

Motion to docket and dismiss under Rule 17.

A. M. Moore and Cook & Cook for plaintiff.
Oates & Herring and Rose & Rose for defendants.

PER CURIAM. The defendants filed motion Tuesday, 5 October, 1920, at 9:30 a. m., to docket and dismiss the appeal in this case. The plaintiff filed his transcript on appeal thereafter at 11:15 a. m. the same day.

Rule 5 of this Court (174 N. C., 828) provides: "Rule 5. *When heard.* The transcript of the record on appeal from a judgment rendered before the commencement of the term of this Court must be docketed at such term 7 days before entering upon the call of the *docket* of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript."

This rule has been often before us for construction. One of the most recent cases is *Cox v. Lumber Co.*, 177 N. C., 227, a case "on all fours" with this, in which the reasons for the rule, and the necessity for its observance were again fully discussed, with citations of authorities, and the appeal was dismissed.

In *Hawkins v. Tel. Co.*, 166 N. C., 213, it was held "the transcript *must* be filed before Tuesday, 10 a. m., of the week preceding the call of the docket, citing many cases, to which we refer as evidence of the uniform practice of this Court. Among numerous other cases to the same purport, *Truelove v. Norris*, 152 N. C., 755, and *Hewitt v. Beck, ib.*, 757, in both of which we said, as in many other cases, that this is a duty personal to the appellant, and is not excused by the neglect of his counsel, who in this matter is "the agent or attorney in fact of his client, and his negligence is the negligence of the appellant." Nor would the delay of the C. S. C. be an excuse, for the appellant should docket the title of the case with affidavits as to the cause of the delay, and apply for a *certiorari*.

In these cases the Court hold that it is not discretionary with us to refuse to dismiss, which we cannot do unless "sufficient legal excuse is shown."

It admits of a *mild surprise* that notwithstanding the rule so plainly stated, and so uniformly enforced, that any appellant should fail to docket a case within the ample time allowed by the rule, and if he fails to do so should seek to be excused from the consequences of his neglect. *Truelove v. Norris, supra.*

The appellant seeks to distinguish this case on the ground that the 8th and 9th districts are docketed in the same week, and the appeals from the 9th are not called before Wednesday. But all the cases from

both districts are required to be docketed for the same week, and transcripts are required to be filed "seven days before entering upon the call of the *docket.*" Under Rule 7, the "docket" is called in its order, but for convenience only, cases from the 9th district are not heard before Wednesday (and hereafter not before Thursday). But this did not give appellant until Wednesday of the week preceding to docket cases from the 9th district. It would be as admissible to contend that inasmuch as the cases from the 8th district cannot in fact be called before Thursday or later, if toward the end of the docket, therefore, the transcript in those cases need not be docketed more than 7 days before they are actually called for argument.

Owing to the uncertainty as to the application of the rule when the docket for the week includes two districts, it will not apply to this case, nor to any other cases *at this term* docketed 7 days before beginning the call of the second district (if from that district), when there are two districts assigned to the same week. But after this term, all appeals from any district must be docketed by 10 a. m. of Tuesday of the preceding week.

Motion denied.

Same decision denying motion to dismiss in *Campbell v. Pearce*, No. 301.

C. W. BUNN v. J. ASHLEY WALL.

(Filed 20 October, 1920.)

Contracts, Written—Parol Evidence—Landlord and Tenant—Leases.

Where there is a written lease between the landlord and tenant and under a separate and distinct agreement the latter has built a barn on the lands for the former, parol evidence of the agreement to build the barn is competent.

APPEAL by defendant from *Daniels, J.*, at the second January Term, 1920, of WAKE.

This is an action to recover damages for breach of contract to build a tobacco barn for the plaintiff, who was a tenant on the land of the defendant Privett.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

J. S. Manning and Little & Barnes for plaintiff.

Armistead Jones & Son for defendants.

PER CURIAM. Parol evidence was admissible to establish the contract about the barn, although there was a written lease, because the two contracts were separate and distinct, and we are of opinion there was circumstantial evidence of authority on the part of Wall to make the contract.

The damages claimed are difficult of admeasurement, but not more so than those allowed in *Spencer v. Hamilton,* 113 N. C., 49, in which a counterclaim, alleging loss of crops by reason of a breach of contract to do certain ditching, was sustained.

No error.

STATE v. ALLEY.

(Filed 20 October, 1920.)

Criminal Law—Directing Verdict—Instructions.

A verdict may not be directed by the trial judge in a criminal action.

APPEAL by defendant from *Daniels, J.,* at the January Term, 1920, of FRANKLIN.

This is an indictment for abandonment.

The State offered evidence, and the defendant testified in his own behalf.

At the conclusion of the evidence the record states that the judge said: "Gentlemen, this ends the case. On the testimony of the witness himself he is technically guilty.

Defendant excepted.

The judge then directed the clerk to enter a verdict of guilty. The defendant excepted.

There was a verdict of guilty entered by the clerk, and the defendant appealed from the judgment thereon.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. M. Person for defendant.

PER CURIAM. Reversed on authority of *S. v. Riley,* 113 N. C., 648; *S. v. Hill,* 141 N. C., 772, holding that the judge cannot direct a verdict in a criminal action.

New trial.

DAVID JORDAN v. TIDEWATER POWER COMPANY.

(Filed 27 October, 1920.)

Negligence—Instructions.

APPEAL from *Guion, J.*, at April Term, 1920, of NEW HANOVER. The following issues were submitted:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'No.'

"2. What damages, if any, is the plaintiff entitled to recover?"

From judgment rendered plaintiff appealed.

Wright & Stevens and W. P. Stacy for plaintiff.
Rountree & Davis for defendant.

PER CURIAM. There are 41 assignments of error in the record. Five of them relate to the evidence. The remaining assignments are directed to the charge of the judge. It is impossible to consider all of the assignments in an opinion of reasonable length. We have carefully examined them, and can find no substantial error. The charge of the judge is full and clear, and based upon the principles of law as laid down in *Bagwell v. R. R.*, 167 N. C., 611, and *Crampton v. Ivie*, 126 N. C., 894.

No error.

CHARLIE MOORE, BY HIS NEXT FRIEND, SANDY MOORE, v. WALKER D. HINES, DIRECTOR GENERAL OF U. S. R. R. ADMINISTRATION, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 27 October, 1920.)

Evidence—Nonsuit.

APPEAL from *Guion, J.*, at April Term, 1920, of NEW HANOVER. At the conclusion of the evidence the court sustained a judgment of nonsuit. Plaintiff appealed.

McClammy & Burgwyn for plaintiff.
Rountree & Davis for defendant.

PER CURIAM. Upon an examination of the evidence we are of opinion that the motion to nonsuit was properly granted.

Affirmed.

MARY LOU POWELL v. WALKER D. HINES, DIRECTOR GENERAL, AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 November, 1920.)

Carriers of Passengers—Baggage—Government Control—Director General—Damages—Rules.

The rule of the Director General limiting the amount of the recovery for lost baggage, etc., to one hundred dollars, both in intrastate and interstate commerce, on railroads under Government control, is valid and enforceable.

APPEAL by plaintiff from *Guion, J.*, at the April Term, 1920, of COLUMBUS.

This is an action to recover the value of certain baggage.

The plaintiff was a passenger on the railroad, which was in the management of the Director General of Railroads, on a trip from Durham, N. C., to Chadbourn, N. C. She arrived at Chadbourn with her suitcase, and there, in some manner unknown, and while in the possession of the railroad owned by the Atlantic Coast Line Railroad Company, it was lost, and it is admitted that the suitcase and contents were worth $320.57. The defense set up by the defendants was that the plaintiff was in no event entitled to recover more than $100. This was on account of the fact that on 25 May, 1918, the Director General of Railroads, by virtue of an act of Congress, promulgated a general order increasing freight rates and laying down certain rules with reference to baggage tariffs, which was duly filed with the Interstate Commerce Commission, in accordance with law, and promulgated rules governing transportation of such baggage, and limiting the recovery to $100 except in certain cases, not material to this action.

His Honor rendered judgment against the Director General for $100, and dismissed the action against the railroad, and the plaintiff appealed, contending that she was entitled to judgment against both defendants for $320.57.

Walter H. Powell for plaintiff.
George Rountree for defendant.

PER CURIAM. The authority of the Director General to promulgate the order limiting the recovery for loss of baggage to $100 on intrastate as well as interstate transactions is fully sustained by *No. Poe R. R. v. North Dakota,* 250 U. S., 135, and that the plaintiff is entitled to judgment against the railroad for $100 is decided at this term in *McGovern & Co. v. R. R.,* and cases there cited.

The plaintiff will pay the costs of the Director General in this Court, and will recover all other costs of the railroad.

Modified and affirmed.

IN RE WILL OF N. S. MORGAN.

(Filed 4 November, 1920.)

1. Wills—Withdrawal of Issues—Courts—Intimation of Opinion.

When a caveat to a will has been filed it is not an intimation of opinion on the evidence for the trial judge to withdraw the issues of mental capacity and undue influence from the jury and leave only the general issue of *devisavit vel non*, when there was no legal evidence to sustain the issues withdrawn.

2. Appeal and Error—Harmless Error—Evidence.

The rejection of evidence having some tendency to show cordial relations between the testatrix and her son, is at most but harmless error when this relation is not controverted, and there is plenary evidence tending to establish it as a fact.

CAVEAT to a will, tried on the general issue of *devisavit vel non*, before *Calvert, J.*, and a jury, at June Term, 1920, of DURHAM.

Verdict and judgment establishing the will, and the caveator excepted and appealed.

Bryant, Brogden & Bryant for propounder.
Brawley & Gantt for caveator.

PER CURIAM. There were three issues framed or tendered for submission to the jury. One as to mental capacity of the testatrix, a second as to undue influence, and a third, the general issue of *devisavit vel non*, the verdict being only on the last issue. It is contended for appellant that in withdrawing the first and second issues from the consideration of the jury, and the comments of the court in doing so, there was adverse intimation given as to the character and weight of the evidence bearing on those questions. The formal execution of the paper-writing as the last will and testament of the testatrix was clearly proven, and if it be conceded that the exception insisted on is open to appellant, it would not avail him, for on careful perusal of the record we are of opinion that there are no facts in evidence to uphold a finding for the caveator on these issues, or that would justify their submission to the jury. The objections as to the rulings of the court on questions of evidence are without merit. The fact that the deceased mother kept her son's picture in her room might, under doubtful circumstances, may have been of significance as tending to show cordial relations between the two, but this was clearly proven by direct testimony, and is unchallenged so far as we can discover. On the entire facts presented, it could in no event be allowed for reversible error. We find nothing in the record that would justify the Court in disturbing the results of the trial, and the judgment establishing the due execution of the will must be affirmed.

No error.

R. W. GRAY v. JOHN KING.

(Filed 10 November, 1920.)

Judgments Set Aside—Defense—Default of Answer—Motions—Excusable Neglect—Laches.

To set aside a judgment for excusable neglect, the movant must show a meritorious defense and a legal excuse for his laches, which he has not done when it appears that he was informed by the plaintiff that prior negotiations to compromise were ended; that complaint must be filed, by a certain time under the statute, a rejected offer by plaintiff of compliance with the compromise which had been declared off, and the final judgment for the want of an answer taken in the course and practice of the courts.

APPEAL by defendant from *Allen, J.*, from denial of motion to set aside a judgment, heard at Hillsboro, 8 September, 1919, from GRANVILLE.

This is a motion to set aside a judgment rendered at July Term, 1920, for mistake and excusable neglect. After hearing affidavits and arguments of counsel the court finds the following facts:

1. That on 18 November, 1919, the defendant offered to sell to plaintiff a certain tract of land in Granville County at $25 per acre, and the offer was accepted by T. Lanier, attorney for plaintiff.

2. That the defendant was not the owner of the said land, which fact was not then known to plaintiff or his attorney representing him, but it was a matter of record in Granville County, where said attorney lived, but in fact unknown to said Gray or his said attorney till after the trade was made.

3. That after this the defendant informed plaintiff that his wife would not sign a deed for the land at $25 an acre, and he could not deliver it, and then, after some efforts to settle it otherwise, it was agreed to settle at $30 per acre for five-sixths of the land (that being the wife's interest), Lanier representing the plaintiff and the defendant representing his wife, but nothing was done about this last agreement until after suit was commenced.

4. That on 18 February, 1920, the attorney, Lanier, wrote to defendant, withdrawing all offers of settlement (see letter of Lanier to King, 18 February, 1920).

5. That action was commenced on 24 February, 1920, and summons served 26 February, 1920, returnable 13 March, 1920.

6. On 24 February summons was issued in this action, returnable 13 March, and was served on defendant.....February. On 8 March, defendant wrote Mr. Lanier asking that the case be put off two or three weeks in order that he might have a chance to look over the land, and stating that he had not employed an attorney (letter of 8 March). On

the 9th Mr. Lanier replied (letter of that date): "If your answer is filed in time for the case to go on the docket for the April term of court it will be all right. This will mean by the 25th of this month." No answer was filed, but on 23 March defendant wrote that he was sending deed for the five-sixth interest of his wife, with draft attached for price at $30 per acre. The deed was not accepted by plaintiff, and deed and draft were returned to defendant.

There was no time limit fixed for the execution of said deed of 23 March, 1920.

7. That at one time during the negotiations or sale of the land, and before any action was in contemplation, the defendant agreed to pay said T. Lanier, attorney, $50 for some services rendered to him, knowing at the time that Lanier was representing Gray, the plaintiff.

8. That after action was commenced, the defendant did not consider Lanier his attorney, but after executing the last deed and sending it to Lanier he believed he had complied with his contract, and that it was not necessary to employ counsel, but he had full notice that the action would be prosecuted if no answer was filed.

Wherefore the motion to set aside the judgment is denied.

O. H. ALLEN,
Judge Presiding, Courts of Tenth Judicial District.

The defendant excepted and appealed.

T. Lanier and D. G. Brummitt for plaintiff.
J. C. Biggs and Hicks & Stem for defendant.

PER CURIAM. The defendant has shown that he had a meritorious defense to the cause of action alleged in the complaint, in that it appears from the record and the findings of his Honor that the contract sued on was abandoned by the plaintiff, and a new contract substituted in its place by the parties, which the defendant offered to perform according to its terms, but the defendant must, in addition, furnish legal excuse for his neglect in failing to appear and plead, and this he has not done. Negotiations had been carried on for several months for the purpose of settling the controversy, but on 18 February, 1920, six days before this action was instituted, counsel for the plaintiff wrote the defendant that all offers of settlement were withdrawn, and that he would commence action on the *original contract*, thus giving him notice not only that efforts to settle were at an end, but also of the exact cause of action that would be alleged.

The summons was served on the defendant in February, and although notified on 9 March that his answer must be filed by 25 March, he did not plead. On 23 March he sent to the plaintiff a deed, with draft

attached, in compliance with the substituted contract, but the deed was not accepted by the plaintiff, and was returned to the defendant.

It thus appears that defendant had notice on 19 February that offers of settlement were withdrawn, and that action would be brought on the original contract; that summons was served on him in February; that he was notified on 9 March that his answer must be filed by 25 March; that the deed which he tendered on 23 March was rejected, and still, with these facts before him, giving him full knowledge that the parties were at arm's length, he neither pleaded nor employed an attorney, and paid no further attention to the action until after the rendition of the judgment in July, when he moves to set it aside on account of excusable neglect.

This cannot be said to be a compliance with the rule which requires a party to an action to "bestow that attention and care upon it which a man of ordinary prudence usually gives to his important business." *McLeod v. Gooch,* 162 N. C., 126.

Affirmed.

O. T. FOWLER AND L. L. MARION v. MRS. EMMA APPERSON AND R. R. SAUNDERS.

(Filed 17 November, 1920.)

1. Evidence—Questions for Jury—Compromise.

Where the defendant resists recovery on a promissory note given in part payment of an exchange of personal property, for fraud in the transaction, transferred to plaintiff for value after maturity, evidence that the original parties had afterwards agreed to exchange with each other the property each had received is evidence of ratification, which, with the other evidence in this case, presents a question of fact for the jury to determine.

2. Instructions—Verbal Requests—Substance.

The consideration of whether the appellant had the right to have an instruction, orally requested, submitted to the jury, under the circumstances of this case on appeal, becomes immaterial when it appears from the instructions given, he had received the full benefit of this request.

3. Issues—Material Facts—Separate Issues.

There is no reversible error in submitting essential part of a transaction, involved in the controversy, on a separate issue to the jury, when the trial is otherwise free from error.

APPEAL by defendant Saunders from *Ray, J.,* at April Term, 1920, of SURRY.

The plaintiffs brought this action against Emma Apperson and R. R. Saunders to recover judgment on a note of $210, executed by Emma

Apperson, payable to R. R. Saunders and endorsed by R. R. Saunders, after maturity, to the plaintiffs. The defendant, Emma Apperson, filed her answer, alleging fraud, among other defenses, on the part of her co-defendant, R. R. Saunders.

The defendant, R. R. Saunders, filed his answer admitting his liability to the plaintiff as endorser of said note, but denying the allegations of fraud and other defenses of his codefendant, Emma Apperson.

Upon the evidence, and under the charge of the court, the following verdict was rendered, which will definitely show the nature of the case:

"1. Did defendant, Emma Apperson, execute the note and mortgage sued on? Answer: 'Yes.'

"2. Was the execution of the note by Emma Apperson procured by the false warranty of R. R. Saunders, as alleged? Answer: 'Yes.'

"3. If said note and mortgage were procured by false warranty, as alleged, what damages has Emma Apperson sustained thereby? Answer: '$120.'

"4. In what amount is Emma Apperson indebted to plaintiff? Answer: '$90.'

"5. In what amount is R. R. Saunders indebted to plaintiff, if any? Answer: '$210, and interest from 6 November, 1913.'

"6. What was the value of the young horse at the time of its replevy by defendant, Emma Apperson? Answer: '$200.'

"7. What was the value of the old horse at the time of its replevy by said Emma Apperson? Answer: '$40.'

"8. Did R. R. Saunders agree to take back the horses, as alleged? Answer: 'Yes.

"9. What was the value of the old horse at the time of its purchase by Emma Apperson? Answer: '$40.'

"10. What was the value of the yoke of oxen traded to R. R. Saunders? Answer: '$150.'

"11. What was the value of the young horse at the time of its purchase by Emma Apperson? Answer: '$200.'

"12. Was the Emma Apperson note and mortgage assigned to Fowler & Marion before maturity? Answer: 'No.' "

Upon the verdict the court rendered the following judgment:

"This cause coming on to be heard upon issues submitted to and answered by the jury, before his Honor, J. Bis Ray, it is now ordered and adjudged:

"1. That plaintiff recover of Emma Apperson $90, with interest thereon from 6 November, 1913, till paid, and the court costs and cost of plaintiff's witness, B. N. Whitaker. That said judgment is a lien upon the property described in the complaint, and that said property be sold to pay same, as provided by the terms of the mortgage, unless

said Emma Apperson shall pay said judgment without sale, and in event the property, or any part thereof, be not surrendered as required for sale; that plaintiff recover of Emma Apperson's bondsman, J. M. Dinkins, the value of said property, at the time of its replevy, but not in excess of the judgment herein against said Emma Apperson, with the adjudged cost.

"2. That plaintiffs recover of R. R. Saunders $210, with interest from 6 November, 1913, until paid, and that R. R. Saunders pay the cost of the other witnesses of plaintiff, from which amount of $210 and interest is to be deducted the amount paid by Emma Apperson as herein adjudged, that is, $90, with interest.

"3. That upon Emma Apperson's payment of the $90 and interest and cost adjudged against her, the mortgage and note be surrendered and canceled."

The defendant Saunders appealed.

W. R. Badgett for plaintiffs.
W. L. Reese for defendant Saunders.
O. E. Snow and J. H. Fogler for defendant Apperson.

PER CURIAM. We have considered this case with careful regard for the rights of the parties and the law applicable to the findings of fact. The case substantially involved only questions of fact, and the verdict was fully warranted by the evidence. The charge of the judge is free from error.

1. The first assignment of error must be disallowed, because the question as to the ratification of the contract, which the defendant, Mrs. Apperson, had attacked for fraud, was one for the jury under the circumstances of this case. There was evidence tending to show that R. R. Saunders had agreed to take the horse back and give up the oxen, in other words, to cancel the bargain, and this, with other evidence bearing on the question, was peculiarly for the jury to consider and pass upon.

2. The oral request for an instruction, if properly submitted, as to Saunders' knowledge of the horse's age, was substantially given by the court, and Saunders had the full benefit of his prayer in the charge.

3. This prayer was properly explained to the jury, and we can see no material harm in it. The whole matter was stated with accuracy by his Honor, and there was nothing to mislead the jury.

4. Issue No. 10 related to a matter which was an essential part of the whole transaction, and there could be no harm done in submitting it to the jury, in order for them to find all of the facts; and the same may be said of issue No. 11, which is the subject of the 5th assignment of error.

5. The other assignment is merely formal. Neither defendant has any ground of complaint. The case was correctly tried and decided.

No error.

D. L. BURCHAM v. HENRY WOLFE.

(Filed 17 November, 1920.)

Appeal and Error—Objections and Exceptions—Evidence—Motions—Nonsuit—Instructions.

The question of the sufficiency of the evidence to sustain a verdict against the defendant in an action against a register of deeds for wrongfully issuing a marriage license, should be raised by a motion to nonsuit or a proper prayer for instruction, for it to be considered on appeal.

APPEAL from *Ray, J.*, at April Term, 1920, of SURRY, to recover the penalty against a register of deeds for wrongfully issuing a marriage license. From the judgment rendered the defendant appealed.

T. W. Kallam for plaintiff.

W. L. Reece and Carter & Carter for defendant.

PER CURIAM. Upon examination of the record we find that there was no motion to nonsuit, and no prayer for instruction which raises the question of the sufficiency of the evidence to be submitted to the jury. Therefore the judgment is

Affirmed.

STATE v. W. P. INGRAM.

(Filed 1 December, 1920.)

1. Intoxicating Liquor—Spirituous Liquor—Unlawful Sale—Evidence.

Evidence that crowds frequenting defendant's place of business were drinking is competent as corroborative of direct testimony to the sale by defendant of intoxicating liquor there, on the trial under an indictment for the unlawful sale of intoxicating liquors.

2. Criminal Law—Evidence—Corroboration—Demurrer.

When, upon demurrer to the State's evidence, the evidence up to that time is insufficient for conviction of the sale of intoxicating liquors, and the defendant puts on his evidence, and thereafter under the State's evidence it becomes sufficient, defendant's demurrer after the close of all the evidence will be overruled.

STATE *v.* INGRAM.

APPEAL by defendant from *Adams, J.,* at the July Term, 1920, of RICHMOND.

This is an indictment charging the defendant with the sale of intoxicating liquor.

The defendant was convicted and sentenced to work on the roads of Richmond County for twelve months, and appealed.

There was direct evidence of a sale of intoxicating liquor, as charged in the indictment.

The State was permitted to offer evidence in corroboration tending to prove that crowds assembled in and about the place of the defendant near the time of the sale, and that there was drinking, or evidences of drinking, among those in the crowd. The defendant excepted to this evidence.

There was also a motion for judgment of nonsuit at the conclusion of the State's evidence, which was renewed at the conclusion of all of the evidence, the motion being upon the ground that there was no evidence that the liquor sold by the defendant was intoxicating. The motion was overruled, and the defendant excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Fred W. Bynum and Boggan & McPhail for defendant.

PER CURIAM. The evidence of drinking in the crowds frequenting the place of business of the defendant was competent in corroboration of the witness Norton, who testified to the sale, and whose testimony was impeached.

In *S. v. Mostella,* 159 N. C., 459, one of the questions asked a witness was, "State the character of the people that usually frequent this pool-room." This was asked to show drunkenness about the premises, and was admitted and affirmed on appeal.

The evidence objected to by the defendant in this case is of the same character.

It is very doubtful if there was any evidence that the liquor sold by the defendant was intoxicating at the close of the State's evidence, but the defendant did not rest his defense on this ground, and introduced evidence in his own behalf.

The State then introduced evidence in reply, which, if believed, showed clearly that three bottles produced in court were those bought by the witness Norton, and that the contents were intoxicating.

The motion for judgment of nonsuit was therefore properly overruled.

No error.

HUTTON & BOURBONNAIS COMPANY v. WOOD HORTON, LARKIN HORTON, CHARLIE HORTON, AND ROBERT WELCH.

(Filed 1 December, 1920.)

MOTION in the cause for judgment, according to the opinion of the Supreme Court, heard before *Adams, J.;* from CALDWELL.

The defendant tendered a judgment, which the court refused to sign. From the judgment rendered the defendant appealed.

Councill & Yount and Mark Squires for plaintiff.
W. C. Newland and Hackett & Gilreath for defendant.

PER CURIAM. This cause was finally determined by this Court, Fall Term, 1919, and is reported 178 N. C., 548. Upon the coming down of the opinion, the defendant tendered a judgment, which the court refused to sign. The court rendered the following judgment:

Upon consideration of the certificate of the Supreme Court filed herein, it is therefore ordered that the former judgment be, and it is, affirmed, as to Wood Horton and Larkin Horton, and as to Charlie Horton and Robert Welch the action is dismissed. The said Charlie Horton and Robert Welch will recover their costs in the Superior Court.

W. J. ADAMS,
Judge Presiding.

We are of opinion that the judgment rendered by his Honor is in strict conformity with the opinion of this Court.

Affirmed.

STATE v. WILLIAM CARRINGTON ET AL.

(Filed 24 December, 1920.)

APPEAL by defendant from *Calvert, J.,* at the June Special Term, 1920, of DURHAM.

This is an indictment against three defendants for the larceny of tobacco, the property of the Imperial Tobacco Company.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and the defendants excepted.

There was a verdict of guilty, and an appeal from the judgment pronounced thereon to the Supreme Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Brawley & Gantt for defendant.

PER CURIAM. We have examined the evidence carefully and are of opinion that it is ample to sustain the verdict.

The evidence of the witness Fallon, which was objected to, was clearly competent as tending to prove the loss of the tobacco.

No error.

STATE v. M. C. WHITMAN AND MYRTLE RUSSELL.

(Filed 24 December, 1920.)

APPEAL by defendants from *Lane, J.*, at the September Term, 1920, of ROWAN.

The defendants were convicted of the crime of fornication and adultery and appealed from the judgment pronounced on the verdict.

The exception relied on is to the refusal to nonsuit.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Maness & Armfield, Whitehead Klutzz, Walter Woodson, and J. M. Waggoner for defendants.

PER CURIAM. The evidence in behalf of the State is much stronger than in *S. v. Waller,* 80 N. C., 401, the case relied on by the defendants, and is ample to sustain the verdict and the cross-examination of the defendant Whitman shows that the jury made no mistake.

We see no reason for disturbing the verdict.

No error.

N. M. DOVERSPIKE v. PARSONS PULP AND LUMBER COMPANY.

(Filed 24 December, 1920.)

CIVIL ACTION, tried before *Webb, J.*, at July Term, 1920, of HAYWOOD.

The motion to nonsuit was sustained. Plaintiff appealed.

Morgan & Ward and Felix E. Alley for plaintiff.

Merrimon, Adams & Johnston for defendant.

PER CURIAM. The Court is of opinion, upon careful examination of all the evidence in this case, that the injury sustained by the plaintiff resulted from an extraordinary and unexpected event, which could not have reasonably been foreseen or anticipated, and that there is no evidence of negligence upon the part of the defendant.

Affirmed.

STATE v. JOE WILLOUGHBY.

(Filed 15 September, 1920.)

1. **Instructions—Admissions—Issues—Statutes—Criminal Law.**

Where the only fact at issue is whether the defendant was the one who had broken into and robbed a store, objection that the charge did not "state in a plain and correct manner the evidence given in the case, and explain the law arising thereon." Rev., 535, is untenable, as the whole controversy is reduced to the determination of one fact.

2. **Appeal and Error—Objections and Exceptions—Instructions—Omissions—Special Requests.**

Exception that the court did not charge the jury in a particular way or omit to give a special instruction on the evidence must be the refusal to give a proper prayer therefor.

3. **Instructions—Admissions—Circumstantial Evidence—Criminal Law.**

The instructions in this case, where the breaking into and robbing a store is admitted, and the identity of the defendant is the only question, are held unobjectionable as charging an admission of defendant's guilt, and upon the law of circumstantial evidence.

4. **Criminal Law—Evidence—Declarations—Admissions.**

The prosecuting witness may give a list of all the goods lost from the store which the defendant is being tried for breaking into and robbing, so that they may be traced by the State; and the declaration of a witness as to the identity of one of them, made in defendant's presence and not denied by him, is competent as his *quasi* admission.

APPEAL by defendant from *Cranmer, J.*, at the March Term, 1920, of PASQUOTANK.

The defendant was convicted upon an indictment containing two counts, one charging the breaking and entering a certain store with intent to steal, and the other charging the stealing of certain goods from said store, and appealed from the judgment pronounced on the verdict.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Aydlett & Simpson for defendant.

ALLEN, J. On the trial in the Superior Court it was "conceded and admitted that the store had been broken into and robbed, and that the only question for the jury to decide was whether it had been proven beyond a reasonable doubt that the defendant was the guilty party."

This is the statement in the record, and it answers the criticisms of the charge, which are mainly directed to the failure 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 statute, Rev., 535, as it reduced the whole controversy to the determination of one fact, freed from the consideration of any legal question.

It also appears there were no requests for special instructions to the jury, and "A party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any special instruction, unless he has called the attention of the court to the matter by a proper prayer for instructions. So if a party would have the evidence recapitulated, or any phase of the case arising thereon, presented in the charge, a special instruction should be requested. *Boon v. Murphy,* 108 N. C., 187." *Simmons v. Davenport,* 140 N. C., 411.

This principle is not disturbed by what is said in *S. v. Cline,* 179 N. C., 704, because two members of the Court dissented in that case, and two members who concurred in the order for a new trial did so on the other grounds than those stated in the opinion.

The defendant specially complains of the following charges to the jury:

"1. There is no contention about the breaking or the larceny, both are admitted, and should give you no concern, as they are eliminated from your consideration. You are to find whether the defendant committed the larceny. It is your duty to ascertain the truth from the evidence, and in so doing you may consider not only what the witness said, but their demeanor on the stand.

"2. The evidence is circumstantial. The court charges you that circumstantial evidence is a recognized instrumentality of the law in finding truth, and is essential in our practice, but it should be closely and cautiously scanned, and each fact proving a necessary link in the chain of circumstances must point to the guilt of the defendant. It has been compared to the strands of a rope, where no one strand may be sufficient in itself, but all together may be strong enough to prove the guilt beyond a reasonable doubt.

"You must be satisfied beyond a reasonable doubt as to each material fact in the chain of circumstances. You are the sole judge of the evidence."

The first of these charges does not contain the statement that the defendant admitted his guilt, but that the breaking and stealing by some one was admitted, which is the position maintained by the defendant throughout the trial, and the second is correct as a legal proposition.

It may have been well to add that the circumstances found by the jury to exist must exclude every other reasonable conclusion except the guilt of the defendant, but the failure to do so is not reversible error in the absence of a special request to so instruct the jury.

We have examined the exceptions to evidence, and none of them can be sustained.

It was competent for the prosecuting witness to give an account of all the goods lost from the store in order that the State might have the opportunity to trace some or all of the articles to the defendant, and the declaration of the witness as to the identity of one of the articles was admissible as a *quasi* admission of the defendant, because made in his presence, and he made no denial at the time.

It was also in corroboration of the witness.

The exception that the defendant was not allowed to state the wages he was earning, if the evidence was competent, is contradicted by the record, which states that the defendant testified he received $12.50 per week, and it nowhere appears that this was withdrawn from the jury.

The evidence fully sustains the verdict, and we find no error in the trial.

No error.

STATE v. TOM HOGGARD.

(Filed 22 September, 1920.)

Judgment—Criminal Law—Suspension of Judgment—Violation of Conditions—Trial Judge—Discretion—Trial by Jury—Appeal and Error.

The proceedings of the trial judge in a criminal action to ascertain whether the terms of a suspended judgment have been complied with, are addressed to his reasonable discretion, and do not fall within the province of the jury; and his action thereon is not reviewable on appeal when supported by evidence, unless this discretion has been manifestly abused by him.

APPEAL by defendant from *Devin, J.*, at the October Term, 1919, of WASHINGTON.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Ward & Grimes and P. H. Bell for defendant.

BROWN, J. This was an appeal from a sentence upon a suspended judgment by his Honor, E. H. Cranmer, judge presiding, at July Term, 1920, of the Superior Court of Washington County. The facts upon which such sentence was based are as follows:

The defendant was indicted in two cases for retailing spirituous liquor. By agreement, the defendant plead guilty in case number one, and a fine was imposed upon him. In case number two he pleaded guilty; the prayer for judgment was continued upon payment of costs and the execution of a bond for defendant's appearance and show that he had not violated the prohibition laws of the State.

The defendant was afterwards indicted for retailing liquor. At July Term, 1920, judgment was prayed upon the suspended judgment, which had been suspended upon good behavior.

The court heard the evidence, and found that the defendant had engaged in the unlawful sale of liquor in violation of the terms of the suspended judgment, and sentenced the defendant to two years on the roads.

The right of a judge to impose sentence upon a judgment suspended upon good behavior is well settled. We said in *S. v. Greer,* 173 N. C., 759: "When judgment is suspended in a criminal action upon good behavior, or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court, and do not come within the jury's province. The findings of the judge, and his judgment upon them, are not reviewable upon appeal unless there is a manifest abuse of such discretion." *S. v. Crook,* 115 N. C., 760; *S. v. Hilton,* 151 N. C., 687; *S. v. Everitt,* 164 N. C., 399.

Affirmed.

STATE v. M. L. SYKES.

(Filed 29 September, 1920.)

Spirituous Liquor—Intoxicating Liquor—Manufacture—Intent to Purchase—Instructions—Verdict Directing—Appeal and Error.

Evidence that the defendant, clad in his overalls, was found at a whiskey still, in operation, with another, is sufficient to convict of the unlawful act of distilling; but when his evidence in explanation is that he only asked where he could get a drink, knew nothing of the still, and was carried to the place and had not gotten it when the officers arrived: *Held,* an instruction that upon his own testimony he would be guilty of aiding and abetting the unlawful act of distilling is reversible error.

APPEAL by defendant from *Bond, J.,* at May Term, 1920, of CHATHAM. The defendant was indicted and convicted of the operation of a whis-

key distillery. The State offered four witnesses, who testified that they went to a place in Oakland Township, and concealing themselves about 40 yards away, they saw the distillery in operation, with only two men there, the defendant, a white man, and the other, a colored man; that they captured the complete outfit and destroyed several hundred gallons of beer, and also captured the white man, who was the defendant, M. K. Sykes; that he had on a Sunday shirt and overalls. The defendant moved for a nonsuit, which was overruled, and he excepted.

The defendant testified that he lived in Durham, and that on that morning, in company with Roy Sykes, he left Durham to go to Pittsboro to visit a relative; that in Chatham County they took a wrong road and drove about 1½ miles out of their way; that while on this road they saw a colored man, whom they did not know, and asked the way to Pittsboro; they also asked him if he knew where they could get a drink of whiskey. He told them he thought he could, and to wait a few minutes. In a short while another colored man came up to the car and told them to follow him and he would show them where they could get the drink of whiskey; that he (M. K. Sykes) followed the colored man 1½ miles to the distillery; that he was there about 30 or 40 minutes, during that time the officers made the raid and he was captured; that he had nothing whatever to do with the distillery; and no interest in it, and knew nothing about its being there until he was shown the place by the colored man, whom he did not know; that he never bought any whiskey from any one there, and denied knowing anything about the distillery until it was shown him by the colored man.

The judge charged the jury that if "they believed the evidence of the defendant himself, that they should return a verdict of 'guilty' against him; that a person who goes to a distillery for the purpose of buying whiskey is guilty of aiding and abetting in the unlawful manufacture of the same." Verdict of guilty, and judgment; appeal by the defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. P. Horton for defendant.

CLARK, C. J. The court properly refused the motion for nonsuit. The defendant being found at the distillery while in operation, in overalls, and under the circumstances detailed in the evidence, was sufficient to take the case to the jury. In *S. v. Killian,* 178 N. C., 753, the defendant, seeing an officer searching for a still, took his gun and fired several times in the air. The officer proceeding to the still found no one there, and the still part removed, but there was fire in the furnace and other indications of recent use. The court held that this was sufficient

evidence to go to the jury that the defendant was guilty of aiding and abetting. In the present case the jury might have found upon the evidence of the State, unrebutted, that the presence of the defendant there while the still was in operation, especially in overalls, justified the inference that he was guilty.

If the case had been submitted to the jury upon the whole evidence, it was for the jury to say how far they believed the evidence of the defendant. But we cannot sustain the instruction that "if the jury believed the evidence of the defendant himself they should return a verdict of guilty against him, for that a person who goes to a distillery for the purpose of buying whiskey is guilty of aiding and abetting in the unlawful manufacture of the same."

This case does not present the question whether the purchaser of a drink is guilty of aiding and abetting in the unlawful sale, for in this case the evidence is that the defendant did not buy a drink of whiskey. The unexecuted wish to buy is not aiding and abetting in a sale which did not take place. Much less is it aiding and abetting in the manufacture of the unsold whiskey. In this case, in the language of the great dramatist, it may be said of the defendant:

"His act did not o'ertake his bad intent."—*Measure for Measure*, Act V, Sc. I.

The attempt to do an illegal act is of course indictable, and under our statute under an indictment for an illegal act, the defendant can be convicted of an attempt to commit, or of a lesser degree of, such an offense. Rev., 3269. "Taking the defendant's evidence to be true," there was no attempt to do any illegal act, but merely an intent to buy a drink of whiskey. An intent uncoupled with any act is merely an operation of the mind, and cannot be indictable. *S. v. Penny*, 4 N. C., 130; *S. v. Jordan*, 75 N. C., 27, however criminal the act intended might be, even treason without any overt act or attempt, unless,

"The unproportioned thought is given his act."—*Hamlet*, Act I, Sc. 3.

An intent is usually an essential element in any crime. In some cases it must be proved. In others it is conclusively presumed from the act done. *S. v. King*, 86 N. C., 603. But intent alone, not coupled with any attempt or act toward putting the attempt into effect is, in no case, cognizable by the courts, however it may be in another tribunal. Matthew 5:28.

Error.

STATE AND O. B. LANGSTON v. LEON COLE.

(Filed 29 September, 1920.)

1. Costs—Criminal Law—Prosecution—Findings—Statutes.

In order to tax the prosecuting witness with the cost of a criminal action, and for his imprisonment, a finding is necessary that the prosecution was frivolous and malicious. Rev., 1297.

2. Same—Justices' Courts—Appeal—Superior Court—Trial de Novo.

An appeal from an order of a justice of the peace taxing the cost against the prosecutor in a criminal action does not involve again the guilt or innocence of the prisoner, who has been acquitted, or violate his constitutional immunity from a second jeopardy, but presents a substantial question to some extent in the nature of a "civil controversy," and comes within the intent and meaning of Rev., 607, 608, which provides for a hearing *de novo* on appeal, and prevails also in matters of strictly criminal nature by our statute. Rev., 3274, *et seq.*

3. Same—Jurisdiction—Additional Findings—Orders—Judgments.

The provisions of our statute, Rev., 1297, conferring on the courts of justices of the peace, and other courts, who heard the case originally, to presently make the necessary findings, before imprisoning the prosecutor, that the prosecution "was frivolous and malicious," does not prevent, on appeal to the Superior Court, an inquiry into the matter by the latter court, *de novo*, or the making additional findings and such further orders and decrees therein as the right and justice of the case may require.

4. Same.

On appeal to the Superior Court from an order of a justice of the peace, in a criminal action, taxing the prosecutor with cost, the proceedings may be entered into *de novo*, and the court may proceed to find upon the evidence that the prosecution was frivolous and malicious, and adjudge that the prosecutor pay the cost, and order that unless he should have done so within a certain time he be imprisoned until he pay them, or discharged according to law.

MOTION to tax prosecutor with costs, heard on appeal from a justice's court, before *Bond, J.*, at April Term, 1920, of JOHNSTON. There was judgment finding prosecution frivolous and malicious, and ordering that unless costs be paid in thirty days, that capias issue for prosecutor, and he be imprisoned till said costs were paid, or until he be discharged according to law, and said prosecutor excepted and appealed.

F. H. Brooks and Murray Allen for Langston, prosecutor.

HOKE, J. From a perusal of the record it appears that prosecutor, O. B. Langston, having instituted a criminal action before a justice of the peace against the defendant for removing crops without giving prosecutor, his landlord, legal notice, etc. The cause was tried by the

justice, R. K. Britt, the defendant acquitted, and a judgment entered that "the prosecutor pay the costs." From this judgment the prosecutor appealed, and the question was heard by the court *de novo* on affidavits setting forth, chiefly, statements of the affiants as to what transpired and was testified to at the justice's trial, and, after full hearing, his Honor entered judgement, in effect, that the prosecutor be taxed with the costs, and, after a finding, embodied in the judgment that the prosecution was frivolous and malicious, adjudged further, as stated, that unless the costs were paid in thirty days that execution issue against the person, and that he be imprisoned till said costs were paid, or defendant discharged according to law.

From this judgment the prosecutor has appealed, assigning for error, chiefly, that the court was without power to add to the justice's judgment the finding that the "prosecution was frivolous and malicious," and that on the record the proceeding should have been dismissed, or at most remanded for further action in the justice's court.

Our decisions construing the statute applicable, Rev., 1297, Con. Stat., sec. 1272, are to the effect that when a prosecutor is taxed with costs, on acquittal of a defendant in a criminal action, in order to his imprisonment it is necessary that there be a finding that the prosecution is frivolous and malicious, and when an order of that kind has been made, an appeal lies to the higher court. While such an appeal may not again involve the guilt or innocence of the defendant, who has been acquitted, as that would be in violation of his constitutional immunity from a second jeopardy, it does present a substantial question in the nature, to some extent, of a "civil controversy," and, in our opinion, comes clearly within the statutory provisions, and our decisions applicable that, on appeal from a justice to the Superior Court, the matter shall be heard *"de novo." S. v. Byrd,* 93 N. C., 624-627; *S. v. Powell,* 86 N. C., 640-646; Rev., 607-608.

This same purpose and policy of requiring a hearing *de novo* on appeals from a justice's court prevails also in matters of a strictly criminal nature, Rev., 3274, *et seq.,* and is recognized on appeals from the clerk to the judge on questions of law, on matters more especially pertinent to the confirmation of judicial sales, as shown in the recent case of *Perry v. Perry,* 179 N. C., 445.

It is urged for defendant that in the statute bearing more directly on the subject, Rev., 1297, the language is that a prosecutor, taxed with costs, may be imprisoned for nonpayment of same, "when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous and malicious," but this statute, conferring on the court, justice, or other, who heard the case originally the right to presently make the finding, by no means withdraws from

an appellate court of general jurisdiction, hearing the matter in the course of regular procedure, and having power to try the question *de novo,* the power of making additional findings, and such further orders and decrees therein as the right and justice of the case may require.

Again, it is insisted that the court that tried the matter, and which had opportunity to observe and note the bearing and conduct of the witnesses, is in much better position to make a just disposition in the matter. Such an argument may not be allowed to interfere with the effect and operation of a valid statute conferring the right to deal with this question *"de novo."* And the position, under very similar circumstances, has been disapproved as controlling in a number of our decisions, which hold that, on trials in the Superior Court, a motion to tax the costs against the prosecutor and to make the pertinent findings of fact, may be heard and determined at a subsequent term and before another judge. *S. v. Sanders,* 111 N. C., 700.

On full consideration, we find no error in the record, and the judgment of the Superior Court is

Affirmed.

STATE EX REL. A. L. HYATT ET AL. v. J. L. HAMME.

(Filed 6 October, 1920.)

1. Officers—Public Officers—Prosecuting Attorney—Removal from Office—Criminal Law—Intent—Statutes.

The proceedings before the judge of the Superior Court to remove a prosecuting attorney, sheriff, police officer, or constable from office, C. S., 3208, is of a civil nature for the protection of the public, and is not a criminal proceeding against the officer.

2. Same—Property—Constitutional Law— Evidence— Admissions— Trial by Jury.

The proceedings before the judge to remove a prosecuting attorney from office "for willful misconduct or maladministration in office," or on the other grounds stated in C. S., 3208, do not require an issue to be submitted to the jury. Upon the defendant's own admissions in this case, and evidence, he is guilty of the offense charged, which is sufficient to remove him from office; such office is not a property right under the provisions of the Constitution of North Carolina, Art. I, sec. 19.

3. Appeal and Error—Officers—Public Office—Removal from Office—Findings—Evidence—Statutes.

An appeal from the judgment of the Superior Court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of facts supported by evidence, Constitution, Art. VI, sec. 8; and the appeal is allowed by C. S., 638.

4. Officers—Public Officers—Removal from Office—Statutes—Evidence.

The evidence of a prosecuting attorney in proceedings before the judge to remove him from office, C. S., 3208, for misconduct, etc., is sufficient to sustain an order removing him when it admits that he attempted to induce, and did induce, a person to violate the statutes of our State in participating in acts made an offense for immorality, etc., whatever his intent may have been therein.

5. Same—Admissions—Petition to Remove from Office—Conviction.

When a prosecuting attorney has been removed upon his own testimony from his office in proceedings before the judge, C. S., 3208, he may not complain that it was not in accordance with the specifications alleged against him in the petition, but upon the specifications in his own evidence, as he could not have been taken by surprise, or well have asked for an amendment to the petition, permitted by this statute in proper instances.

APPEAL by defendant from *Kerr, J.*, at May Term, 1920, of LENOIR.

This is a proceeding to oust the defendant as prosecuting attorney of the recorder's court of Kinston, under the provisions of sec. 3208, C. S., for willful misconduct in office.

The evidence is voluminous, but it is not necessary to recite it, as the facts found by the judge are set out in his judgment, which is as follows, and there is evidence and admissions of the defendant to sustain his findings:

JUDGMENT.

SUPERIOR COURT—MAY TERM, 1920.

This proceeding coming on to be heard before the undersigned judge of the Superior Court, presiding in this the Sixth Judicial District, and being heard upon the pleadings and the evidence, which appears of record.

The court doth find the following facts, viz.:

1. That the defendant, J. L. Hamme, was duly elected city prosecuting officer for the city of Kinston, North Carolina, and about July, 1919, was duly inducted into said office and began the duties incident to the same as prescribed by chapter 277, Laws 1919. And at the time hereinafter referred to the said defendant was performing the duties of said office.

2. That the said defendant, some time after his entry upon the duties of said office, went, in the night time, to the home of one Mabel Holmes, a prostitute, who kept a house of prostitution in the "red light district" of the city of Kinston, and after drinking a small quantity of cologne or alcohol, falsely pretended to be in a state of intoxication, and by means of this fraud and deceit, attempted to procure the said Mabel Holmes to commit a crime, to wit, sell to him liquor or some intoxicant.

3. That on or about 16 March, 1920, the said defendant, J. L. Hamme, in the night time, and about the hour of midnight, went to the said home of the said Mabel Holmes, a prostitute, and a keeper of a house of prostitution, and being then and there alone with the said prostitute, removed his clothes and shoes, save his shirt and underclothes, and while in the said woman's bedroom, was found by the police officer of the said city of Kinston, North Carolina, one Richard Stroud, which officer at that time raided the said house of prostitution and forcibly opened the door to the said room in which the defendant, J. L. Hamme, was then and there in company with the said prostitute, Mabel Holmes, and the defendant, J. L. Hamme, then and there violently attempted to prevent said entrance.

The defendant's explanation given for being caught in said prostitute's bedroom was that he had planned with one Aldridge, a policeman of the said city of Kinston, for the purpose of getting evidence to convict said prostitute, to go to her said house at the said time, and go to bed with said prostitute after removing his clothes, and at a given signal, which was to be made by said defendant while in the bed with said prostitute, the said policeman was to forcibly raid the house, and the defendant was to flee undressed with his clothes in his hands, and the said policeman Aldridge was to arrest the woman, not recognizing the said defendant, J. L. Hamme, and the said policeman was to testify to these facts in the prosecution of the said woman in the city court of the city of Kinston, the defendant, J. L. Hamme, being then and there the prosecuting officer of the said court. The said policeman Aldridge denied having any such agreement with the said defendant, and testified that the first he knew of the said defense of the defendant, J. L. Hamme, was about three o'clock a. m. after the said defendant was apprehended in the said house by policeman Stroud, when the said defendant met Aldridge near the Norfolk-Southern depot and asked him to state that this was the plan and agreement, and stating to him that he had already made it all right with the woman; said policeman further testified that he told said defendant in answer to said defendant's request, that he had no such plan or agreement, and if he had to tell anything, he would have to tell the truth.

The court does not pass upon the fact whether the defendant was in the house of the said Mabel Holmes for an immoral purpose, or for the purposes contended for by the defendant; but, upon the foregoing facts found, which facts appear from the evidence of the defendant, the court doth adjudge the said defendant guilty of misconduct in office, which said misconduct doth bring his office in contempt, and renders the said officer inefficient to conduct the duties thereof. And the said J. L. Hamme, city prosecuting officer of the city of Kinston, North Carolina,

is hereby removed from said office as provided by law, and to pay the cost of these proceedings to be taxed by the clerk.

JOHN H. KERR,
Judge Presiding Sixth District.

Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Rouse & Rouse, Moore & Croom, G. V. Cowper, and R. T. Allen for defendant.

CLARK, C. J. The statute under which this proceeding is based is to be found in sections 3208-3212, inclusive, of C. S. It was originally chapter 671, Public-Local Laws 1913, and applied only to Guilford County. By chapter 288, Laws 1919, it was made applicable to the whole State. Section 3208, C. S., provides: "Any city prosecuting attorney, any sheriff, police officer, or constable shall be removed from office by the judge of the Superior Court upon charges made in writing, and hearing thereunder for the following causes:

1. For willful or habitual neglect or refusal to perform duties of his office.
2. For willful misconduct or maladministration in office.
3. For corruption.
4. For extortion.
5. Upon conviction of a felony.
6. For intoxication, or upon conviction of being intoxicated."

The officer may be removed for misconduct or failure to perform the duties of his office, whether such failures were willful or habitually negligent; the statute was evidently enacted for the protection of the public, and not for the punishment of the delinquent officer. It is not a criminal proceeding for his punishment, but is a civil proceeding brought in the name of the State upon the relation of five qualified electors in the county. *Territory v. Sanches,* 20 Ann. Cas., 109, and note on page 112. The delinquent officer is not entitled to have the issues of fact tried by a jury. An office is not property within sec. 19, Art. I, of the Constitution. *Mial v. Ellington,* 134 N. C., 131, and citations thereto in Anno. Ed. This statute does not provide for any appeal from the findings and judgment of the Superior Court, but the appeal is authorized by C. S., 638, which is as follows: "An appeal may be taken from every judicial order of the judges of the Superior Court upon or involving a matter of law or legal inference." Consequently, this Court has no jurisdiction to review the findings of fact made by the judge below under sec. 8, Art. VI, of the Constitution.

In Mechem on Officers, sec. 457, he says: "Misconduct, willful maladministration, or breach of good behavior, in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive."

In Throop on Officers, sec. 367, it is said: "Where such an official act or omission has occurred, the officer may be removed therefor without reference to the question whether it was done maliciously or corruptly," citing *Minkler v. State,* 14 Neb., 181, and *S. v. Leach,* 60 Me., 58. In the latter case it is said: "Misconduct does not necessarily imply corruption or criminal intention. We think the Legislature used the word in its more extended and liberal sense. This statute is not, strictly speaking, a penal statute, but is rather remedial and protective."

In the courts of nearly all the States which have similar statutes it is held that it is in the nature of a civil proceeding for the protection of the public from misconduct, neglect of duty, or inefficiency by providing a speedy investigation and removal of the officers named. Such a power is sometimes vested in the Governor or other executive officer, but in others, as in this State, the power is vested in the courts. It is not a criminal proceeding, and it is held that though the act for which the officer is removed may also be punishable as a crime, this does not affect his liability to removal for the same act. *Territory v. Sanches,* 20 A. & E. Anno. Cas., 109, and notes thereto. This is true also as to impeachments, Art. IV, sec. 3.

Upon the facts found by his Honor, it should be unnecessary in any tribunal to debate whether the defendant should be removed from office under the clear intent and purport of this statute. It appears that:

1. A prosecuting attorney accepted employment and a fee in a civil action from one whom he was prosecuting on a charge of being a habitual criminal and violator of the law, and he put in evidence his own letters to her, a woman of the town, addressing her as "My dear Miss Holmes," and making appointments with her to come to his office from time to time.

2. He also went to her house, according to his own statement, feigning drinking and drunkenness, and tried to get her to sell him liquor in order to induce her to commit a crime for which he would convict her.

3. He, being prosecuting attorney, according to his own statement, went to the prostitute's house, and in her bedroom and in her presence took off his outer clothing with a view to being caught by the officer in this compromising position, in order that he, as prosecuting attorney, might obtain evidence against the woman, he having arranged, he says, with the policeman to make his own escape, and that the policeman

should perjure himself by testifying that he did not recognize the man who was with the woman.

Upon his own statement, the defendant endeavored to procure the woman to commit two distinct and separate offenses against the law, with a view of convicting her of such offenses, and also was guilty of an attempt to procure the policeman to perjure himself.

It was unnecessary, as his Honor held, for him to pass upon the question whether when the defendant went to the house of the prostitute his purpose was as alleged by the State, or that stated in the defendant's evidence. Upon the facts found by the judge from the evidence of the defendant, the court properly adjudged "the said defendant is guilty of misconduct in office, which said misconduct does bring his office into contempt, and renders said officer inefficient to conduct the duties thereof," and removed him from office.

There can be no two opinions upon that subject, and the necessity for just such a statute as this could not be more strongly presented than by the facts of this case, for without such an act the public sense of propriety and decency would have been outraged by his remaining in office.

The learned counsel for the defendant puts his defense almost entirely upon the ground that the defendant was found guilty by the judge most largely, if not altogether, on the specifications of misconduct stated in the defendant's own testimony rather than upon the allegations of fact specified in the petition. C. S., 3210, provides that, "The petition shall state the charges against the accused, and may be amended." This is a civil proceeding, and if the additional facts and circumstances stated in the defendant's testimony had come out in the evidence for the State, the defendant might well have alleged that he was taken by surprise and unprepared to meet them. The court might thereupon have permitted an amendment of the charges, and, in his discretion, have given the defendant time to answer and to produce his witnesses, but when, as here, the additional facts in proof of the charge of misconduct in office are stated by the defendant himself, and the judge finds those statements to be true, the defendant has no ground to complain. He could not, and did not, ask time to produce witnesses to contradict his own testimony, which fully authorized, and indeed required, the judge to remove him from office.

No error.

STATE v. WASH BRYANT.

(Filed 20 October, 1920.)

1. **Homicide—Criminal Law—Instructions—Murder—Manslaughter—Appeal and Error.**

Where there are facts in evidence tending to reduce the crime to manslaughter, and the prisoner is tried under an indictment for murder, it is the duty of the trial judge to submit this view of the case to the jury under a correct charge, and his failure to do so will constitute reversible error, though the defendant may have been convicted of the higher offense.

2. **Same—Prayers for Instructions.**

Where, upon the trial for murder, there are facts in evidence permitting the inference that the homicide was not intentional, but was unintentionally caused by the defendant's careless use of his pistol, in a culpably negligent manner, a charge of the court to the jury which makes no reference to the offense of manslaughter, and ignores a special request presenting these principles, is reversible error.

3. **Homicide— Criminal Law— Instructions— Statutes — Murder — Manslaughter.**

Where the defendant is being tried under an indictment for murder, and there is evidence, in his behalf, tending to show that the crime was of the less offense of manslaughter, a charge of the court to the jury which gives no instructions pertinent to these respective positions, or otherwise as to what may constitute either murder or manslaughter, is erroneous in not sufficiently complying with our statute, Rev., 535, requiring that the court shall declare and explain to the jury the law pertaining to the facts in evidence.

4. **Criminal Law— Verdicts— Murder— Lesser Offense—Manslaughter— Statutes.**

While a general verdict of "guilty" on a trial for murder may be considered in connection with the evidence and the charge a sufficient compliance with our statute, the profession and officials engaged in trials of this supreme importance are admonished that verdicts should be rendered in the precise form required by the statute, and specify in terms the degree of the crime of which the prisoner is convicted. Rev., 3271.

INDICTMENT for murder, tried before *Bond, J.*, at May Term, 1920, of HARNETT.

In apt time the State announced that it would not ask for a verdict of murder in the first degree, and thereupon, and on plea of not guilty, there was evidence on the part of the State to the effect that in January, preceding the finding of the bill of indictment, defendant shot and killed his wife, Ida Bryant, and under circumstances that would make such killing murder in the second degree, as claimed by the State.

There was evidence on the part of the defendant that at the time of the occurrence the defendant, whose corn crib, situate some distance off,

had been broken into, stepped to the window of the house and asked his wife to hand him his pistol, and in doing so it was accidentally discharged, causing her death.

On these opposing positions the issue was submitted to the jury, who rendered their verdict of "Guilty."

Judgment that defendant be imprisoned for the term of 12 years in the State's prison, and defendant excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Young & Best for defendant.

HOKE, J. It has been held in numerous decisions with us that "Where on an indictment for murder there are facts in evidence tending to reduce the crime to manslaughter, it is the duty of the presiding judge to submit this view of the case to the jury, under a correct charge, and his failure to do so will constitute reversible error, though the defendant may have been convicted for the higher offense." *S. v. Merrick,* 171 N. C., 788-791, citing *S. v. Clyde Kennedy,* 169 N. C., 289; *S. v. Kendall,* 143 N. C., 654 and 664; *S. v. White,* 138 N. C., 704 and 715; *S. v. Foster,* 130 N. C., 666-673; *S. v. Jones,* 79 N. C., 630; *S. v. Matthews,* 148 Mo., 185; *Baker v. The People,* 40 Mich., 411. That opinion then quotes from *Kendall's case,* as follows: "It is a principle very generally accepted that on a charge of murder, if there is any evidence to be considered by the jury which tends to reduce the crime to manslaughter, the prisoner, by proper motion, is entitled to have this aspect of the case presented under a correct charge, and if the charge given on this question is incorrect, such a mistake will constitute reversible error, even though the prisoner should be convicted of the graver crime, for it cannot be known whether, if the case had been presented to the jury under a correct charge, they might not have rendered the verdict for the lighter offense."

And from *Foster's case:* "If it had been clearly explained to the jury what constituted murder in the second degree, of which, through his counsel, he had admitted himself to be guilty, it may be that the jury would have coincided with that view; but in the absence of instruction on that offense, with only the issue of murder in the first degree placed before them with instructions only as to that offense, with evidence of the homicide, it may well be that the jury held against the prisoner, that he was guilty, simply because they were not informed as to the constituent elements of the lesser offense." And *Jones' case, supra,* is also referred to as a direct authority for the position as stated.

In the present case, there were facts in evidence on the part of the defendant permitting the inference that the homicide was not intentional, but may have been the result of culpable negligence on the part of the defendant, and so amounting only to the crime of manslaughter. *S. v. Stitt,* 146 N. C., 643; *S. v. Vines,* 93 N. C., 493.

A perusal of the record will disclose that not only is there no reference to the offense of manslaughter in the charge, but a special request for instructions presenting the question was refused or ignored by his Honor, and for this error the issue must be referred to another jury.

In *Stitt's case, supra,* it was held, among other things, that: "Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown or imputed, as is sometimes the case, by reason of the killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life."

And on the record the charge is objectionable further in that it gives to the jury no instructions pertinent to these respective positions or otherwise as to what may constitute either murder or manslaughter, and is not a sufficient compliance with the statute applicable (Rev., 535), requiring that the court shall declare and explain the law appertaining to the facts in evidence.

Defendant excepts, also, for that the jury have rendered a general verdict of "guilty" without specifying the degree of the crime as directed by sec. 3271 of the Revisal.

We have held in several decisions on the subject that a verdict of that kind may be considered a sufficient compliance with the statute when the degree of the crime can be clearly ascertained by reference to the evidence in the case and the charge of the court (*S. v. Wiggins,* 171 N. C., 817-818, and authorities cited), but we deem it not amiss to again admonish the profession and officials engaged in trials of this supreme importance, that the verdict should be rendered in the precise form that the statute requires; that is, to specify in terms the degree of the crime of which the prisoner is convicted. *S. v. Murphy,* 157 N. C., 614.

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

New trial.

STATE v. D. J. WARD.

(Filed 4 November, 1920.)

1. **Appeal and Error—Docketing—Dismissal—Rules of Court.**

An appeal to the Supreme Court from a judgment rendered prior to the commencement of a term thereof, must be docketed at the next succeeding term, or, on motion, it will be dismissed. Rule 5.

2. **Homicide—Murder—Evidence.**

Evidence that the prisoner shot at the deceased four times, two of the shots taking effect after the deceased had fallen, with malice and without provocation or legal excuse, is sufficient for conviction of murder in the first degree.

3. **Trials—Remarks of Counsel—Homicide—Murder.**

A remark by the solicitor when selecting a jury for trial for murder, that he understood the defendant did not deny the killing, is not objectionable as an improper one, when the sole defense was insanity.

4. **Trials—Homicide—Murder— Insanity— Drunkenness— Questions and Answers—Appeal and Error.**

A question asked by the solicitor, on cross-examination on the trial for murder, defended on the plea of insanity, as to whether the defendant did not get into a high temper when drunk, is competent under evidence that he was drunk at the time of the homicide, and if otherwise, is not prejudicial when the witness has stated that he had never appeared to be dangerous when drinking.

5. **Homicide—Murder—Insanity—Drunkenness—Evidence—Experts—Witnesses—Hypothetical Questions.**

When the defense of insanity is interposed on a trial for murder and there is evidence that the prisoner had been drinking at the time of the crime, a question asked a medical expert, on cross-examination, whether, in his opinion, the prisoner was under the influence of whiskey or was crazy, if he could walk straight and carry on a rational conversation, is a proper one, when based on facts the counsel contended he had proved.

6. **Appeal and Error—Objections and Exceptions—Evidence—Argument.**

An exception to evidence not taken until the case on appeal to the Supreme Court was served, will not be considered; as also to the course of the argument, if not taken in apt time.

APPEAL by defendant from *Guion, J.*, at the January Term, 1920, of COLUMBUS.

The defendant was convicted of murder in the first degree at January Term, 1920, of the Superior Court of Columbus County, and appealed from the sentence of death pronounced on the verdict.

The transcript of the record was filed in this Court during this, the fall term, and the State moves to dismiss the appeal because not docketed at the spring term of court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Irvin B. Tucker and Lewis, Powell & Lewis for defendant.

ALLEN, J. An appeal from a judgment rendered prior to the commencement of a term of this Court must be docketed in the Supreme Court at the next succeeding term (Rule 5, *Porter v. R. R.*, 106 N. C., 479), and the defendant having failed to comply with this rule, the appeal is dismissed, not, however, without an examination of the record to see if there is any substantial error, as the life of the defendant is involved.

Three eye-witnesses testified to the shooting of the deceased by the defendant, and that he fired four shots, two of them after the deceased had fallen.

There is not the slightest evidence of provocation or legal excuse, and evidence of malice is abundant.

The defense is insanity, and there is evidence to support it.

The defendant excepted because the solicitor said, while the jury was being selected, that he understood the defendant did not deny the killing.

We see nothing improper in the remark, and it could not have been prejudicial, as the case was tried upon the question of insanity, and it was not disputed that the defendant killed the deceased.

Also to the following question, asked by the solicitor on cross-examination of Josh Nobles:

"Q. When he got drunk or was drinking he was in a high temper was he not?"

The question was permissible, but if not, the answer was favorable to the defendant: "So far as I know he was always about like other men. He was feeling good and all, and always had a whole lot to say and do, and never appeared to be a dangerous man when he was drinking."

There are four other exceptions, none of them with more force than those referred to.

The defendant seems to rely principally on the exception that, "That the court erred in allowing the solicitor for the State to ask the expert witness, Dr. R. B. Whitaker, the following question: 'If the jury should find that the defendant on 28 August left his home some time after 5 o'clock, walked two miles, walked straight, carried on a rational conversation with parties on the road, and after he arrived at Mr. Mercer's he talked to Mr. Mercer in a rational manner, and afterwards he shot the deceased, left there walking straight, carrying on a rational conversation with parties after the shooting, would you say, in your opinion, he was so under the influence of whiskey that he was in a crazy condition

and did not know what he was doing?' and to the answer thereto, as follows: 'If that should be found, I should say no.'"

Dr. Whitaker was examined in behalf of the defendant, and this was in reply.

The defendant propounded a question, based on facts he contended he had proved, and the solicitor, on cross-examination, asked the opinion of the expert on facts he claims were established, which was entirely proper.

The question and answer, however, prove nothing, as any one would say the defendant was not in a crazy condition if he walked straight before and after the killing, and carried on rational conversations before, at the time of, and after the killing.

There is also an exception to a remark of counsel, assisting the State, in his argument to the jury, which we could not consider because the exception was not entered until the case on appeal was served. *S. v. Lewis,* 93 N. C., 581; *S. v. Suggs,* 89 N. C., 527; *Byrd v. Hudson,* 113 N. C., 203. Objection to the course of argument must be taken at the time.

Appeal dismissed.

STATE v. GREELY PASLEY.

(Filed 4 November, 1920.)

Criminal Law—Costs—Conviction—Trial by Jury—Justice's Court—Appeal—Superior Court—Courts—Constitutional Law.

An appeal from a court of a justice of the peace by the defendant in a criminal action, carries with it the constitutional right to a trial by jury in the Superior Court, where the trial is *de novo*, and the latter court may not affirm that part of the justice's judgment taxing the defendant with cost, over his objection, without conviction before the jury upon the merits of the case. Constitution of N. C., Art. 1, secs. 13 and 2.

APPEAL by defendant from *Ray, J.,* at Spring Term, 1920, of ASHE.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Charles B. Spicer for defendant.

WALKER, J. The defendant was charged, in a criminal proceeding before a justice of the peace, with unlawful trespass upon land; that is, entering thereon after having been forbidden to do so. Upon conviction, he appealed to the Superior Court, where the case seems to have taken a peculiar course. There was negotiation between the parties

for a settlement of the controversy, but they could not agree as to the final terms, defendant refusing to pay the costs. The court affirmed the judgment of the justice as to the costs against the consent of defendant, and without allowing him a jury trial, and he thereupon appealed to this Court.

When an appeal is taken in a criminal action before a justice, of which he has jurisdiction, the trial in the upper court is *de novo*. *S. v. Koonce,* 108 N. C., 752.

The judgment in the Superior Court was no doubt entered by the judge in a laudable attempt to settle a small matter, which was really cumbering the docket and delaying the court. Section 11 of Article I of the Constitution, so far as material, provides: "In all criminal prosecution, every man has the right not to be compelled to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." See *S. v. Cannady,* 78 N. C., 539, and *S. v. Hicks,* 124 N. C., 829. The general rule is that when the subject-matter of an action has been disposed of by compromise, destruction of the property, or otherwise, this Court, on appeal, will not pass upon the merits of the original matter in litigation to ascertain which side in law ought to have won, in order merely to decide who shall pay the costs. This rule, however, does not apply to an appeal in a State case where the appeal involves the enforcement of a constitutional right. *S. v. Horne,* 119 N. C., 853. As it is clear from the record that there was no proper conviction of the defendant in the court below, we are unable to sustain the action of the judge, by any substantial reasoning.

Article I, section 13, of the Constitution says: "With right of appeal." And this Court has held in the case of *S. v. Brittain,* 143 N. C., 668, that when a defendant asserts his right of appeal, and the case comes up in the Superior Court, the defendant's right of trial by jury, as guaranteed by the Constitution, is preserved to him.

It makes no difference what the real issue is, so that the charge involves the commission of a crime for which he can be punished and made to pay the costs.

For refusing to allow the defendant a hearing by a jury, his Honor erred, and the defendant is entitled to a new trial.

The judgment will be set aside, and a new trial by jury ordered.

New trial.

STATE v. CLEOPHUS GRAY AND WILLIAM BALLENTINE.

(Filed 4 November, 1920.)

1. Criminal Law— Automobiles — Negligence — Evidence — Homicide — Statutes.

Evidence tending to show that one of the defendant's was instructing the other how to drive an auto truck, with the hands of both on the steering wheel, on a street much used by pedestrians in a populous part of the city, and while running at a speed exceeding the speed law and without looking ahead or warning, they ran upon, injured, and killed a child three years of age, endeavoring to cross the street, which a slight deflection of the machine from its course could have saved, is sufficient to sustain a verdict of manslaughter, irrespective of whether the death of the child was willfully or intentionally caused. Public Laws of 1917, ch. 140, secs. 15 and 17.

2. Same—Prior Negligence.

Where one driving an automobile in a reckless manner and in violation of the requirements of the statutes as to speed and care intended to prevent injury (Public Laws of 1917, ch. 140, secs. 15 and 17) runs upon and kills a three-year-old child crossing a street in a populous portion of a city, he is guilty of manslaughter at least, and under some circumstances, murder, though as soon as he has seen the danger of the pedestrian he has used every effort to avoid injuring him, if his prior recklessness had rendered him unable to control the car and prevent the injury.

3. Same.

While the negligence of one driving an automobile causing death must be of greater degree in the criminal action than is required in a civil one, it is sufficient if it was likely under the circumstances to produce the death, or great bodily harm, as in this case, where the defendant, driving in a reckless manner, in violation of the statute, could reasonably have anticipated the result that actually followed.

4. Same—Contributory Negligence.

The doctrine of contributory negligence has no application in the criminal law, and constitutes no defense for one who has recklessly and in violation of our statute enacted for the purpose of protecting pedestrians, etc., caused injury or death. *S. v. Oakley*, 176 N. C., 755, as to whether evidence of this character may be considered upon the question of negligence, cited and distinguished.

5. Criminal Law—Automobiles—Negligence—Children—Infirm Persons.

The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions who are to be met upon the streets, and he is required to increase his exertions and use more care to avoid danger to children whom he may see, or, by the exercise of reasonable care, should see, on or near the highway.

6. Same—Contributory Negligence.

The law will not impute contributory negligence to a child of three years of age, who has been injured by the negligence of one driving an auto truck.

7. Appeal and Error—Harmless Error—Evidence—Negligence—Automobiles.

The statement of a witness that, in his opinion, the defendant tried for criminal negligence while driving an automobile, which has caused injury, on the street, to a pedestrian endeavoring to cross it, was unskillful in handling the automobile, if erroneously admitted, is harmless, when it appears from all the evidence in the case that this was indisputably the fact. *Semble*, the testimony of the witness in this case was competent as "a shorthand statement of a fact."

8. Appeal and Error—Witnesses—Experts—Courts—Findings.

The findings of fact by the trial judge, upon evidence, as to whether a witness is an expert or not, is not reviewable on appeal.

9. Evidence—Witnesses—Experts—Speed of Automobiles—Negligence.

Witnesses qualified as experts therein may testify, when relevant to the inquiry, as to the distance within which an auto truck of the kind causing the injury in the action can stop when going at a given speed an hour.

APPEAL by defendants in a criminal action from *Daniels, J.*, at June Term, 1920, of WAKE.

The defendants were convicted of involuntary manslaughter at June Term, 1920, of Wake County Superior Court, Hon. F. A. Daniels, judge presiding, and from this judgment, upon such conviction, appeal to this Court.

The State's evidence, fairly considered, tended to show the facts as herein narrated. Rachel Mann, a little girl three years of age, was, on an afternoon of March, 1920, visiting at the house of her uncle, M. L. Mann, who lived directly across South Salisbury Street from the house of J. H. Mann. Between 5:30 and 6 p. m., Mrs. M. L. Mann went with the little girl out in front of her house so that she might go home. After looking up and down Salisbury Street, and seeing no automobile or vehicle coming from either direction, Mrs. Mann permitted the little girl to go, and she started running across the street directly toward her father's house. The M. L. Mann house was the fourth house from the corner of West Cabarrus and Salisbury streets, and the J. H. Mann house was directly across Salisbury Street from the M. L. Mann house. The street was paved with asphalt, and at that point was about 42 feet wide from the curb of the east sidewalk to the curb of the west sidewalk. Salisbury Street runs north and south; Cabarrus runs east and west. After the child had started to run across the street, a new Corbitt truck, driven by the defendants, came out of Cabarrus Street and turned south along Salisbury Street. No signal was given by blowing a horn, or otherwise, by the driver of the truck. It came out of Cabarrus and rounded into Salisbury at a slow speed, and as it straightened out to run along Salisbury the speed increased to 20 miles an hour. The truck struck the child when she was 16 feet and 4 inches from the west curb

and 25 feet and 6 inches from the east curb, knocked her down, and the right fore wheel of the truck ran across her head, crushing it, and killing her instantly. The point where the child was struck was 165 feet from the intersection of Cabarrus and Salisbury streets. No effort was made by the driver of the truck to stop it or to avoid the child. By turning its direction slightly to the east, even when within 10 feet of the child, the truck would have passed her probably without doing her any injury. After thus killing the child, the truck ran 13 feet without any effort being made to lessen its speed, or to stop. At that point brakes were put on, and the truck skidded 33½ feet to the point where it was stopped; thus it ran 46 feet after striking the child. One eye-witness, L. H. Amis, swears that at the time the truck struck the child it was, in his opinion, running 20 miles an hour. And quite a number of witnesses who were experienced in the handling of automobiles and trucks swear that in order for this truck to have skidded 33½ feet after the brakes were put on, it must have been running at a rate of speed exceeding 20 miles an hour. The defendant Gray had charge of the truck, but had permitted Ballentine, known to him to be an inexperienced driver, to drive it at that time, as he (Gray) was sitting by his side.

One witness, William Thames, testified: "I saw the truck come around the corner. There were two men in front. They were both using their hands in the operation of the truck."

Defendants were convicted, and from the judgment they appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Armistead Jones & Son for defendants.

WALKER, J., after stating the case: We need not give all the facts disclosed by the evidence, as those we have stated are sufficient to present the real question of the case.

All the witnesses testify that there was nothing to obstruct the view of the driver of the truck in the direction in which they were going. All of them testify that no warning or signal of the coming of the truck was given. The very fact that the driver put on brakes after the child was run over shows conclusively that he was not keeping an adequate lookout as he ran along the thickly populated street. There is obviously no doubt, and cannot be, that the defendants were operating the motor truck at an excessive speed, and were not keeping a lookout for persons in the street. If they had been, the little child could easily have been seen and saved.

It appears to us that, if anything, the undisputed facts of the case make it even stronger against the defendants than were those in *S. v.*

Gash, 177 N. C., 595, against him. They were operating the truck at a speed in excess of eighteen miles an hour, contrary to the provisions of the statute, Public Laws of 1917, ch. 140, sec. 17, and *S. v. McIver,* 175 N. C., 761. Though driving along a thickly settled street, they kept no proper look ahead at all to avoid a collision with a child, or children, whom they knew, or should have known, were constantly playing in or crossing the street, or with grown persons who used it for legitimate purposes, and gave no signal of their coming. This was a clear violation of the law, which reads thus: "Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk, . . . every person operating a motor vehicle shall slow down and give a timely signal with its bell, horn, or other device for signaling." Sec. 15 of ch. 140, *supra.* It is very clear that the defendants in this case were keeping no lookout at all. If they had been, the child would not have been killed. As it was, she had passed so far to the right that the right wheel of the truck was the wheel that struck her. Thus it would have required but a slight variation of the direction of the truck to have saved the child. Instead of changing this direction, as a matter of fact, they were bearing down upon the child, and gave her no chance to escape.

The principle is generally stated in the textbooks that "if one person causes the death of another by an act which is in violation of law, it will be manslaughter, although not shown to be willful or intentional" (McClain Cr. L., vol. 1, sec. 347), or that when life has been taken in the perpetration of any wrongful or unlawful act, the slayer will be deemed guilty of one of the grades of culpable homicide, notwithstanding the fact that death was unintentional and collateral to the act done (13 R. C. L., 843); but on closer examination of the authority, it will be seen that the responsibility for a death is sometimes made to depend on whether the unlawful act is *malum in se* or *Malum prohibitum,* a distinction noted and discussed in *S. v. Horton,* 139 N. C., 588. It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and under some circumstances of murder. The principle is recognized in *S. v. Horton, supra,* and in *S. v. Turnage,* 138 N. C., 569; *S. v. Limerick,* 146 N. C., 650, and *S. v. Trollinger,* 162 N. C., 620, and has been directly applied to deaths caused by running automobiles at an unlawful speed. In 2 R. C. L., 1212, the author cites several authorities in support of the text that one who willfully or negligently drives an automobile on a public street at a prohibited rate of speed, or in a manner expressly forbidden by statute, and thereby causes the death of another, may be

guilty of homicide; and this is true, although the person who is recklessly driving the machine uses, as soon as he sees a pedestrian in danger, every effort to avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian. There is evidence, in this case, of negligence amounting to recklessness, and "where one, by his negligence, has cause or contributed to the death of another, he is guilty of manslaughter." McClain Cr. L., vol. 1, sec. 349. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to be submitted to a jury in a criminal prosecution if it was likely to produce death or great bodily harm (*S. v. Tankersley,* 172 N. C., 955), and in this case the defendant could reasonably anticipate meeting some one at the crossing, and to approach it at a rate of speed twice that allowed by law, without reducing the speed and without signal, is evidence of recklessness which justified submitting the question of guilt to the jury. *S. v. McIver,* 175 N. C., at pp. 765, 766.

It is immaterial that there was negligence on the part of the deceased contributory to the result, the doctrine of contributory negligence having no place in the law of crimes. McClain Cr. L., vol. 1, sec. 349; 2 R. C. L., 1212; *Schultz v. State,* Ann. Cases., 1912, ch. 496, and note.

The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions. He must increase his exertions in order to avoid danger to children, whom he may see, or by the exercise of reasonable care should see, on or near the highway. More than ordinary care is required in such cases. *Deputy v. Kimmell,* 80 S. E. (W. Va.), 919; 8 N. & C. Cases, 369. Moving quietly, as an automobile does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicle, it is necessary that caution should be continuously exercised to avoid collision with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. Berry on Automobiles, sec. 124; Huddy on Automobiles (4 ed.), sec. 214. In *S. v. Gash, supra,* the court below charged the jury: "If the defendant was operating the car lawfully, and at the rate of speed permitted by law, yet if by reason of a failure to keep a proper lookout he failed to see the deceased in time to avoid injuring him, and 'by reason of his carelessness and negligence in failing to keep this lookout' he caused the death of the child, he was guilty." The Court held that in this charge there was no error. Very clearly, then, the court below was right in

overruling the defendants' motion for judgment as of nonsuit. Exceptions 1 to 3 are so clearly without foundation that we pass them over without further comment.

The witness, L. H. Amis, was testifying, and in the course of his testimony said: "The car seemed to be handled by persons that did not know anything about it." Defendants moved that this be stricken out, and the motion was denied. If this was not "a shorthand statement of the fact," and admissible for that reason, *S. v. Leak,* 156 N. C., 643; *S. v. Johnson,* 176 N. C., 722; *S. v. Spencer,* 176 N. C., 709, the car was so plainly mishandled that no harm was done by what the witness said. The defendants got the full benefit of the evidence, the subject of exception 5, both from the statement of this witness and other witnesses.

Exceptions 6, 7, 8, 9, and 13 are all directed to the admission of so-called expert evidence.

Whether a particular witness is an expert or not is a question of fact to be determined by the court below preliminary to the admission of the testimony. That once determined, as it necessarily is determined, if the testimony is admitted, the appellate Court accepts the findings of the court below (*Caton v. Toler,* 160 N. C., 104), if there is any evidence to sustain them. *S. v. Wilcox,* 132 N. C., 1120; *Summerlin v. R. R.,* 133 N. C., 550. Admitting, then, that each of the particular witnesses was an expert in regard to the matter about which he was examined, testimony as to the distance within which such a truck, as Corbitt's truck, could be stopped when going at a rate of speed 20 to 25 miles an hour was plainly admissible. *Cox v. R. R.,* 126 N. C., 103; *Draper v. R. R.,* 161 N. C., 307.

Exceptions 15 to 19, inclusive, were directed to the judge's failure to give certain special instructions requested by defendants. All of these have inherently the same vice, *i. e.,* that the carelessness and recklessness of the defendants must have been so great as to constitute an actual felonious intent.

"If one person causes the death of another by an act which is a violation of the law, it will be manslaughter, although not shown to be willful or intentional." *S. v. McIver, supra.*

"The negligence which will render unintentional homicide criminal is such carelessness or recklessness as is incompatible with a proper regard for human life. An act of omission as well as commission may be so criminal as to render death resulting therefrom manslaughter. But the omission must be one likely to cause death." *S. v. Tankersley,* 172 N. C., 959.

The remaining exceptions, other than those not formal, were directed to alleged errors in the judge's charge. The judge, however, it seems to us, followed the law as laid down by this Court in *S. v. McIver, supra;*

S. v. Tankersley, and *S. v. Gash, supra.* He was very careful to distinguish between negligence occasioning damage out of which arises a civil action and that reckless disregard of human life which constitutes a crime, and if there was any error in his charge upon an involuntary killing while doing an unlawful act, that error was in favor of the defendants.

While we hold the defendants to be guilty, as charged in the bill of indictment, upon what must be conceded as the facts of the case, we are yet moved to caution those whose children venture upon the streets and public highways, where so many motor cars pass and repass at short intervals, to bestow more care and vigilance in guarding them against danger. The chauffeur of an automobile may be ever so careful—and every one of humane feelings would deplore an injury to a little child—and yet with all his care, children are apt to get in the way of a car without the slightest warning to him of their movements, so suddenly, in their childish play, do they dart out in the roadway, not conscious of any peril in doing so. Drivers of vehicles should take account of this characteristic of theirs, and exercise greater precaution against accident because of it. This record does not present such a case, for, after the chauffeur either saw or could have seen the child, having a fair and unbroken view, he had ample time to turn the car or to stop it, if necessary, and avoid the catastrophe. The indiscretion of the little one was no excuse for the driver's *reckless* conduct, for that correctly describes it. The law imputes no wrong to a child of such tender years, who was less than three years old, but requires far more care and watchfulness of the driver under the circumstances. We can safely aver that no case has come before this Court where there was such utter disregard of the plain duty which the law imposes upon a chauffeur. He and his companion have taken the innocent life of a little child, under most distressing circumstances, a homicide not less than manslaughter, and palpably of that degree, at least, and they must suffer the penalty of their wrongdoing. The law looks at their act alone, as they are prosecuted for a public and criminal offense, and the act of the little girl, even if indiscreet for one so young, cannot avail them. The law should be enforced with more vigor, locally and generally, against those who drive so recklessly and with such great indifference to the rights of others. The defendants were fortunate when they were convicted of the lower degree of homicide, and received so light a sentence.

The charge of the judge was free from error, and was more, for it was very liberal to the defendants, giving them the benefit of the law, in one or two respects, beyond what they were entitled to have.

The contention of defendants that there is no evidence that their conduct was in violation of the speed law or statute designed to prevent

injury to pedestrians, or others, nor is there any evidence that it was itself dangerous, cannot be sustained. There is overwhelming testimony to the contrary.

Defendants contend that the conduct of the child, while not of itself a defense, is material to be considered as bearing upon defendants' negligence, for which they cite *S. v. Oakley,* 176 N. C., 755, which holds that "contributory negligence is not a defense to a charge of involuntary manslaughter, and may only be considered in its relevancy to the question of the defendant's negligence, which must be in a greater degree than that required to sustain a civil action for damages," citing *S. v. Tankersley,* 172 N. C., 959, but in *Oakley's case* the defendant had acted in a proper manner, was guilty of no recklessness, but was traveling at a lawful rate of speed and obeying the law, and the fatal accident occurred because the lad, who was killed, had stepped suddenly from a car in front of a house, where it had stopped after being driven in front of defendant's car for some distance, and the latter was unable, even by the exercise of the highest degree of care, under the circumstances, to save him. Besides, it appeared that defendant had exercised an unusual degree of care, in approaching the other car. These cases are widely different in their facts, and *Oakley's case* lacks a great deal of supporting defendants' position here. The same may be said of *Tankersley's case, supra,* and all this is true, even if we follow strictly what was so well said by *Justice Ashe* in *S. v. Massey,* 86 N. C., 658, 660, that it is neither charity nor in accordance with common sense, nor is it law, to infer the worst intent which the facts will admit of or justify. In the last named case the Court ruled that where the acts of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

But this principle does not apply where there is a clear violation of the law, upon self-evident facts, which leads necessarily to the result, and is the efficient cause thereof, as the law does infer the intent to do that which is the almost inevitable consequence of the defendants' acts. By over driving, and thus increasing their speed to twenty miles or more at the time of the impact, they disabled themselves to stop the car, or even to divert its course, at the very time when it was necessary to do so, in order to save the little child from injury. The other exceptions are more a quarrel with the jury for its verdict than a protest against the rulings of the court.

We have carefully examined the case, and the exceptions taken by defendants, and find no error in the case or record.

No error.

STATE v. CHAMBERS.

(Filed 10 November, 1920.)

1. Subornation of Perjury—Perjury—Evidence.

Upon a trial for subornation of perjury of a witness who had testified falsely in behalf of the defendant's son in a criminal action, it is competent for the State to show the commission of the act of perjury on the trial of the criminal action against the defendant's son and the defendant's threats and coercion resulting in the perjury of the witness, and such facts and circumstances in evidence on the son's trial that will tend to show defendant's motive therein and to corroborate the State's witness in the present trial for subornation of perjury.

2. Evidence—Exclusion—Appeal and Error—Questions and Answers.

The exclusion of the answer to a question which the witness afterwards substantially answered and when, at the time, it did not appear what the answer would have been, if erroneous, is harmless error.

3. Instructions—Appeal and Error.

Where the charge of the court, in a criminal action for subornation of perjury, construed as a whole, correctly states the law in relation to the evidence, a "slip of the tongue" at a certain part will not be held as reversible error; nor will any detached expression of the court be so held, when the charge is correct! in its entirety, and so construed, the presumption being that the jury did not overlook any part of it.

4. Criminal Law—Misnomer—Idem Sonams.

A mistake in the spelling of the defendant's name, in an indictment for subornation of perjury where it is as slight as in this case, comes within the maxim *idem sonans*, and is not reversible error on appeal.

5. Arrest of Judgment—Judgments—Indictment—Criminal Law.

The defect in an indictment must appear upon the face of the bill, and the objection that the proof did not conform thereto is not a ground for arresting the judgment.

6. Subornation of Perjury—Perjury—Trials—Statutes.

While subornation of perjury is accessional in its nature it has been made an offense separate and distinct from perjury, triable independently (Rev., 3615) and punishable as if the person committing the offense had himself committed the perjury. (Rev., 3616.)

7. Subornation of Perjury—Definition—Perjury.

Subornation of perjury is where the accused has instigated or procured a person to testify knowingly, willfully, falsely and corruptly, under oath administered by one lawfully qualified for the purpose, with the foreknowledge, or belief, that the testimony would be thus falsely given.

8. Subornation of Perjury—Perjury—Admissions—Burden of Proof—Instructions—Pleas—Confession and Avoidance.

Upon the trial of an action for subornation of a witness on a general denial of guilt by the accused, an admission by him that the witness had been convicted of perjury by a court of competent jurisdiction, is not an

admission by the accused that he had corruptly subserved him, and a charge by the court to the jury that the admission was in the nature of a plea of confession and avoidance places upon the accused the burden of showing he was not guilty of corruptly procuring the testimony, when the burden remains with the State throughout to show it beyond a reasonable doubt, and the instruction is reversible error.

APPEAL by defendant from *Ray, J.*, at May Term, 1920, of ROCKINGHAM.

The defendant was indicted and tried for subornation of perjury at the May Term, 1920, of Rockingham Superior Court.

The State's evidence tended to show that at the August Term, 1919, four young men, Will Tolbert, Henry Chambers (son of defendant), Will Clowers, and a man by the name of Fox were indicted for breaking, entering, and stealing from the store of Edmonds at Leaksville, N. C., and the case stood for trial at that term. Of these defendants Tolbert and Henry Chambers were present, Fox and Clowers had run away. On the Sunday afternoon before this court convened on Monday morning the defendant James Chambers, father of Henry Chambers, went to the house of Mrs. Tolbert, the mother of Will Tolbert, codefendant with Henry Chambers, and, according to the testimony of Mrs. Tolbert, Will Tolbert, Tom Lemons, and the defendant James Chambers, took Mrs. Tolbert and Will into a room and said to Will, "Bill, remember what I told you. There are not but two who know anything about this, for the others are gone, and if you tell a word or leak a drop I'll shoot your brains out." When the case was called the following Tuesday morning, the court permitted the solicitor to try separately Will Tolbert and Henry Chambers, the only two of the young men caught at that time. Will Tolbert was first tried, and both he and his mother testified that neither he nor Henry Chambers had anything to do with the breaking into Edmund's store. Will Tolbert, however, was convicted and sentenced to 18 months on the roads. In the course of the trial it developed that Clowers was in Greensboro. The solicitor sent an officer immediately after him, postponing the trial of Henry Chambers until Clowers could be produced as a witness. The officer returned with Clowers, and thereupon both he and Henry Chambers pleaded guilty to the charge. Immediately after Will Tolbert was convicted and sentenced, his mother became conscience-stricken, and told one of the officers that she had sworn falsely when testifying in behalf of her son. She went back upon the stand in the afternoon and told the judge of it, and that the reason for her doing so was because the defendant James Chambers had made the threats on the Sunday afternoon before, detailing that incident in the same way then as she did on the trial of this case.

The defendant admitted that he was at Mrs. Tolbert's house, but denied that he had made any threats, particularly those set out in the State's evidence, and stated that he had gone to her house simply to prepare for the trial of his own son.

There are 37 exceptions in the record, 26 of them to the admission or exclusion of testimony.

The defendant was convicted, and from the judgment of the court upon the verdict he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharpe and J. R. Joyce for defendant.

WALKER, J., after stating the case: The first six exceptions relate to the examination of witnesses by the State as to what occurred at the trial of Will Tolbert, in which the perjury was alleged to have been committed. This testimony was competent for several purposes, and, among them, to show the commission of the perjury and the threats and coercion of the defendant to bring it about, and also to corroborate the State's witnesses who testified at the trial of this case. There are other reasons which sustain the rulings of the court not necessary to be set out in much detail, as they are very apparent, upon an inspection of this record. We may state this much, as applicable to these exceptions and to several others, that the testimony to which many of the exceptions were taken was competent and relevant as tending to show a motive on the part of defendant, and to present clearly the setting of the facts and circumstances, under which the defendant conceived and executed his nefarious scheme to subdue witnesses by his intimidation of them in order to protect and save his son, and thereby to obstruct the fair administration of justice in the courts, and especially was it relevant as corroborating Mrs. Tolbert. The evidence tended to show that Henry Clowers was protesting his innocence, so long as only he and Will Tolbert were present; that a separate trial being ordered, and Will Tolbert—having taken the stand and denied that he and Henry Chambers had anything to do with the entry into Edmund's store—Henry Chambers still protested his innocence until Clowers was brought from Greensboro, when, seeing that all of his efforts were futile, he plead guilty. Another reason why this testimony was admissible is that the perjury of Will Tolbert must be proven, and all the evidence excepted to tended to show, in connection with his own testimony and that of his mother, that perjury had been committed.

These reasons also apply to exceptions seven to twenty-four, both inclusive. As to exception eight, which was to the exclusion of the ques-

tion of defendant to Pat Adkins, a deputy sheriff, it appears that the question was afterwards substantially answered, and fully enough to render harmless any error, if one was committed. *Monds v. Town of Dunn,* 163 N. C., 108; *Berbarry v. Tombacher,* 162 N. C., 497. Besides, it did not appear, at the time, what his answer would have been to the question. *Smith v. Comrs.,* 176 N. C., 466. Another reason why the ruling was correct is that the proposed testimony was hearsay, as it called for the unsworn declarations of Will Tolbert, and this also applies to exception twenty-five.

The next exception was directed to what manifestly was a mere "slip of the tongue" by the judge, which was harmless, as it appeared beyond question what was the charge in the indictment and the whole case was, in that respect, tried upon the correct theory. That portion of the charge to which exception twenty-seven was addressed was an attempt by the judge to explain the nature of the offense and to state its several elements, and in no sense was it an expression of opinion upon the facts. The passage in the charge which follows shows conclusively that no expression of opinion as to the facts was intended, nor was any such opinion given or intimated. The defendant's contention was that, even if the testimony of the witnesses in the other case was false and perjured, he was in no way responsible for it, as he did not instigate it. The judge fairly stated this to the jury, and left it to them to pass upon, without any suggestion as to what should be their conclusion.

There are objections to the manner in which contentions of the parties were stated by the judge to the jury, but they come too late, as we have often held in similar cases, the following being some of the most recent ones. *S. v. Spencer,* 176 N. C., 709; *Bradley v. Mfg. Co.,* 177 N. C., 153; *Sears v. R. R.,* 178 N. C., 285, and *Hall v. Giessell,* 179 N. C., 657.

The rule as to the duty of the jury to find the facts essential to constitute guilt beyond a reasonable doubt, was sufficiently explained to the jury. It will not do to base an exception upon a single expression of the judge in his charge, omitting what naturally goes along with it, and stated in other parts thereof, but the charge should be taken and construed as a whole, in the same connected way as intended and given by the judge, and upon the presumption that the jury did not overlook any part of it. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389; *S. v. Lewis, ibid.,* 632.

The motion in arrest of judgment was properly disallowed. As to the alleged misnomer in the spelling of Tolbert's name, the two names are so nearly alike as to bring them within the operation of the maxim *idem sonans. S. v. Patterson,* 24 N. C., 360; *S. v. Collins,* 115 N. C., 718; *S.*

v. Drakeford, 162 N. C., 667. The time when the offense was committed is sufficiently stated in the indictment.

Our statute has abolished many matters of form that do not affect the substantial merits of the case. Consol. Statutes of 1920, sec. 4616. That the proof did not conform to the allegations of the bill is not ground for arresting the judgment. The defect must appear upon the face of the bill. *S. v. Hawkins,* 155 N. C., 466. The last ground is not true in fact, as will appear from the indictment, the word "willfully" being used therein.

Subornation of perjury consists in procuring, or instigating, another to commit the crime of perjury, and is a misdemeanor at common law. While accessorial in its nature, it has been made an offense separate and distinct from perjury, and, therefore, the suborner of perjury, it has been said, may be tried before the conviction of the perjurer. 30 Cyc., 1423. The elements of the offense are there fully set forth, and they were established in this case. 30 Cyc., 1423 (b). A person is guilty of subornation of perjury if he procures another, by threats, to knowingly commit the offense. *S. v. Geer,* 48 Kansas, 752. Our statute provides that "if a person shall, *by any means,* procure another person to commit such willful and corrupt perjury, as is mentioned in the preceding section" (3615), he shall be punished as if he had himself committed the perjury. (Revisal, sec. 3616.) This is like the Kansas statute, under which *Geer's case* was decided.

At common law perjury is committed when a lawful oath is administered in some judicial proceeding or due course of justice to a person who swears willfully, absolutely, and falsely, and corruptly in a matter material to the issue or point in question. Where the crime is committed at the instigation or procurement of another, it is termed subornation of perjury, though some authorities hold that it is in fact mere perjury, but this on the theory that it is a misdemeanor, and aiders and abettors are principals and not accessories. In order to convict of this crime the jury should be satisfied from the evidence: (1) that the testimony of the witness claimed to have been suborned was false; (2) that it was given by him willfully and corruptly, knowing it to be false; (3) that the defendant knew or believed that such testimony would be false; (4) and that the defendant also knew, or believed, that the witness claimed to have been suborned would willfully and corruptly so testify; (5) that the defendant induced or procured the said witness to give such false testimony. *S. v. Fahey,* 19 Delaware Reports (3 Pennewill's), 594. There was ample evidence to prove all the elements above enumerated.

So far there was no error, but we are of the opinion that his Honor erred in his charge to the jury, which is as follows: "The court charges

you that all the requirements, all the essentials necessary to support the charge of subornation of perjury have been met by the State, in this case, it not being contended by the defendant that the other court had no jurisdiction to investigate the matter, the defense being, as the court sees it, not the truth of the State's contentions that there was testimony given which was false, but that the defendant himself did not procure it to be given; that in a measure the defendant does what is known to the law as entering a confession and pleading the avoidance. He admits that the other court had the jurisdiction and the essentials necessary under the definition of perjury, whether or not the evidence be true or false. He does not undertake to justify upon that ground, but denies and contends that he did not procure the perjury to be committed, and if he has satisfied you that that is the truth of the matter, then he would not be culpable of any crime." This was calculated to mislead the jury in two respects. First, to say that defendant had confessed, and then pleaded in avoidance, was an intimation that he had admitted that the offense of perjury had been committed by Tolbert, and sought to avoid the effect of such admission by taking the laboring oar and satisfying the jury that he had not suborned the witness to commit the crime of perjury. The burden was not on the defendant to prove his innocence, but upon the plaintiff, throughout the case, to prove his guilt, nor was there a confession and avoidance, or anything like such a plea in a civil action, which consists in admitting the cause of action, and pleading new matter to neutralize or avoid its effect. We do not see that he confessed anything, but, however this may have been, he did not try to avoid it, but simply denied the allegations of the State that he had procured Tolbert to commit the perjury. This was not an avoidance of matter confessed, which would place the burden on defendant, but only a plea of not guilty, which imposed the whole burden upon the State to make out its case beyond a reasonable doubt, the presumption of innocence being with the defendant. This instruction of his Honor was harmful error. The plea of not guilty was a general denial of guilt, and of all evidence tending to show it. The burden, therefore, was upon the State to show guilt, and not upon the defendant to show innocence, which, of course, required the State to prove not only the perjury, but the subornation.

The testimony of Pat Adkins as to what Henry Chambers did, after he pleaded guilty, was nothing but hearsay, irrelevant, and incompetent, and it was also prejudicial. This is too plain to require the citation of any authority. To cure the errors indicated, a new trial is necessary, and is accordingly ordered for the purpose of correcting them.

New trial.

STATE v. JESSIE C. BARBER.

(Filed 17 November, 1920.)

1. Taxation—Automobiles—License—Principal and Agent—Statutes.

Chapter 90, sec. 72, Public Laws of 1919, requiring a license tax of five hundred dollars from manufacturers, or from corporations or persons offering for sale, etc., auto-vehicles in this State, authorizing such as have paid the tax to employ an unlimited number of agents to sell the machine designated in the license, upon a duplicate license issued with the agent's name therein on the payment of a fee of five dollars for each agent, was not intended to, and does not include a dealer in second-hand automobiles, but only contemplates the payment of the tax and the taking out of a license by the manufacturer, or in default thereof, by the dealer in new automobiles, with the right of the latter, in so doing, to appoint agents in the same manner and to the same extent as the manufacturer was authorized upon the payment of the five hundred dollar tax as provided by the statute.

2. Statutes—Doubtful Meaning—Courts— Validity— Licenses— Automobiles—Taxation.

It is a rule of statutory construction that the courts are inclined against an interpretation that will render a law of doubtful validity, and *quaere*, as to the validity of a statute giving to a manufacturer, or others, the exclusive privilege of selling any special make of automobiles after the same has been acquired and used by independent purchasers.

3. Same—Amendments—Criminal Law.

Construing ch. 90, sec. 72, Public Laws of 1919, with the act subsequently passed at the Special Session of the same year, adding a provision for licensing second-hand dealers in automobiles when the manufacturer's tax of five hundred dollars has been paid and fixing the fee at fifty dollars, evidences the intent of the former law that taxing second-hand automobiles was not included in its provisions, though not applicable to the indictment in the present case, the alleged offense of selling a second-hand automobile without the license having been committed before the passage of the amendment.

4. Statutes—Amendments—Taxation—License—Automobiles.

Section 85, ch. 90, Public Laws of 1919, making it a misdemeanor for any one engaging in any business or practicing any profession for which a license is required by the Act, by its express terms and accepted interpretation applies only where a license is provided for in other portions of the law, and not to the sale of second-hand automobiles, not included within the intent and meaning of sec. 72 of the same chapter.

5. Verdicts— Special Verdicts— Findings— Inferences— Criminal Law—Judgments.

A special verdict on the trial of an action charging the defendant with violating the provisions of ch. 90, sec. 72, by engaging in the business of selling automobiles without a license, is defective when it does not find that the defendant was engaged "in the business of selling the same in the State," and a conviction cannot be sustained thereon, under the principle

that such verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests, and that the trial judge is not permitted to find any fact, or inference of fact, necessary to the determination of the issue of guilt or innocence. *S. v. Allen*, 166 N. C., 267, cited and applied.

WALKER, J., dissenting in part.

CRIMINAL ACTION, tried on appeal from recorder's court, before *Ray, J.*, at June Term, 1920, of ROCKINGHAM.

Before recorder, the jury rendered a special verdict, as follows:

"In this case the jury finds the following facts: The defendant made application to the State Treasurer of North Carolina for license to sell second-hand Ford automobiles, the Ford Automobile Company, the manufacturers of said Ford cars having already paid the license of $500 to do business in the State of North Carolina, as required by section 72, chapter 90 of the Public Laws of 1919, and tendered the license tax required by law. The State Treasurer refused to issue the license so applied for solely on the grounds that the Ford Motor Company of Detroit, Michigan, the manufacturers of said cars, had instructed him not to issue said license.

That the defendant, Jessie C. Barber, subsequent to said application for license, sold a second-hand Ford car, which he purchased for sale to Lester Somers, and received the money therefor. The defendant had no license to sell Ford cars at the time of said sale.

"Upon the foregoing facts, if the court being of the opinion that the defendant is guilty, the jury find him guilty; if the court be of the opinion that the defendant is not guilty, the jury find him not guilty."

Upon these facts, the recorder, Hon. I. R. Humphreys, being of opinion that defendant is not guilty, it was so adjudged.

On appeal the verdict and judgment of acquittal was affirmed, and the State appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharpe and Glidewell & Maberry for defendant.

HOKE, J. The portion of the statute more directly applicable to the question presented, Public Laws of 1919, sec. 72, is as follows:

"Every manufacturer of automobiles engaged in the business of selling the same in this State, or every person or persons or corporation engaged in selling automobiles or automobile trucks in this State, the manufacturer of which has not paid the license tax provided for in this section, before selling or offering for sale any such machine, shall pay to the State Treasurer a tax of five hundred dollars and obtain a license

for conducting such business. Any applicant for a license shall furnish the State Treasurer with the names of every class or style of machine offered for sale with a written application for the license. The State Treasurer shall, upon the written application of any one who has obtained the license provided in this section, and the payment of a fee of five dollars, issue a certified duplicate containing the name of the agent representing the holder of the license, which gives him the privilege of doing business as the agent of the holder of the license. Every one to whom license shall have been issued as provided in this section shall have power to employ an unlimited number of agents to sell only the machine designated in the license upon the payment of the tax aforesaid. Each county may levy a tax of five dollars on each agent doing business in the county. It shall be the duty of the State Treasurer to have this section printed on the face of each license issued under this act for the information and protection of parties to whom the same may be issued."

It thus appears that any manufacturer of automobiles, on the payment of $500, shall be licensed to sell his machines anywhere in the State, and shall have the privilege of designating any number of agents for the purpose who may obtain a certified duplicate of the license showing the name of the agent, and for which a fee of five dollars is allowed. And where the manufacturer has not seen proper to take out a license, any dealer may do so on payment of the $500, and shall thereupon have the same privilege of designating the agents who may operate under the license obtained by him. From a careful perusal of the section, we are of opinion that it is the purpose and policy, and by correct interpretation the true meaning of the law to provide for licensing the business of selling automobiles at first hand, either by the manufacturer, or by a dealer necessarily operating under a contract or arrangement with the manufacturer, and that the business of selling second-hand automobiles is not contemplated or provided for in the original statute. It is among the accepted rules of statutory construction that the courts are inclined against an interpretation that will render a law of doubtful validity, and there is question if the General Assembly could enact a statute giving to a manufacturer or other the exclusive privilege of selling any special make of cars after the same had been acquired and used by an independent purchaser. We are further confirmed in our view of the law that the same Legislature of 1919, at its special session amended the section we are considering by adding a provision for licensing independent second-hand dealers in automobiles when the manufacturer's tax of $500 had been paid, and fixing the fee for same at $50. This amendment, however, was enacted and ratified on 26 August, 1920, after the occurrence set forth, and established in the special verdict, and may not directly affect the guilt or innocence of the defendant on the facts

presented. We are not inadvertent to the general language of section 85 of the statute to the effect that any one who engages in any business or practices any profession for which a license is required by this act, without having procured a license therefor, shall be guilty of a misdemeanor. This, by its very terms and accepted interpretation, applies only to cases where a license is provided for in other portions of the law, and the statute as it prevailed when the defendant did the act specified not extending to a dealer in second-hand machines, defendant's conduct does not come under the condemnation of this, the punitory clause of the law. It is, furthermore, the accepted position with us that a special verdict, as a matter of correct procedure, shall set forth all the essential facts required to establish a defendant's guilt. As said in *S. v. Allen,* 166 N. C., at page 267: "The guilt or innocence of the defendant must follow as a conclusion of law from the facts found in a special verdict, which refers to the decision of the judge any fact or inference of fact necessary to a determination of the issue will be set aside." Under this principle, the verdict in the instant case would seem to be defective in that the jury have not found that the defendant has been engaged in the business of selling second-hand automobiles, but only certain specified facts from which the ultimate fact might be inferred. As the case is of public moment, however, involving the construction of a clause in the general revenue law, we have preferred to deal with it upon its merits. On the record we are of opinion that defendant has been properly acquitted, and the judgment to that effect is affirmed.

No error.

WALKER, J., concurring in result: The defect in the special verdict will justify the decision of the Court, but I do not concur in the reason given for it, that by the statute the defendant was not taxable.

The purpose of the Legislature in enacting Public Laws of 1919, ch. 90, sec. 72, was to protect all agents of those manufacturers of automobiles, who had applied for and received a license to sell them in the State, but it was not intended that his license should extend to those engaged in such business of selling automobiles on their own account and independently of the manufacturer. Such persons are not selling under him or connected with him in any way, but, on the contrary, they are selling in opposition to him, and are his competitors and rivals in business. It was therefore provided that, where any person or corporation engaged independently in the business of selling automobiles for which privilege the manufacturer of the automobiles has not paid the license tax, he shall pay to the State Treasurer a tax of $500, and himself obtain a license for conducting such business. It was clearly in-

tended that no one shall sell under the manufacturer's license unless he is his agent. The State Treasurer is authorized to issue a certified duplicate only to the "agent or representative" of the manufacturer, "which shall give him the privilege of doing business *as the agent* of the licensee." But not so with the second proposition, for if the manufacturer has not paid the license fee where one, not his agent, is about to engage in the business of selling his automobiles, or those of any other manufacturer, the person so proposing to engage in such business shall pay it. If this is not true, then two persons, not connected in business, can sell the same kind of automobiles under one license, even though they be competitors or rivals in business. Surely the Legislature did not contemplate this result. The independent seller may, under such a construction, and under certain circumstances, enjoy a more valuable privilege than the manufacturer, and pay nothing for it. My conclusion is that the business of the independent dealer is taxed, if not expressly, then by the clearest and most manifest implication, which is sufficient. The defendant offered to pay the tax, but the manufacturer protested against its being received, and the State officer desisted. The ground of the manufacturer's opposition was, though he may not have stated it, that it would bring the defendant into competition with him and destroy his monopoly, now grown, as we all know, to enormous proportions.

The special act of 1920 is of no significance, except as showing that, in the opinion of the Legislature, such a business as that of a dealer in second-hand machines should be subject to the privilege tax, but that the amount of $500 was too much, under the circumstances, as the business, from its nature, is somewhat localized, though it may spread out. The rule as to legislative construction does not apply here, as this was not a construction at all, but a change of the law (*Stockdale v. Ins. Co.,* 20 Wallace (U. S.), 331; *Koshkoning v. Burton,* 104 U. S., 668), and the construction was not of long duration and settled on, but of recent date. *Attorney-General v. Bank,* 21 N. C., 216; *Attorney-General v. Bank,* 40 N. C., 71. The larger tax was intended for those who dealt through agents, and covered a wide territory. The general license protected each agent by the payment of a small additional tax taken out in his name by the principal, but the State license of the latter did not protect third parties, who were not selling for him. The manufacturer, therefore, had not taken out a license which protected the defendant's business, within the meaning of the words of the statute. It would be singular if the Legislature intended to leave so large and well known a business untaxed, or exempt from the privilege tax.

STATE v. CHARLIE BREWER, HARVEY BREWER, AND WILLIAM BREWER.

(Filed 17 November, 1920.)

1. Appeal and Error—Evidence—Matters of Law.

Only errors of law can be considered on appeal to the Supreme Court, and the judgment of the Superior Court will not be disturbed when there is sufficient evidence to support the verdict, upon an exception relating to its weight and credibility.

2. Indictment—Criminal Law—Motion to Quash—State's Witness—Grand Jury.

A motion to quash an indictment made after the plea of not guilty, will not be granted on the ground that a witness for the State, in a criminal action, was a member of the grand jury, that found the true bill, especially when it appears that he took no part therein.

3. Same—Courts—Discretion.

The denial of a motion to quash an indictment, made upon the ground that a State's witness in the action was a member of the grand jury that found the true bill, and after the plea of not guilty will not be disturbed on appeal, the matter being one exclusively addressed to the discretionary power of the trial judge.

4. Criminal Law—Indictment—Motions to Quash—Pleas—Abatement.

Where the defect does not appear on the face of the record, but requires extraneous evidence to support the motion, the remedy is by plea in abatement, and not by motion to quash.

APPEAL by defendant from *Ray, J.*, at the August Term, 1920, of DAVIDSON.

This is an indictment under section 3627 of the Revisal.

The defendants were convicted, and appealed from the judgment pronounced on the verdict.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. B. Jones, E. E. Raper, and Craige & Vogler for defendants.

ALLEN, J. The evidence of the prosecuting witness, Robert Hudson, which the jury has accepted, is sufficient to sustain a conviction of the defendants, and while there is much evidence tending to prove the innocence of the defendants, and particularly of the defendant Harvey Brewer, it is not within our province to pass on the credibility of the testimony.

We can only consider the errors of law alleged to have been committed, and upon a review of the record we find nothing to justify a reversal of the judgment.

The motion to quash the indictment, made after the plea of not guilty had been entered, because a witness for the State was a member of the grand jury which found the bill, was addressed to the discretion of the court, and the ruling thereon is not reviewable. *S. v. Burnett,* 142 N. C., 577.

The court might also have declined to consider the motion because the defect did not appear on the face of the record, and had to be established by extraneous evidence, the remedy in such case being by plea in abatement, and not by motion to quash.

We are also less inclined to attach importance to the objection of the defendants, because it appears that the witness did not participate in the deliberations of the grand jury when the bill was considered, and did not vote on finding the bill, thus excluding all idea that the defendants have been prejudiced.

In *S. v. Wilcox,* 104 N. C., 847, it was held that "The fact that a member of the grand jury which returned a true bill for perjury, was one of the petit jury that tried the issues in an action wherein it was charged the perjury was committed, is not good ground for abating or quashing the indictment. He was bound by his oath as a grand juror to communicate to his fellows the information he had acquired as a petit juror."

Also in *S. v. Sharp,* 110 N. C., 604: "Plea in abatement filed before pleading generally to an indictment is the proper way to raise the question of the qualification of an individual grand juror. Such plea will not be sustained, unless it shows the want of some positive qualification prescribed by law. . . . The fact that the son of the prosecutor, in an indictment for larceny, was a member of the grand jury, and actively participated in finding the bill, did not vitiate the indictment, and it was error to quash it on that ground."

In *Krause v. State* (Neb.), Ann. Cases, 1912 B, 736, the Court goes further, holding that: "It is not a good plea in abatement to an indictment that it was returned by a grand jury of which the complaining witness was a member."

The other exceptions, eighteen in number, relate to evidence, except two that are formal.

They present no new question, and there can be no practical benefit in discussing them *seriatim.*

We have considered them with the care and diligence the importance of the case demands, and see no sufficient reason for setting aside the verdict.

No error.

STATE v. BAXTER SHEMWELL.

(Filed 17 November, 1920.)

1. Criminal Law—Indictment—Solicitor's Signature—Motions to Quash.

It is not necessary that a true bill found by the grand jury should have been signed by the solicitor, and a motion to quash it on that account will be denied.

2. Criminal Law—Instructions—Assault With Intent to Kill—Self-defense.

Where, on the trial of an assault with intent to kill, the defendant has not introduced any evidence, and there were only two witnesses for the State whose evidence was uncomplicated, tending to show that the defendant had entered the law office of the prosecuting witnesses and on account of his behavior they had ordered him out, without threats or offer of violence, whereupon he said no one could make him leave, drew two pistols, aiming at each of the prosecutors, one of them throwing a paper weight, which hit the defendant on the head, and he fired after the prosecutors had hold of him trying to disarm him. *Held*, a charge to the jury, placing on the State the burden of showing defendant's guilt beyond a reasonable doubt, and instructing them to find a verdict of guilty of an assault with a deadly weapon should they find the facts to be as testified, is not objectionable as directing a verdict, there being no element of self-defense.

3. Instructions—Explaining Evidence—Appeal and Error.

Where the evidence is plain and uncomplicated, upon a trial for an assault with a deadly weapon with intent to kill, a charge of the court which is otherwise without error, is not objectionable solely because the judge did not explain the evidence to the jury.

4. Instructions—Recapitulating Evidence—Special Requests—Appeal and Error.

The failure of the judge to recapitulate the evidence in his charge to the jury, without a special request made in apt time to do so, is not properly assignable for error on appeal.

5. Criminal Law—Indictments—Less Offense—Assault With Intent to Kill—Deadly Weapons.

Upon the charge in an indictment of an assault with a deadly weapon, with intent to kill, a verdict of the less offense of an assault with a deadly weapon, is authorized by our statute, C. S., 4640.

6. Judgments—Motions in Arrest—Concurrent Jurisdiction—Plea in Abatement.

A motion in arrest of judgment can be made only for a defect appearing upon the face of the record, and objection that a court of concurrent jurisdiction has the case before it is only to be taken upon plea in abatement.

7. Same—Recorder's Court—Committing Magistrate.

Where a recorder's court and the Superior Courts have concurrent jurisdiction of a criminal offense and the judge of the former court acts within his powers of committing magistrate, and binds the prisoner over to the Superior Court, objection that the recorder's court had thereby taken jurisdiction of the offense is untenable, and neither will a motion to quash the indictment, nor a plea in abatement be sustained.

8. Appeal and Error— Record—Stenographer's Notes — Instructions — Constitutional Law.

A certificate by a stenographer of his notes taken on the trial of a case, set out in the record, on appeal, is no part thereof, and its variance with the judge's charge, set out in the case settled on appeal, cannot affect it, for the judge, alone, under the provisions of our Constitution, can settle the case.

APPEAL by defendant from *Ray, J.*, at August Term, 1920, of DAVIDSON.

The defendant was indicted on two counts, one for an assault with a deadly weapon upon Wade H. Phillips with intent to kill, and the other for an assault upon John C. Bower with a deadly weapon with intent to kill. Verdict of guilty, and judgment. Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

James H. Pou, J. R. McCrary, Emery E. Raper, and W. A. Self for defendant.

CLARK, C. J. As one of the prosecuting witnesses, J. C. Bower was the solicitor for the district, the presiding judge, February Term, 1920, appointed Z. I. Walser *pro tem.* to represent the State. He failed to sign the bill, but it was acted upon by the grand jury, who returned a true bill without such signature. The defendant excepted to the court's refusal to quash the bill for such omission, and again excepted to the judge permitting Walser to sign the bill at August term, *nunc pro tunc.*

In *S. v. Mace,* 86 N. C., 670, *Ruffin, J.*, said: "The signature of the prosecuting officer, while usually attached to the indictment, forms no part of it, and is in no manner essential to its validity. The indictment is not his work, but the act of the grand jury, declared in open court, and need not be signed by any one; and if it be, it is a mere surplusage and cannot vitiate it. *S. v. Vincent,* 4 N. C., 105; *S. v. Cox,* 28 N. C., 440." Indeed, even an endorsement by the foreman of the grand jury is not essential to its validity. *S. v. Sultan,* 142 N. C., 572, 573; *S. v. Long,* 143 N. C., 676.

The court charged the jury: "Gentlemen of the jury, the law presumes the defendant to be innocent. The burden of proof is on the State to convict him beyond a reasonable doubt. The question to be passed upon by you is the credibility of the witnesses. If you believe the witnesses introduced by the State have sworn the truth beyond a reasonable doubt; have no doubt as to the truth of what they have testified; then the court instructs you to return a verdict of guilty of an assault with a deadly weapon." The defendant excepted because the

court failed to explain to the jury the evidence and the law applicable thereto, as required by statute, and also because the court stated to the defendant's counsel that there was no evidence of self-defense. We think the charge was a correct statement of the law, and sufficient upon the facts of this case. If the defendant desired a fuller charge he should have asked for it. There were only two witnesses, and the questions presented to the jury were not at all complicated. There was no evidence which would justify a claim of self-defense on the part of the defendant, and in the absence of a special request to the judge to recapitulate the evidence, his failure to do so is not assignable as error. In *S. v. Ussery,* 118 N. C., 1180, it is said: "If the prisoner desires the entire testimony, or any specific part thereof, repeated to the jury, he should make the request in apt time and before verdict. If no such instruction is asked, the failure of the court to repeat will not be a ground for a new trial." To the same purport, *S. v. Kinsauls,* 126 N. C., 1095, and other cases.

We also think the judge was correct in ruling that the evidence presented no element of self-defense. The State's evidence was that the defendant, Baxter Shemwell, went to the law office of Bower & Phillips in an angry mood, armed with two pistols. Both of these gentlemen endeavored to get him to leave without having any difficulty. When he was asked to leave he drew both pistols, pointing one at Major Phillips and one at Bower. When this was done, Bower picked up a paper fastener and threw it at the defendant, which struck him on the head, disconcerting him somewhat, whereupon Messrs. Phillips and Bower endeavored to disarm him, and the defendant fired his pistol.

The only evidence upon which the defendant claims that there was some element of self-defense is to be found in the cross-examination of Major Wade H. Phillips: "The paper fastener was on the desk by Mr. Bower. I cannot say that I did see when he first put his hands on it. I am sure that Mr. Bower did not throw until the defendant had drawn his pistol. He threw it after the pistol was out and before it went off. The pistol did not go off until we both had Mr. Shemwell, trying to disarm him. When Mr. Bower threw the paper fastener it hit the defendant glancing his left side, may have burst his hat (the hat was shown with break entirely through brim on left side, near front of bow on hat band). Defendant's head was bleeding."

Also, in the cross-examination Bower testified: "I hit him before he fired. He had the pistol presented, and was looking at me before I threw the clamp at him." And he further said: "Mr. Shemwell did not move toward the door until Mr. Phillips got up and asked him to leave. He then jumped back about two steps toward the door, and pulled out his pistols, and said: 'No man can run me out of this office.'"

The evidence of the two witnesses for the State is clear and unambiguous, and shows an assault by the defendant upon the two prosecuting witnesses in their own office with two pistols, one pointed at each of them, because they requested him to leave. The defendant did not go upon the stand nor put on any evidence. The evidence for the prosecution is that the prosecutors requested him to leave, and not until he had drawn and pointed his pistols at them did Bower throw, or offer to throw, the clamp at the defendant, and if they had not been a little quicker than the defendant after he drew his pistols, one or both of them doubtless would have been his victim. They resorted to no force in the attempt to put him out until after he had drawn and pointed his pistols at them. We fully concur with the judge that there was in the evidence no element of self-defense on the part of the defendant.

The court did not direct a verdict against the defendant, but told the jury, as a matter of law, that if they believed the evidence for the State, to find the verdict of guilty, charging them that "the law presumes the defendant to be innocent. The burden of proof is on the State to convict him beyond a reasonable doubt. . . . If you believe the witnesses introduced by the State have sworn the truth beyond a reasonable doubt, and have no doubt as to the truth as to what they testified, then return a verdict guilty of an assault with a deadly weapon." This was strictly in accordance with *S. v. Riley,* 113 N. C., 648, and authorities there cited, and the citations to that case in Anno. Ed.

The charge was for an assault with a deadly weapon with intent to kill. The verdict was for the lesser offense of an assault with a deadly weapon. This is authorized by the act of 1891, now C. S., 4640; *S. v. Matthews,* 142 N. C., 621, and cases there cited.

After verdict, the defendant moved in arrest of judgment, alleging that the recorder's court had taken jurisdiction of this case, and that it was erroneous to try the same in the Superior Court.

A motion in arrest of judgment can be made only for a defect upon the face of the record, and none appears in this case. The matters urged could have been the basis only for a plea in abatement. But passing by that defect, the plea would not have availed if it had been made. Ch. 276, Public-Local Laws 1913, establishing a recorder's court at Lexington, gave it original, exclusive jurisdiction of criminal offenses committed in the township of Lexington below the grade of felony. But ch. 299, Laws 1919, provides: "That in all cases whereby in any statute original jurisdiction of criminal actions has been taken from the Superior Courts and vested in courts of inferior jurisdiction, such exclusive jurisdiction is hereby divested, and jurisdiction of such actions shall be concurrent and exercised by the court first taking cognizance thereof."

The recorder issued the warrant against the defendant, and on its return did not bind the defendant over to his own court, but as a committing magistrate bound him over to the Superior Court, as he was fully empowered to do, and made this entry, "The defendant waives examination, and is held for Superior Court. Appearance bond, $5,000, to cover this case and warrant No. 2,894. This 21 January, 1920."

The recorder did not take cognizance of the action for his court within the meaning of the act of 1919, but clearly refused to do so, and acting solely within his powers as a committing magistrate, bound the defendant over to the Superior Court. The defendant made no objection at that time, nor at the trial in the Superior Court, and by waiving examination it would seem that he was consenting to the course adopted, but this is not material.

The Superior Court had concurrent jurisdiction of this offense, and the defendant was bound over to that court by a committing magistrate with full authority to bind over to either court, and who exercised his election to bind over to the higher court. Doubtless this was done in the public interest to avoid the delay and expense of two trials in a case of this importance.

The defendant objects that the instruction to the jury, as set out by the judge, varies from the stenographer's notes thereof. This appears only in the defendant's brief on a certificate by the stenographer, which is not a part of the record and cannot be considered as contradicting the case as settled by the judge. In *Cressler v. Asheville,* 138 N. C., 485, the Court said: "The stenographic notes will be of great weight with the judge, but are not conclusive if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge, who alone is authorized and empowered by the Constitution to try the cause, and who alone (if counsel disagree) can settle for this Court what occurred during the trial." In this case the alleged variation, if correct, would be immaterial.

After full and careful consideration of every exception, we find

No error.

STATE v. ROBAH BAITY AND SPENCER McNEILL.

(Filed 15 December, 1920.)

Homicide—Murder—Premeditation—Evidence—Questions for Jury—Motions—Nonsuit—Trials.

The evidence of the element of deliberation and premeditation, which are essential to a conviction of murder in the first degree, is sufficient, if shown to exist for however short a time preceding the homicide; and

where the evidence tends to show that some one had given previous warning, with answering call, as the sheriff approached an illicit still in operation, and the sheriff was shot and killed by the defendant while being taken into custody, who watched the approach of the shreiff across a clearing, and stood with pistol in hand, ready to shoot, together with the defendant's declaration made some time previous, in a joking manner, that if he were blockading and an officer interfered "he would shoot his way out," is sufficient for a conviction of murder in the first degree, and defendant's motion of nonsuit should be denied.

APPEAL by defendant from *Harding, J.*, at May Special Term, 1920, of YADKIN.

This is an indictment for murder. The defendant was convicted of murder in the first degree, and from the judgment upon such conviction appealed to this Court. Spencer McNeill was tried with the defendant, but the jury acquitted him. The deceased was J. E. Zachary, sheriff of Yadkin County, and the killing occurred at an illicit distillery in Yadkin County. The State's evidence tended to show that Sheriff Zachary, on the night of 13 February, 1920, after summoning the witness, T. A. Caudle, to his assistance, went to the place of the illicit distillery, accompanied by the witness Caudle. When not far from the distillery they met a man who went some little way, then turned around and followed them, then he passed them, went out of the road a little piece and turned through the field, going parallel with them in the direction of the distillery. When they stopped, this man came down on the bank of a small branch and whistled several times, and the whistling was answered from the distillery. The distillery was located on the right side of this branch. After the man on the bank whistled, they went on again to the distillery, which was close enough for any one there to have heard the whistling. Caudle, continuing his testimony, said:

"The land is flat on the right-hand side of the branch; there are no trees in the bottom; the sheriff was going down on the south side of this branch; right next to the branch it is not so marshy as it is a little way out from the branch; it was marshy where the sheriff and I were going. I would think that the sheriff and I made considerable noise because we were miring and jumping from one place to another, trying to find some solid land. We saw Robah and Spencer McNeill at the distillery; when I first saw these men I would think we were twenty yards from the distillery. We were on the northwest side of the branch, which was the left-hand side as you go. I think it was something like twenty yards from the distillery when I first saw Robah Baity and Spencer McNeill; there was considerable light at the distillery; there were fence posts in the furnace and pine burned which made considerable light, and a lantern was sitting just below. The distillery was on the south side of

the branch; when I first saw them I am of the opinion that I was on the north side of the branch; the two men were standing in front of the furnace and were looking towards us; they did not change their positions from the time they saw us until we got there. There was nothing above the distillery, we were in plain view of the distillery; the branch near this distillery is in the form of an 'S,' in going down the branch we crossed one of these bends in the branch before the sheriff got to the men. The sheriff came down, stepped across the little branch where it makes a crook and took hold of the two men, like this, and said, 'Hold up; I've got you.' (Illustrates taking hold of coat lapel of each.) This man to my right is Robah Baity; I am taking the place of the sheriff; to my left Spencer McNeill. Now, Mr. Hayes, you raise your arm, left hand. In the position Mr. Hayes has his left hand Robah Baity's hand came up (hand up toward witness's shoulder). I heard a gun-shot, saw the flash, the light from the gun. The sheriff reeled back in this way (illustrating), and I stepped across the branch and into the branch and caught him as he started to fall.

"I was some ten or twelve feet from the sheriff when the shot was fired. I think the sheriff took hold of the right side of Baity's coat and I think he took hold of the left side of McNeill's coat. I think the two men were standing something like six or eight inches above the sheriff when he took hold of them."

Dr. S. A. Hardy testified that he saw Sheriff Zachary's body about one o'clock in the morning. The wound penetrated his right shoulder, just below the clavicle, and ranged in the direction of his heart. It penetrated the heart or one of the large blood vessels and caused his death. He said that Baity, the defendant, was ambidextrous, worked with his right hand or left hand either; that the sheriff was about 5 feet, 10 or 11 inches tall; that "A bullet entered below the collar bone and lodged somewhere on the left side; the ball went in at the right side and angled across by about 45 degrees, penetrating the heart or large blood vessel."

Noah Norman testified that in the summer preceding the killing he heard the defendant make the declaration in a joking manner that if he were blockading and an officer interfered with him he would shoot his way out.

At the end of the State's evidence, the defendant moved for judgment as of nonsuit as to murder in the first degree. Motion overruled: defendant excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Jones & Clement and J. B. Craver for defendant.

ALLEN, J. The motion for judgment of nonsuit is upon the ground that there is no evidence of deliberation and premeditation, which is a necessary and essential element in murder in the first degree.

In *S. v. Banks,* 143 N. C., 657, the following charge was approved: "In order to constitute murder in the first degree, the killing must not only be done with malice aforethought, expressed or implied, but it must be done with willful premeditation and deliberation, and all this must be shown beyond a reasonable doubt.

"Without willful premeditation and deliberation being thus shown, it cannot be murder in the first degree.

"The word 'willful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. The meaning of the word 'premeditation' is a prior determination to do the act in question. It is not essential that this intention should exist for any considerable period of time before it is carried out. If the determination is formed deliberately and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried out. An act is done deliberately when done in cold blood, and after a fixed design to do the act.

"No particular time is necessary to constitute premeditation and deliberation, and if the purpose to kill has been deliberately formed, the interval which elapses before its execution is immaterial."

It is also said in *S. v. Bynum,* 175 N. C., 780: "It has been repeatedly held by this Court that the deliberation and premeditation need not be of any perceptible length of time. *S. v. Jones,* 145 N. C., 466; *S. v. Banks,* 143 N. C., 652; *S. v. Daniel,* 139 N. C., 549.

" 'It is not essential in order to show *prima facie* premeditation on the part of the prisoner that there should be evidence of preconceived purpose to kill formed at a time anterior to the meeting when it was carried into execution. It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there were such purposes deliberately formed, the interval, if only a moment, before its execution is immaterial.' *S. v. McCormac,* 116 N. C., 1033, where it is also said, approving Kerr on Homicide, sec. 72: 'The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances.' "

The absence of adequate provocation, preparation of a deadly weapon, proof that there was no quarreling before the killing are circumstances tending to prove premeditation and deliberation (*S. v. Daniels,* 164 N. C., 464), and these and other circumstances were present in this cast.

The defendant was engaged in an unlawful act at the time, and the jury might well infer from the evidence that he was notified of the approach of the officers by some one who whistled as a signal; that he

heard the notice, because there was a response to it; that he had plenty of time and opportunity to escape and would not do so, preferring to stand his ground; that he heard and saw the officers when they were twenty steps away, and instead of leaving at that time stood with back to the still and pistol in hand; that he shot without a word, and for the purpose of killing, pursuant to his declaration in the summer to the witness Norman, "That if he were blockading and an officer interfered with him he would shoot his way out," and this would be evidence of a fixed purpose to kill formed prior to the act of killing which meets the requirements of the law.

The statement of Norman was competent under the authority of *S. v. Howard,* 82 N. C., 623, in which evidence of a declaration made by the prisoner twelve months before the homicide bearing upon the act of killing and the motive was admitted.

There are other exceptions in the record, which we have carefully examined, but they are without merit and require no discussion.

The charge to the jury was fair and accurate, and covered the different contentions of the parties.

The case itself is one of peculiar interest. On one hand, the sheriff of a county has been killed while in the performance of his duty, and it must be understood that the officers of the law will be protected, and that those who resist or interfere in the performance of their duties will be severely punished.

On the other hand, we have a mountain boy who volunteered before he had reached the age requiring him to respond under the Selective Draft Law, and who spent eleven months in France, and while there was in four battles. During this period he had to undergo strict discipline and training with but one thought and purpose, and that was to teach him to kill, and as expeditiously as possible. How far this training, which may be all he ever had, and his familiarity with blood and death while in service, have influenced this crime we cannot know.

We have, however, only to deal with the conduct of the trial in the Superior Court, and in that we find

No error.

STATE v. DUNCAN McFARLAND.

(Filed 15 December, 1920.)

1. Criminal Law—False Pretense.

In order to convict of the crime of obtaining goods under false pretenses it is necessary for the State to show, beyond a reasonable doubt, the pro-

curement with fraudulent intent of the thing charged, or that it was done under a false representation as to existing facts, false within the knowledge of the party making them, or made recklessly without belief or any fair and just reason to believe in their truth, calculated and intended to deceive and which does deceive the person from whom money or things of value is taken, and reasonably relied on by such person at the time of the taking.

2. Same—Instructions—Evidence.

An instruction in an action for obtaining money or other thing of value under false pretense, which would make the defendant guilty if he had notice which would have put a reasonable man upon inquiry that would have revealed the truth of his misrepresentations, is reversible error, which is not cured because in other parts of the charge the correct principle of law relating thereto had been given.

3. Same—Moving Cause.

Where there is evidence that other conditions induced the transaction than the representations made by the defendant, upon trial for obtaining a thing of value under false pretense, an instruction to find the defendant guilty if his false statement in any way influenced the trade is reversible error, it being necessary that it be a moving cause and one without which the transaction would not have been made.

INDICTMENT for obtaining goods by false pretenses, tried before *Ray, J.*, and a jury, at March Term, 1920, of HENDERSON.

There were three of the indictments, respectively, for having obtained money on notes by false pretenses as to Frank Smith, J. G. Walker, and W. J. Baldwin. The same having been consolidated and tried together, there was a verdict of not guilty as to Smith and Walker and guilty as to W. J. Baldwin. Judgment on the verdict, and the defendant excepted and appealed, assigning errors, etc.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Jones & Williams for defendant.

HOKE, J. There was evidence on the part of the State permitting the inference that defendant, acting as agent for the Asheville Milling Company, in the early part of 1918, induced a purchase for value of shares of stock in said company at much more than their actual worth by false representations and assurances as to the value of said stock and by statements of existent facts bearing on such value knowingly made and calculated and intended to deceive, and which did deceive the purchaser, etc. A false statement, among others, being that the company had bought a valuable lot in Fletcher, N. C., with a view of erecting a warehouse thereon for the storage of grain, etc. There was evidence for the defendant tending to show that the Asheville Milling Company

having conceived the plan of enlarging and strengthening their business by creating warehouses for the purchase and storage of grain in some of the adjacent towns and selling shares of stock to citizens of the different communities advertised for agents for making said sale, etc. That the defendant, who had been in the Canadian army, discharged because he had developed tuberculosis, was in Asheville seeking restoration to health, and in answer to said advertisement applied for and received the appointment as one of the agents, and entered upon the sale of stock to certain persons in Fletcher, Baldwin and others; that defendant was assured by Mr. Danielson, a manager or super-agent of the company, that the stock of $100 par value was well worth $120. There was evidence ultra of assets owned by the company tending to support the estimate. That the defendant had heard negotiations for the purchase of the lot in question between Danielson and the owner, and was afterwards told by Danielson that the purchase had been completed; that the defendant did not knowingly make any false statement inducing the sale, as to the value of the stock or ownership of the lot, but believed, and had every reason to believe, that the statements made by him in both respects were true. There was evidence also to the effect that the purchaser, Baldwin, did not buy on any assurance of value given by defendant or statement by him about the lot, but refused to purchase till he could ascertain if certain influential citizens had bought some of the stock, and on being shown the notes of these persons given for stock, which they had bought, the trade was made, etc. Upon this, a sufficient statement of the case to a proper apprehension of the defendant's exceptions, the court, in its charge, after correctly defining the offense, stated very fully the testimony pertinent to the issue and the position of the respective parties concerning it, and in reference to the falsity of the statement as to the purchase of the lot and the requisite knowledge thereof on part of the defendant, instructed the jury, among other things, as follows: "Now, in this connection, the State contends that he was there when Danielson approached Mr. Fletcher about the purchase of the lot, asked him if he could not sell the lot, if he could not negotiate the purchase for this milling corporation, and that Mr. Fletcher remarked that he would take it up with the other heirs. Now if that would have led a reasonable man to have gone on and examined the statement afterwards of Danielson that he had purchased the lot, and a reasonable man, being in the town of Fletcher, and would not have inquired to ascertain from the parties who owned the lot and with whom the negotiations were pending, and a man of business, would have relied upon Danielson, or the information obtained from him, and that would not be gross carelessness, and would not amount to a dereliction of duty, then, gentlemen, you would find the defendant not guilty. But if an

ordinary prudent man would have investigated this further, having met the man Danielson but a short time before in Asheville, and had gone out to Sandy Mush on that week and gone to work on the last day of the week after and without investigating his standing, but went on placing confidence in him, as the State contends, if this was the conduct of a reasonably prudent man, then you would acquit him, but if that was not the conduct of an ordinarily prudent man, then he would be guilty, and you would so find. Because a man can be criminally careless in prudence in finding out these things that he has represented to other men." In this excerpt the court gives clear intimation, if not positive direction, that false pretense can be established and criminal responsibility imputed by reason not of knowledge actually passessed by defendant, but that which might have been acquired if defendant had pursued the inquiry incumbent upon a man of ordinary business prudence. Such a rule may at times prevail as to fixing one with notice in matters of civil litigation, but is not at all permissible in a criminal charge of this nature. The basis of the crime is a fraudulent intent on the part of the wrong-doer arising ordinarily from actual knowledge. His Honor, in this case, and more than once, in accord with our decisions, had instructed the jury that to constitute false pretense there must be false representations as to existent facts, false within the knowledge of the party making them, or made recklessly without belief or any fair and just reason to believe in their truth, calculated and intended to deceive, and which do deceive, the person from whom the money or thing of value is taken, and reasonably relied on by such person at the time of taking. *S. v. Whedbee,* 152 N. C., 770; *Modlin v. R. R.,* 145 N. C., 218; *S. v. Whidbee,* 124 N. C., 796; *S. v. Moore,* 111 N. C., 667; *S. v. Munday,* 78 N. C., 460; *S. v. Phifer,* 65 N. C., 321. And in departing from this the correct position, and in permitting the jury to impute criminal knowledge to defendant because he had failed to act as a prudent business man in pursuing inquiry that would lead to knowledge, the portion of the charge excepted to is well calculated to mislead the jury, and should be held for reversible error. Again, in reference to the claim of the defendant and the evidence tending to support it that the false statement complained of did not induce the trade, but the purchaser bought only on being shown that a Mr. Fletcher and others in whom he had confidence had already bought some shares of the stock, and further, as to the effect of causes in addition to the alleged false statements having influenced the purchase, the court give the jury the following instruction: "But if you find that the inducement was the representation that they owned the lot, and you find that the representation was false, and that it was intended to deceive, and that it did deceive, and that the witness Smith did not rely upon that representation in fact, but it

entered into the negotiations of subscribers to the stock, and parted with his note for the stock by reason thereof, and that it entered into it, though not wholly, but was part of the influence that caused him to subscribe for the stock, if it entered into his consideration, then, gentlemen, if you find that beyond a reasonable doubt, then the defendant would be guilty.

"What I am trying to get you to understand is that the witness Smith might or could rely in part upon the inducement offered by the defendant, if he did offer it, that is, that they had purchased a lot and would build a warehouse on it, if he did not rely wholly upon the fact that Fletcher had gone into the corporation, then the defendant would still be guilty, because he must not influence him in any way by false pretense.

"Now, gentlemen, that would apply what I have said in this connection, as to the partial fraud not being the whole cause, but if it entered, however little, if it entered in as any part of the inducement, in either of the other cases," etc.

In a recent work of approved excellence, it is said to be the better opinion on this subject that "in order to sustain a conviction for false pretense, it is not necessary that the owner should be induced to part with his property solely and entirely by pretenses which are false, nor need the pretense be the paramount cause of the delivery to the purchaser. It is sufficient if they are a part of the moving cause, and that without these the person defrauded would not have parted with his property." 11 R. C. L., p. 836, and an examination of the authorities cited. *Woodbury v. State,* 69 Ala., p. 242; *S. v. Briggs,* 74 Kansas, 377; *In re Snyder,* 17 Kansas, 542, and other cases will show that to be a correct and well considered statement of the law applicable. In the portion of the charge here excepted to, we do not think the defendant was given the proper benefit of this position, the charge in effect being that "if the false statement in any way influenced the trade it would suffice and did not at all require either within the terms or meaning of the principle that it shall be "a moving cause, and one without which the purchase would not have been made." For the error indicated, we are of the opinion that the defendant is entitled to have the cause tried before another jury, and it is so ordered.

New trial.

STATE v. KOHLER HOLDSCLAW.

(Filed 15 December, 1920.)

1. **Homicide—Murder—Motive—Evidence.**

Evidence that the deceased had been living in an illicit manner for years with a woman with whom the defendant was infatuated, and to his knowledge, is sufficient to show the defendant's motive in taking his life, upon his trial for murder.

2. **Homicide—Murder—Evidence—Res Gestae—Res Inter Alios Acta.**

Upon evidence tending to show that the defendant premeditatively and deliberately shot and killed the deceased for illicitly living with the woman with whom he was infatuated, testimony that others had remonstrated with the deceased for so doing, and the conduct of the woman over the body of the deceased immediately after the killing, etc., is not a part of the *res gestae*, but *res inter alios acta.*

3. **Homicide—Murder—Premeditation.**

The length of time between the premeditation and killing is immaterial in order to convict the defendant of murder in the first degree, and if he had preconceived the purpose to kill in all events, for however short a time, it is sufficient.

INDICTMENT for murder, tried before *McElroy, J.*, at July Term, 1920, of CATAWBA. The defendant was convicted of murder in the first degree of John W. Gabriel on 29 December, 1919. From the sentence of death, defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. A. Whitener and M. H. Yount for defendant.

BROWN, J. The evidence tended to prove that the defendant and the deceased were at Connor's store at Terrell, in the county of Catawba, on 29 December, 1919; that no words passed between the defendant and the deceased, according to the State's witness, preceding the shooting. The deceased had a negro boy named Bud Farrar to help crank his automobile. The deceased was leaning over the hood of the machine pulling the flood wire when the defendant advanced on him without warning and fired his first shot. The shot entered the right side of deceased's head, and he fell backwards prone upon the ground. The defendant advanced toward him and fired the second shot directly into his forehead as he lay upon the ground. Either shot would have been fatal. The defendant then mounted his horse, which he had ready saddled and bridled, waved his pistol towards Marjorie Lockman, who

was at Connor's house, about 125 yards off, and exclaiming, "Fare you well, Marjorie!" rode rapidly off, and was afterwards found in the State of Alabama.

There was ample evidence of a motive to take the life of the deceased. The defendant was infatuated with Marjorie Lockman, whom, the evidence showed, had been living with the deceased in an illicit manner for some years.

The defendant offered to prove, first by the witness Bruce Gabriel, then by the witness Blain Sigmon, and also by the witness Henry Gabriel, that each had at different times a conversation with the deceased, with reference to his illicit relationship with Marjorie Lockman, and in which each attempted to dissuade him from continuing it further, and to each the defendant replied signifying his intention of continuing it, and of his determination not to be interfered with by the respective witnesses or any other.

Defendant offered to prove by the witness, Sheriff Isenhour, that on the day of the homicide he had a conversation with Marjorie Lockman wherein she told him of her illicit relations with the deceased since she was thirteen years of age, and that she stated to the witness that defendant had been begging her to marry him, and that she could not on account of deceased.

Defendant offered to prove by the witness Henry Gabriel that he knew that there was a general reputation in the community that there was an illicit relationship existing between the deceased and Marjorie Lockman.

Defendant offered to prove by the witness Gabriel that Marjorie Lockman, when she came up to the dead body, fell down over it and cried out, "Some one has killed my darling."

None of this testimony was competent. It is all irrelevant to the issue to be tried by the jury, and could furnish no justification or excuse for the killing of the deceased, if it had been admitted. None of the proposed facts was a part of the *res gestae,* but all were *res inter alios acta. S. v. John,* 30 N. C., 330; *S. v. Samuel,* 48 N. C., 74; *S. v. Harman,* 78 N. C., 515.

There are several exceptions to the judge's charge which it is unnecessary for us to consider *seriatim.* There was abundant evidence of preparation and premeditation which his Honor correctly recited to the jury. In charging the jury as to what constitutes premeditation, we think the judge carefully followed the well settled decisions of this Court. No particular time is necessary to constitute premeditation and deliberation for conviction of murder in the first degree under the statute. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. *S. v. Banks,* 143 N. C., 652.

The judge very fully stated the contentions of the defendant, together with the evidence upon which he relied, in a very clear manner. The defendant relied upon a plea of self-defense. The instructions upon that phase of the case followed the decisions of this Court. *S. v. Clark,* 134 N. C., 698; *S. v. Bailey,* 179 N. C., 724.

Upon a careful review of the whole record, we are unable to find any reversible error.

No error.

STATE v. JOHN BLACKWELL.

(Filed 15 December, 1920.)

Intoxicating Liquor—Spirituous Liquor—Criminal Law—Manufacture—Evidence—Questions for Jury—Trials.

Testimony that the defendant, charged with the unlawful manufacture of intoxicating liquor, was arrested at an obscure place suited to the purpose, with the meal reduced to the state of beer, proper to be made into whiskey, the still complete, except the cap and worm, which would not be needed in a week, with declarations of the defendant that he was manufacturing the liquor for his own use but had been caught before he could do so, with further evidence that the still gave indication that it had been used before, goes beyond being evidence of preparation to commit the offense, and is sufficient to sustain a verdict of guilty.

APPEAL by defendant from *Ray, J.,* at the March Term, 1920, of HENDERSON.

This is a criminal action, tried upon an indictment charging the unlawful manufacture of intoxicating liquor.

STATE'S EVIDENCE.

Sheriff M. Allard Case: I know John Blackwell. He lives in the eastern part of Henderson County. I saw him at a blockade still on 3 January, 1920, over at Big Hungary, ten miles from here in this county. Mr. Hill and Mr. Lyda were with me at the time. Blackwell had a complete outfit, except that he had no cap or worm for the still. When we found him he had about three bushels of meal in two boxes, and he was putting water in the still, getting ready to make beer—was pouring water from a tub and was getting water into the still. I suppose he was putting water in to make the meal work quicker. The meal was a little bit wet. He had poured some water on it. The outfit was complete with the exception of the cap and worm. Blackwell was alone. I arrested him.

Cross-examination: Blackwell had a complete outfit except the cap and worm. He was getting ready to make whiskey. There were two boxes of meal; looked like some water had been poured over it. There was a sack there also with some meal in it. The still was made of copper and would hold thirty-five or forty gallons. The furnace looked new and had not been used before. The two boxes contained about three bushels of meal and the sack from one-half to a bushel. There was nothing about the place that gave the appearance that any whiskey had been made there.

Redirect examination: It (the still) was kind of in a hollow over a mountain, in a pretty big hollow—an obscure place—a very good place for a still. The still had been used before, but the furnace had not.

T. V. Lyda: I was with the sheriff when he arrested John Blackwell. I saw two boxes there containing mash in some water—what they call sweet mash. He had about three bushels of meal in the boxes and about three bushels in a sack. Sweet mash is used for making beer, and beer for making whiskey. It takes from seven to eight days for mash to ferment. The still had no cap, work or doublings. It was about a thirty-five gallon copper still. Blackwell could not have made any whiskey earlier than a week if he had had the cap and worm. He was making preparations.

Sheriff M. Allard Case, recalled: When I cought Blackwell he said he was fixing to make some whiskey for his own use.

Cross-examination: He said, "You got me before I made any."

At the close of the State's evidence the defendant moved for judgment as of nonsuit. Motion overruled, and the defendant excepted.

The jury returned a verdict of guilty.

Judgment of court that the defendant be confined to the common jail of Henderson County, and be assigned to work upon the public roads of said county for the term of twelve months. The defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McD. Ray for defendant.

ALLEN, J. The evidence is sufficient to support the verdict, and goes beyond proof of preparation to commit the crime of manufacturing intoxicating liquor.

It is true the cap and worm were not present, but they would not be needed for a week, and in the meantime the defendant was engaged in one of the processes of manufacture.

He had not produced any of the completed product, but he was manufacturing it as rapidly as he could, knowing that the cap and worm would be available when the beer was ready for distillation.

The sheriff also testified: "The still had been used before," which, in the absence of explanation, permitted the inference that the defendant had been manufacturing at some other point, and was then engaged in changing his location.

The evidence is as strong, if not stronger, than in *S. v. Perry,* 179 N. C., 718.

No error.

STATE v. FRANK HENDERSON.

(Filed 24 December, 1920.)

1. Courts—Continuance of Case—Discretion—Appeal and Error.

A motion of the defendant, indicted for a crime, to continue his case because he had not had time to prepare his defense is addressed to the sound discretion of the trial judge, and is not reviewable on appeal in the absence of abuse of this discretion.

2. Appeal and Error—Objections and Exceptions—Brief—Assignments of Error.

The appellant must set out and discuss in his brief the exceptions he relies on, and his request, in his brief, that the Supreme Court consider all the exceptions set out in the record is not a compliance with the rule.

3. Homicide— Murder— Premeditation— Method of Killing—Evidence—Manslaughter—Instructions.

A deliberate and premeditated purpose to kill may be evidenced by the manner employed in the taking of the life, as where there is evidence that the prisoner, living in adultery in another State, away from his home, returns thereto by rail, avoiding recognition, discovers another man with his wife, waits until he has left her, and then chokes her to death, etc., and upon this, and other conflicting evidence, a motion; based upon a lack of premeditation and motive, as of nonsuit thereon, will be denied; and *Held further*, under the evidence in this case, an exception that the judge failed to charge upon the aspect of manslaughter cannot be sustained.

APPEAL by defendant from *Long, J.,* and a jury, at September Term, 1920, of MADISON.

The defendant, together with one Gertrude Sams, was indicted for the murder of his wife. At the trial the defendant, Frank Henderson, was convicted of murder in the first degree, and Gertrude Sams was acquitted. From the judgment upon such conviction, Frank Henderson appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. Coleman Ramsey and Mark W. Brown for defendant.

BROWN, J. The defendant moved for a continuance of the cause because he had not had time to prepare his defense. This matter was presented to the presiding judge by affidavit, and he declined to grant the continuance. This is well settled to be a matter resting in the sound discretion of the judge, and will not be reviewed by us unless there is evidence of an abuse of such discretion. There is nothing of that sort in this record. The same may be said of a motion to remove the cause to another county.

In the typewritten brief of the counsel for defendant, we are requested to consider all the exceptions set out in the record. There are 186 pages of typewritten matter in this record, and the Court cannot be expected to hunt up all the exceptions of an appellant. We have frequently said that it was his duty to set out in his brief the exceptions that he relies upon, and to discuss them. We do not consider any matter of sufficient importance for us to consider which is not of sufficient importance to be discussed in the brief.

The exception to the refusal of the court to charge the jury that there was no evidence of murder in the first degree was properly overruled.

The defendant offered no evidence. There was evidence introduced by his codefendant, Gertrude Sams. The confessions of the defendant were introduced in evidence and properly admitted, and in these confessions he admits the killing of his wife. The counsel for the defendant contends that if his confession is true, he is not guilty of murder in the first degree, and the motion to nonsuit the first degree count should have been allowed, and the special instructions given.

This may all be true, but the jury is not required to accept the whole of the confession. They may accept a part and reject a part. In considering whether there is any evidence of premeditation and deliberation, the entire evidence must be considered, and in the aspect most favorable to the State.

The State's evidence tended to show that on the morning of 24 August, 1920, about 6:30, the dead body of defendant's wife was found upon the porch of the house where she lived, as though, apparently, laid out by some person. There was no hat upon her head or shoes or stockings upon her feet. Her hair was loose, and there were fragments of grass and leaves in it, while her feet showed signs of dirt, as though she had been walking barefooted. Dr. J. N. Moore, a practicing physician and coroner of Madison County, held the *post mortem* examination upon her body that day. He found a frothy mucus issuing from the mouth and

nose, imprints of finger nails on each side of her throat, black and blue spots on her left arm and right leg, this discoloration extending over the lower part of her throat and back of it, and over almost her entire back, and parts of both legs and both arms. He further stated that in his opinion she died of strangulation. The house itself was a small wooden house, with a porch in front, about two feet from the ground and about eight or ten feet wide. It is about fifteen or twenty feet from the road. On the side of the road, but about 77 steps away was a level place above the road covered with old dead leaves and things of that sort. There was evidence of a struggle there, and barefoot track and other tracks. Sheriff Bailey picked up a hairpin there that corresponded with hairpins in the hair of the deceased, and the dead leaves at that place corresponded with those in her hair. On the opposite side of the house from this place he also saw a woman's track, a heel of a woman's shoe, and it looked like a woman had gotten up on the bank and mounted a horse or something. He saw the whole track of the shoe (p. 55). Other witnesses testified to the track of this woman, and further on they discovered the track of a mule. The defendant acknowledged the killing of his wife. He said he came on No. 27 that passes "here" about 9:42 on the night of 23 August; that he got off the train at Barnard and started on out home. He was going down to Sandy Bottom, and coming up the road that comes down the railroad, about a mile this side of Betsy's Siding, and as he went on down the railroad he struck up with a man who had some whiskey, and who gave him two or three drinks of whiskey; that he went this road up Sandy Bottom and went around home, and when he got home there was a man there with a mule and his wife was on the porch, and he just passed right on down the road a little piece, and sat down, and he said that the man got on the mule and left, and said, directly she came down where he was and said they got to talking, and one word brought on another, and said after a while he said he choked her, and said in a minute or two she got up and put her hand on his shoulder and took him by the arm and they went back up to the house, and she sat on the porch, and he sat down in the yard, and she fell over on the porch. He said he thought she was crying, and went up to her and saw she was dead; and he said that sorter straightened him up and he sorter straightened her out and left. Said he came on back down that same road to Betsy's Siding to the railroad, and said he passed here about three o'clock in the morning and caught a freight at Rollins' and went into Asheville and caught the early morning train out of Asheville into Spartanburg.

We think upon this evidence the jury may well have inferred that the killing of the wife by the husband was premeditated and deliberate. It doesn't require any great length of time to elapse between the time when

the design to kill is formed and when it is put into execution. When the purpose of killing is weighed long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, it is put into execution, there is sufficient premonition and deliberation to constitute murder in the first degree. *S. v. Covington,* 117 N. C., 834; *S. v. Dowden,* 118 N. C., 1145.

There is evidence of motive to put the wife out of the way. The defendant had deserted his wife and children, according to the evidence, and had gone to another State and was living in adultery with his co-defendant, Gertrude Sams. He was intent on selling the home where his wife and children lived, but she refused to join in the execution of the deed.

On the afternoon of the homicide he left Spartanburg, South Carolina, and while riding on the train tried to conceal himself from the passengers who might recognize him. He got off the train between 9 and 10 o'clock the night of 23 August. According to his own statement, he went to his wife's home and, seeing a man there with a mule with his wife on the porch, he passed by and concealed himself until the man left. His own confession, as well as the evidence of the physician, shows that he strangled his wife to death. The evidence also shows that her body had been badly beaten up; that there were black and blue spots on her left arm and right leg, and all over her entire back and parts of both legs and both arms. The method employed to produce death is some evidence of a deliberate purpose to kill. A man may fire a pistol in the heat of passion and kill another, and unpremeditately, but one who strangles his wife and beats her to death, not only employs a most brutal and inhuman means, but he employs one that indicates a deliberate purpose to destroy life at all hazards. He has the opportunity to see the effect of what he is doing. There is time for repentence and of an opportunity to stop before he has finally carried out his fiendish purpose.

There is also evidence that the defendant had a confederate with him to assist him in getting rid of his wife, and this confederate, it is contended by the State, must have been Gertrude Sams.

It is useless, however, to discuss this evidence at length. There is abundant evidence to go to the jury that the defendant deliberately and purposely killed his wife, and that he had a very compelling motive which urged him on.

The defendant excepts because the judge failed to present to the jury a view of manslaughter. His Honor very properly charged the jury that there was no evidence of manslaughter in the case. There is no evidence that the wife was armed or committed any act which would excuse the conduct of the defendant.

On account of the importance of this case, we have not confined our examination of the record to the matters presented in the brief. We have examined the whole record and find

No error.

STATE v. A. D. CANUP.

(Filed 24 December, 1920.)

1. **Homicide—Murder—Evidence—Threats—Character.**

Upon a trial for a homicide where there is no evidence that the prisoner acted in self-defense, or was reasonably apprehensive that his life was in danger, or of receiving great bodily harm, but that he had shot the deceased in the back, and the transaction is not in doubt, evidence of the character of the deceased, or of threats made by him but not previously communicated to the prisoner, are properly excluded.

2. **Homicide—Murder—Intoxication—Evidence.**

Upon a trial for a homicide where the evidence shows that the prisoner shot the deceased when the latter was drunk, profane and boisterous, testimony under the facts of this case was not improperly excluded that the deceased was in the habit of drinking.

3. **Homicide—Murder—Evidence—Declarations.**

Where the prisoner is a policeman, and on his trial for the homicide of one whom he was assisting to arrest, by shooting him in the back with a pistol, his declarations, made some time before the homicide, as to his promptitude and readiness to shoot under such circumstances are properly admitted, with other evidence tending to show his guilt.

4. **Homicide—Murder— Character— Evidence— Cross-examination— Impeaching Evidence.**

The deceased was killed when being arrested by the prisoner, a policeman: *Held*, upon a trial for murder, the defense may cross-examine a witness who has testified to the good character of the deceased, upon matters tending to impeach his general character, but not as to specific instances, or as to how many men it had taken to arrest him on a former occasion, this being collateral to the issue being tried.

APPEAL by defendant from *Webb, J.*, at August Term, 1920, of CHEROKEE.

The defendant and John H. Cooper were tried for murder of Dan Sprinkle. The solicitor at the beginning of the trial announced that he would not ask for a verdict of murder in the first degree, and at the close of the testimony for the State took a *nol pros* as to Cooper.

Canup was a policeman in the town of Andrews. The deceased (Sprinkle) was drinking that night, and was boisterous and profane in the presence of Cooper, who was also a policeman, and the defendant.

They attempted to arrest Sprinkle, who resisted. With the aid of the witness Will Cook, and a man named McAfee, they got him down and put handcuffs on one arm. He begged to go home, and said he would come back and pay his fine. Cooper said: "Let him up." The deceased got up, knife in hand, making two licks at Cook with his knife. He then started for Cooper, who backing said: "Dan, I hate to kill you, but I am going to do it if you don't stop," and fired his pistol into the ground. At this juncture the wife of the deceased ran up and got between Sprinkle and Cooper, whose connection with the matter there ended.

Will Cook testified: "Sprinkle wasn't doing anything when Canup fired his first shot. He was standing with his back to us. Me and Canup were behind Sprinkle. I was about as close to Sprinkle as the table. The first shot hit him in the back. It staggered Sprinkle, and he turned around and went to fighting like Canup, and then Canup kept shooting. I didn't see Sprinkle do anything up to the time Canup shot him in the back the first time. I was standing there all the time. I said to Canup, 'Don't shoot him; don't shoot a drunk man; knock him down and put the handcuffs on him!' "

The shot that killed Sprinkle entered his back and came out at his collar bone. The defendant was found guilty of manslaughter, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. N. Moody and Felix E. Alley for defendant.

CLARK, C. J. Exceptions 1 and 2, to the exclusion of threats made by the deceased against the officers, Cooper and Canup. The judge excluded the evidence of these threats because not communicated to Canup.

In *S. v. Blackwell,* 162 N. C., 672, it is said: "As a general rule, evidence of the character of the deceased is not relevant to the issue in a trial for homicide, and consequently it is not permissible to show the general reputation as a dangerous or violent man; but when there is evidence showing, or tending to show, that the prisoner acted in self-defense, under a reasonable apprehension that his life was in danger, or that he was in danger of great bodily harm, evidence of the character of the deceased, as a violent and dangerous man, is admissible, provided the prisoner at the time of the homicide knew of such character, or the nature of the transaction is in doubt."

The same rule applies to threats. *S. v. Hines,* 179 N. C., 758, and cases there cited. Moreover, in this case, according to the evidence, the

deceased was not fighting when Canup, from behind, fired the first shot, which caused the death of the deceased.

The doctrine, as laid down in *S. v. Turpin,* 77 N. C., 473, and in *S. v. Baldwin,* 155 N. C., 494, stating the cases in which the proof of uncommunicated threats are permissible, does not apply in this case, for there were no other threats, which had been communicated which this testimony would have tended to corroborate; the evidence of the transactions was not circumstantial, but direct, and the character of the transaction was not in doubt.

Exception No. 3. It was not error to exclude evidence that the deceased was in the habit of drinking. The evidence was uncontradicted that he was drunk, boisterous, and profane that night. Exception No. 4. It was not error to admit the declaration of the defendant, made some weeks before the homicide as to his general attitude in regard to shooting, while on the police force, that "he would go ahead and the first thing he would do he would shoot somebody and learn them how it was." He said he would not take any chances himself. The jury was entitled to this evidence as showing that the defendant intended to be quick in using a deadly weapon in making arrests.

Exception No. 5. The witnesses for the State testified that the character of the deceased was good. The defense asked this witness, "Do you know how many men it took to arrest him at Sylva when he was drunk?" This question was properly excluded. It was competent in cross-examination to ask questions tending to impeach general character, but not as to particular matters as this would raise innumerable collateral issues. *S. v. Holly,* 155 N. C., 485, and citations thereto in Anno. Ed.

The assignment of errors in the charge is upon the ground that the charge as a whole is argumentative and equivalent to the expression of opinion by the court, but we do not think this objection is sustained by a perusal of the charge.

No error.

STATE v. LORENZO McMILLAN ET AL.

(Filed 24 December, 1920.)

Intoxicating Liquor—Spirituous Liquor—Manufacture—Common Benefit —Circumstantial Evidence.

A conviction of several defendants upon wholly circumstantial evidence tending to show that they had a common purpose in illicit distilling spirituous liquor in a close neighborhood to each other, upon adjoining premises, and receiving a common benefit, may be had, as in this case,

where there was evidence that they had moved stills from one place to the other on their lands, to conceal their operations, used the still slops for the feeding of their hogs, with other circumstantial evidence tending to show the joint and unlawful manufacture of the liquor, and identifying them therewith.

APPEAL by defendants from *Finley, J.*, at April Term, 1920, of SCOTLAND.

The defendants, four brothers, were convicted of manufacturing liquor, and from the judgment upon such conviction they appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Walter H. Neal for defendants.

WALKER, J. The jury might very well have acquitted the defendants, but as it did not, the main question on this appeal is whether or not there is any evidence which justified such conviction. That evidence is wholly circumstantial, but, from the nature of such offenses, that quite frequently is the only evidence available, but sometimes it is of so strong a character as to be really more convincing than any other kind. We have affirmed convictions for this class of offenses where the testimony was not as strong as that we find in this record. *S. v. Horner,* 174 N. C., 788; *S. v. Carroll,* 176 N. C., 730; *S. v. Bush,* 177 N. C., 551.

The following circumstances, among others, tend to show defendant's guilt:

1. They all lived between two creeks, three of them on the same land and one on the adjoining tract, their houses being about a quarter of a mile apart: first, Charles' home, then Elijah's, then Jesse's, then Lorenzo's.

2. Within forty-five steps of Charles' home the officers found a complete still and beer ready to still. The path led from the still to the hog lot, and the hogs had been fed still slops. There was a pool from which water was obtained for the still nearby.

3. At Elijah's, a quarter of a mile off, they found that his hogs had been fed still slops; steps leading from the hog lot to two barrels of beer, hid in the woods, one right above and the other right below. There were paths leading from the still site to the house. "The paths all led back to the house, and there were fresh tracks coming and going." Plain path from Elijah's house to still.

4. At Jesse's they found a still site in a swamp near by, and there were still sites up and down the creek with paths leading between them. At

the still site near Jesse's they found jars, bottles, and things of that sort, and about a half barrel of beer.

5. At Lorenzo's they found a place where whiskey had been made, about 131 steps from his house, fresh signs which showed that liquor had been made within three or four days, signs of beer which had been emptied in a pit, and it could be smelled some distance.

L. P. Smith, for the State, said: "We would go there and find where a still was, and maybe inside of another week we would find it in another place. On one occasion when I went over there I found two men at the still between Elijah's and Lorenzo's house. We found two men operating, and they ran. One of them looked like it was Lorenzo, and he had on an army hat like I had seen him wear. I never have seen him wear it since, because I had it."

This is not only some evidence of all the defendants' guilt, but also of a common purpose and enterprise in which they were engaged. If this proposition is correct, then both questions were for the jury, and it has determined both adversely to the defendants.

The defendants each went upon the stand and testified in his own behalf. They also introduced evidence of their good character. The State, in rebuttal, introduced a number of witnesses who testified that their characters were bad for making whiskey. They having put their character, as parties, in issue, this is a circumstance which amounts to substantive evidence against them. *S. v. Atwood,* 176 N. C., 704; *S. v. Butler,* 177 N. C., 585.

While there is no very positive or direct evidence to show a conspiracy to manufacture liquor, or a joint manufacture of the same, which is more accurate, there are circumstances from which the jury could reasonably infer that such was the purpose of these defendants. They evidently understood by secret or tacit agreement among themselves that they should derive a joint benefit from the transaction. The evil intent of persons may be concealed in many and various ways, and it would be impossible for the State to expose the particular intent, in any individual case, unless it could resort to circumstantial evidence. This had the appearance of a family affair, a brotherhood of lawbreakers, and it was not an unnatural affiliation, if they were all, as it seems, disposed to do it in that way.

The hogs of all of them were included in the procedure, as they were gathered together at a common trough and were fed with the swill taken from the stills, which were used apparently in this joint enterprise. But this is not so vital a fact as to be essential to a conviction.

It cannot be seriously denied that there was some evidence of the individual guilt of the defendants, but they, each and all of them, do assert that there is no evidence of a combination between them to violate

the law. We think there is some evidence of concert between them.

The removal or shifting of the stills and equipment from one place on their lands to another, the location and proximity of their homes, the general appearance of the places, and the use to which they put the slops, or swill, and the manner in which they did it. If all of the circumstances are taken together, as they should be, they tended to show coöperation, or united action, by the defendants sufficient for the jury to pass upon the fact. The defendants agreed to the consolidation, provided it was tried on the theory of a joint purpose to break the law, and we have considered it that way.

We cannot see why there is much practical difference in a conviction of all the defendants of a joint unlawful dealing in liquor and a separate conviction of each one of them of the same offense, as either is a misdemeanor punishable in the discretion of the court, where the manufacture is the first offense, Consol. Statutes, sec. 3409, but the decision is not put upon this ground, nor need it be.

We have read and carefully considered the able and learned briefs of defendants' counsel, which strongly present their side of the case, but when we weigh the proof, as has been done, we find ourselves unable to say that there is absolutely no evidence of coöperation by these defendants in manufacturing the liquor.

The nonsuit, therefore, was properly refused, and the request for a peremptory instruction to acquit should not have been granted.

No error.

STATE v. ESTIE FORE.

(Filed 24 December, 1920.)

1. Intoxicating Liquor—Spirituous Liquor—Possession—Presumptions—Evidence.

Evidence that the defendant occupied a room in a city ten miles from his home, fitted up for receiving intoxicating liquor and keeping it for sale, and therein, at the time of his arrest, there was found in his possession more than a quart of whiskey, in several small bottles, and also a whiskey glass, a funnel, empty bottles and fruit jars, is, in the absence of explanation, sufficient to sustain a conviction of the offense of receiving liquor illegally and for an illegal purpose.

2. Same—Statutes—Congress—Volstead Act—Constitutional Law—Concurrent Powers.

The purpose of the Eighteenth Amendment to the Federal Constitution was to prevent the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof

from the United States and the territories subject to the jurisdiction thereof for beverage purposes, and to give Congress and the several States "concurrent power" to enforce these provisions "by appropriate legislation": *Held*, by giving Congress and the Legislatures of the different States "concurrent" powers, the latter may enact such laws for the accomplishment of the main purpose of the Eighteenth Federal Amendment as are not in conflict with the congressional legislation on the same subject-matter, but in addition thereto and coming within the police regulations of the State, and in the enforcement thereof; and our State statutes on the subject of the presumption that the possession of spirituous liquors, in certain quantities, is for the purpose of unlawful sale, is not in conflict with the Volstead Act of Congress, 41 U. S. Sts. at Large, and is a valid and enforcible enactment.

3. Same.

As to whether our statute upon the subject of receiving more than one quart of intoxicating liquor in fifteen days is in conflict with the Volstead Act, *Quaere?*

APPEAL by defendant from *Long, J.*, at the September Term, 1920, of BUNCOMBE.

The defendant was convicted of receiving and keeping liquor on hand for sale, and from the judgment upon such conviction appealed to this Court. There were four counts in the bill of indictment, the first charging the transporting of liquor; second, the delivering of liquor in a quantity greater than one quart; third, the receipt of more than one quart of liquor during fifteen consecutive days; and fourth, keeping liquor in his possession for the purpose of sale.

"Before the impaneling of the jury, counsel for the defendant moved to dismiss the action, for that all laws upon the statute books of the State of North Carolina referring to the manufacture, sale, and transportation of intoxicating liquors were repealed when the Eighteenth Amendment to the Constitution of the United States went into effect, said date being 16 January, 1920, and this offense with which this defendant is charged having been committed since said date, and this court therefore being without jurisdiction." Motion overruled, and defendant excepted.

The State offered the following evidence:

W. H. Harris, a member of the police force of Asheville, testified: "That he had known the defendant for about one year; that on the night of ..... August, 1920, he arrested the defendant at a boarding-house in the city of Asheville; that when he entered the room occupied by the defendant the defendant was on his bed asleep; that he found there about four pints of whiskey, and some empty bottles, and a funnel; that there was also in said room an empty suitcase on the floor close to the bed occupied by the defendant; that there were some empty fruit jars in the room, but that there had not been any whiskey in the jars; that they

were all empty quart jars; that the whiskey was in a bureau drawer, also the empty bottles; that he knew of no sale of whiskey being made by the defendant, nor had he seen the defendant offer any whiskey for sale; that the defendant was partially intoxicated at the time of the arrest; that the total amount of whiskey found in the room was about three and one-half pints, and two empty pint bottles; that the defendant was in his sleeping-room at the time of the arrest; that he smelled of the fruit jars, and that in his opinion there had been no whiskey in them."

R. H. Luther testified: "I went to his room with Mr. Harris, when the arrest was made. We found the whiskey contained in the bottles offered in evidence, and saw six or eight empty bottles and six or eight fruit jars in the room; also a small whiskey glass and a funnel; the fruit jars were at the foot of the bed in which the defendant was asleep. The whiskey was in one of the drawers, which was about half-way open. The defendant was drunk or intoxicated when we found him on the bed. The defendant lives near Leicester, about ten miles from this rooming-house."

At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the ground that there was no evidence to support either count in the indictment, which motion was overruled, and the defendant excepted.

The jury returned a verdict of guilty on the third and fourth counts, and from the judgment pronounced thereon the defendant appealed

Attorney-General Manning and Assistant Attorney-General Nash for the State.

George S. Reynolds for defendant.

ALLEN, J. The evidence is sufficient to sustain the verdict. The defendant lived ten miles from Asheville, and he was occupying a room in a boarding-house in Asheville, fitted up for receiving liquor and keeping it for sale. At the time of his arrest he had more than a quart of whiskey in his possession in several small bottles, a whiskey glass, and a funnel, and empty bottles and fruit jars were found in his room. In the absence of explanation the jury might reasonably and legitimately infer from these circumstances that the defendant was receiving liquor illegally and for an illegal purpose.

The effect of the prohibition amendment and of the Volstead Act on State legislation is fully considered in the instructive and learned opinion by *Rugg, Chief Justice,* of Massachusetts, in *Commonwealth v. Nickerson,* recently decided, from which we quote at length, preferring to do so to presenting the thoughts and reasoning of the Court in our own language.

The defendant was convicted on the charge of selling liquor illegally in violation of a statute of the State, which the defendant insisted was superseded by the Volstead Act.

The Court says: "The Eighteenth Amendment was proclaimed as having been ratified, and thus became a part of the fundamental law of the land, on 29 January, 1919, 40 U. S. Sts. at Large, 1941. Its first two sections, being the ones here pertinent, are in these words:

" 'SECTION 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes are hereby prohibited.

" 'SEC. 2. The Congress and the several States shall have concurrent power to embrace this article by appropriate legislation.'

"Congress, pursuant to the power conferred upon it by the second section of the Eighteenth Amendment 'to enforce this article by appropriate legislation,' has enacted the National Prohibition Law, being act of 26 October, 1919, ch. 85, acts Sixty-sixth Congress, 41 U. S. Sts. at Large, 305, known as the Volstead Act."

"By Title II, s. 1, of the Volstead Act it is provided that, 'The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes,' with exceptions not here material. By s. 3 of the same title it is provided that 'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end and that the use of intoxicating liquor as a beverage may be prevented.' By s. 29 the penalty for a sale of liquor in violation of Title II is for a first offense a fine of not more than one thousand dollars or imprisonment not exceeding six months, and for a second or subsequent offense a fine of not less than two hundred dollars, nor more than two thousand dollars, and imprisonment for not less than one month nor more than five years."

Section 35 provides: "All provisions of law inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

The Court then quotes from *Rhode Island v. Palmer,* 252 U. S., as follows: " '6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a State Legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits.

" '7. The second section of the amendment—the one declaring "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

" '8. The words "concurrent power" in that section do not mean joint power, or require that legislation thereunder by Congress to be effective shall be approved or sanctioned by the several States, or any of them, nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

" 'The power confined to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States, or any of them.' By conclusion 10 the Volstead Act is declared applicable indifferently to the disposal for beverage of liquors manufactured before and after the Eighteenth Amendment became effective, and by conclusion 11 the declaration of that act that liquors containing as much as one-half of one per cent of alcohol by volume and fit for use for beverage shall be treated as intoxicating was held to be within the scope of the Eighteenth Amendment."

Concluding that the Supreme Court of the United States has not given an authoritative definition of the words "concurrent power," he discusses this question at length with full and interesting citation of authority.

"This is the only instance to be found in the Constitution, or any of its amendments, where there is a definite declaration that both Congress and the several States have 'concurrent power to enforce' any constitutional mandate or power 'by appropriate legislation.' Certain powers are reserved to the States. Article 1, section 8. Article X of the amendments. Certain powers are prohibited to the States, and certain other powers can be exercised by the States only by consent of Congress. Article 1, section 10. But in the Eighteenth Amendment alone is there

express establishment of the existence of concurrent power in Congress and the several States to enforce by legislation its provisions.

"The words of the second section of the Eighteenth Amendment are specific to the point that 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' This phrase is significantly different from that found in corresponding sections of Amendments XIII, XIV, and XV. In those three instances Congress alone is given power 'to enforce' 'by appropriate legislation.' Here the several States are joined with the Congress as depositories of concurrent legislative power. It is reasonable to presume that this change in phraseology was adopted understandingly, and imports an intention to effect a change in substance and in scope of the power. *Slaughter House cases,* 16 Wall., 36, 74. It is hardly likely that in an instrument of such transcendent importance as an amendment to the Constitution, the conjoining of Congress and the separate States as severally possessors of legislative power for enforcement of prohibition should under any circumstances be a barren grant or confer merely an insubstantial shadow upon either. The difference between the phraseology of the Eighteenth Amendment and that of the Thirteenth, Fourteenth, and Fifteenth Amendments in this particular, according to the common and approved usage of language, expressed a purpose to repose in the States a substantial power capable of some measure of effective exercise under all circumstances. The words of the amendment declare a complete possession of power by the States of which they cannot be deprived by Congress. The force and effect of the words of the Eighteenth Amendment, while possibly enlarging the permissible scope of State legislation respecting importation and exportation of intoxicating liquors, leaves open to State legislation the same field theretofore existing for the exercise of the police power concerning intoxicating liquors subject only to the limitations arising from the conferring of like power upon Congress with its accompanying implications, whatever they may be.

"Having regard only to the words of the Eighteenth Amendment, the Congress and the several States are placed upon an equality as to legislative power. It is only when the amendment is placed in its context with other parts of the Constitution that the supremacy of the act of Congress, if in direct conflict with State legislation, becomes manifest."

"The amendment does not require that the exercise of the power by Congress and by the States shall be coterminous, coextensive, and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the State legislation must yield.

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment, and making contribution to the same general aim according to the needs of the State, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the States need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the States need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a State may forbid, under penalty, acts not prohibited by the act of Congress. The concurrent power of the States may differ in means adopted, provided it is directed to the enforcement of the amendment. Legislation by the several States approximately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress in performance of the duty cast upon it by that amendment has defined and prohibited beverages, and has established regulations concerning them. State statutes, rationally adopted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, regulations and penalties from those contained in the Volstead Act, and not in conflict with the terms of the Volstead Act, but in harmony therewith are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of national prohibition does not exclude the operation of appropriate State legislation directed to the enforcement by different means of prohibition within the territory of the State.

"The power thus reserved to the States must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment."

The Court then discusses the power of the State under the amendment to enact legislation dealing with intoxicating liquors assuming that the view expressed as to the meaning of "concurrent power" may not be correct, and says: "The general principle as to the right of the States to exercise the power of effective legislation concerning subjects over which Congress also has power was stated in these words (summarizing language of *Mr. Justice Story* in *Houston v. Moore,* 5 Wheat., 1, at 49), in *Gilman v. Philadelphia,* 3 Wall., 713, at 730: 'The States may exercise concurrent independent power in all cases but three: 1. Where the power is lodged exclusively in the Federal Constitution. 2. Where it is given to the United States and prohibited to the States. 3. Where

from the nature and subjects of the power, it must necessarily be exercised by the National Government.' "

Then follows many illustrations from decided cases of the application of the principle that one may be guilty by the same act of a violation of a statute of the State and an act of Congress, and concludes:

"In our opinion the irresistible conclusion from these decisions is that State legislation which in its practical operation is appropriate to enforce the chief aim of the Eighteenth Amendment, and to make it more completely operative in all its amplitude is not suspended, superseded, set aside, or rendered inapplicable in its denouncements by the Volstead Act, in so far as not incompatible therewith or in contravention of its provisions."

The conclusions of the Court are satisfactory to us, and applying them to the facts in the record, we hold that the defendant has been properly convicted on the count charging him with having liquor in his possession for the purpose of sale, because the statute denouncing this as a crime is not in conflict with the amendment or the Volstead Act, and on the contrary, is in aid of and carries out the purpose of both.

It is not so clear that the conviction on the count for receiving more than one quart of liquor in fifteen days can be sustained, as the statute under which this count is framed permits the possession of liquor in limited quantities for beverage purposes, which may conflict with the Volstead Act, but it is not necessary to decide this question, as the verdict on the other count is sufficient to sustain the judgment. *S. v. Coleman,* 178 N. C., 760.

No error.

STATE v. OSCAR C. HODGES.

(Filed 24 December, 1920.)

Health—Cattle—Eradication of Ticks—Constitutional Law—Quarantine —Statutes.

The regulation of a quarantine district laid off and enforced in pursuance of C. S., 4688 (3) and 4873, for the eradication of ticks on cattle under the authority of the commissioners of the county affected, and the State and Federal Departments of Agriculture, and also under the State and Federal inspections therein provided for, requiring those in the district to have their cattle dipped in a solution, and by methods furnished them, to get rid of the ticks on the cattle and prevent infection, is a reasonable and valid regulation.

APPEAL by the State from *Calvert, J.,* at November Term, 1920, of BEAUFORT.

The defendant was indicted for the violation of the rules and regulations adopted by the State Board of Agriculture to prevent the infection of sound cattle from other cattle infected with tick fever and to cure those already infected. The complaint averred that the defendant in Washington Township in the county of Beaufort, "on or about 1 October, 1920, unlawfully and willfully refused for five days, after notice, and continues to fail and refuse, to dip certain of his cattle, to prevent the infection of cattle ticks, in vats prepared for said purpose, and containing an improved solution, under and by regulation of, the Board of Agriculture of North Carolina, he being the owner and keeper of cattle and premises, and served with official notice of said regulation and quarantine thereunto established and living in a territory and section of said State and county wherein the work of tick eradication had been taken up; quarantine including said county duly established by State and Federal agricultural authorities, and notice thereof duly proclaimed; in violation of regulations of said department of agriculture, passed 11 June, 1919, and contrary to Compiled Statutes, 4688 (3) and 4873."

The defendant was tried before the recorder's court on this charge and upon appeal to the Superior Court the jury found by special verdict that the charge was true, and that by regulation 2, secs. 2, 3, 7, and 28 of the North Carolina Department of Agriculture, passed 11 June, 1919, the work of tick eradication in Beaufort County was taken up under the authority of the commissioners of said county, and of the State and Federal Departments of Agriculture, and an order was made that cattle infected with, or exposed to, cattle tick fever should be dipped by their owners at stated intervals; that vats containing approved solution for this purpose of eradicating tick fever had been provided in said territory and available to the defendant, who was the owner of cattle and premises in said territory and available to said vats, and though due notice had been given him as prescribed by regulation, he had refused and failed to dip his cattle.

Upon said special verdict the court was of the opinion that the defendant was not guilty, and judgment was entered accordingly. Appeal by State.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No counsel contra.

CLARK, C. J. C. S., 4688 (3), provides that the commissioner and Board of Agriculture shall have authority to make "investigations adapted to promote the improvement of milk and beef cattle, and special investigations relating to the diseases of cattle and other domestic ani-

mals, . . . and shall have power in such cases to quarantine the infected animals and to regulate the transportation of stock in this State, or from one section of it to another, and *may coöperate with the U. S. Department of Agriculture in establishing and maintaining cattle districts or quarantine lines to prevent the infection of cattle from splenic or Spanish fever.* Any person willfully violating such regulations shall be liable to a civil action to any person injured, and for any and all damages resulting from such conduct, and shall also be guilty of a misdemeanor."

The validity of such statute conferring power on the Board of Agriculture to make regulations within the purview of this section was upheld in *S. v. R. R.*, 141 N. C., 846, and *S. v. Garner*, 158 N. C., 630. The Legislature can authorize municipalities to require persons to be vaccinated. *S. v. Hay*, 126 N. C., 999; *Morgan v. Stewart*, 144 N. C., 424, and in other matters, *S. v. Beacham*, 125 N. C., 652; and in many other instances. *Shelby v. Power Co.*, 155 N. C., 196; *Durham v. Cotton Mills*, 141 N. C., 615; and many other cases. *A fortiori* the power to make regulations can be confided to a State administrative board.

C. S., 4873, provides that upon proclamation being made of a quarantine, "The Commissioner of Agriculture shall have power to make rules and regulations to make effective the proclamation, *and to stamp out such infectious or contagious diseases as may break out among the livestock in this State.*"

By virtue of the authority, the State Board of Agriculture passed the regulations in question. Regulation No. 2, section 2, requires the State Veterinarian to coöperate with the U. S. Department of Agriculture in the eradication of the fever tick, and the Commissioner of Agriculture was authorized to appoint inspectors to work under inspectors of the U. S. Department of Agriculture and the State Veterinarian.

Section 3 provides that the work of tick eradication shall be taken up in any county when the Commissioner of Agriculture deems it wise and best, and shall issue notice to that effect.

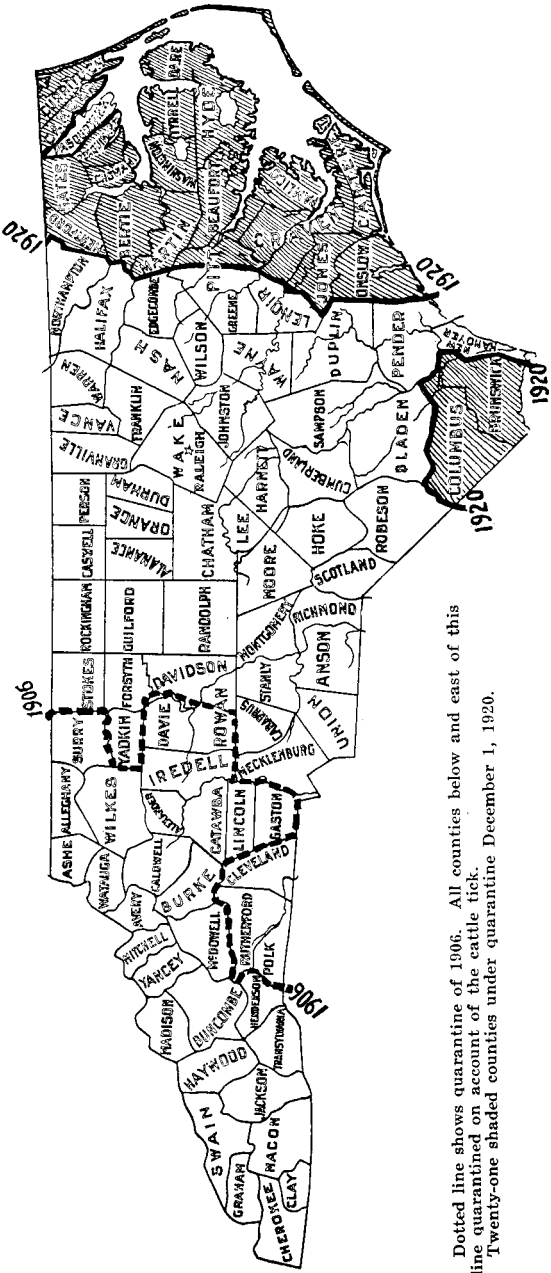
Section 7 provides: "When an owner or keeper of cattle and premises is served with official notice of quarantine, said cattle shall be properly and thoroughly disinfected by him regularly every 12 or 14 days under supervision of the State Veterinarian or a duly authorized quarantine inspector in an approved dipping solution until such a time as it is ascertained by a regular official inspection that the cattle and premises are free from ticks and notice of such has been given by the quarantine inspector. If the owner or keeper of cattle fails within 5 days after notice to adopt the recognized and approved methods of disinfecting cattle established in the county he shall be liable for prosecution for each offense."

"Section 28. The annual order of the U. S. Department of Agriculture, and amendment, naming the counties in North Carolina which are in quarantine on account of the cattle tick (*Margaropous annulatus*), is hereby adopted and approved, and in addition to these counties, those counties which the Commissioner of Agriculture may deem necessary are hereby declared under State quarantine." The county of Beaufort was one of these counties.

The facts found in the special verdict placed beyond question the violation of the above regulations, and specially section 7, which is set out in full, nor is there any question under the above quoted decisions of this Court that the General Assembly could delegate the power to make such regulations upon the Board of Agriculture. The only question presented is whether the statute authorized such regulation. We think it did. C. S., 4688 (3), provides that the State Board of Agriculture "may coöperate with the U. S. Department of Agriculture in *establishing and maintaining cattle districts and quarantine lines.*" The board has accordingly, in coöperation with the U. S. Department of Agriculture, established Beaufort County as a cattle district within the quarantine lines for the purpose of disinfection. The method of disinfection is that prescribed by the United States authorities, and the work is being done in "coöperation" with them.

C. S., 4873, has given the Commissioner of Agriculture the power to make rules and regulations "to stamp out such infectious or contagious diseases as may break out among the livestock of this State." Section 7, above set out, is in pursuance thereof, and, authorized by the above statutes, any violation thereof is a misdemeanor under the terms of the statute.

The eradication of the cattle tick is a matter of national importance, and especially to the South, for beyond a certain isothermal line running through northern Virginia and thence through the mountains of western North Carolina, and then northwesterly again, the cattle ticks are destroyed by the winter freezes. The Federal Government has spent vast sums of money, in coöperation with smaller sums contributed by this and other States in which, by reason of the milder winters, the tick pest is perennial except where it has been eradicated by the action of the State and Federal Governments. Already many States have been rendered absolutely free from the pest, and the Federal statutes control the shipping or the passing of cattle from those parts of any State not yet free from the pest into the other parts of the Union. The map on next page shows (dotted line) where the quarantine line between the free and infected districts stood in 1906. The shaded portion shows where it now stands, having by the gradual action of the State and the Federal Governments been pushed eastward until only 21 counties in North Carolina



Dotted line shows quarantine of 1906. All counties below and east of this line quarantined on account of the cattle tick.
Twenty-one shaded counties under quarantine December 1, 1920.

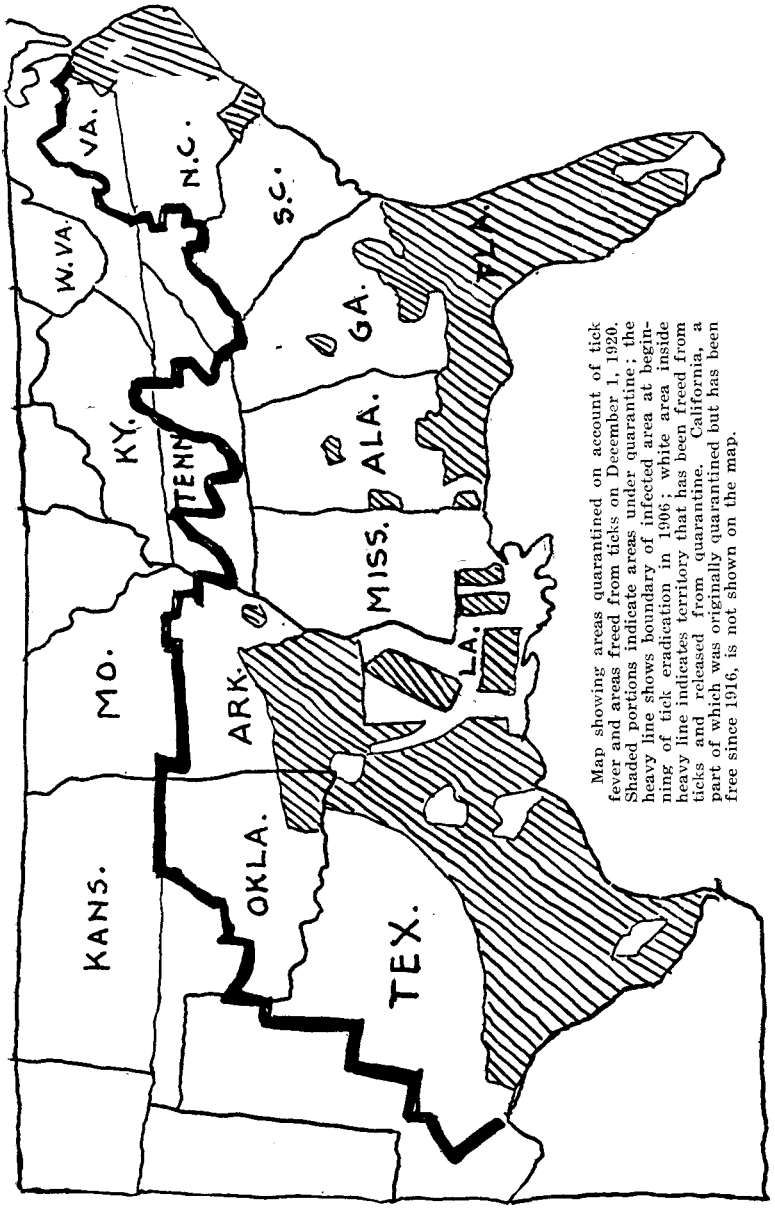
remain in the infested district, most of them being small counties in area, and even beyond the quarantine line of 1920, one county (Pasquotank) is already freed. The work of pushing the line eastward and freeing those counties is being pressed in several counties, among them the county of Beaufort, in which the defendant claims the right to halt the State and Federal Governments in this great work which is doing so much for the benefit of agriculture, as well as the stock-raising interests.

The cattle tick is being stamped out in the South, in which alone any infested districts still remain. Indeed, it may be said that good livestock is the basis of good farming. When there is no manure with which to enrich the soil, the farmer must depend upon one or two cash crops. With tick-infested cattle the result is much the same, for scrubs do not turn into beef and milk to the same extent as graded stock, and they cannot be shipped across the line for any purpose whatever, for sale, or otherwise, into tick-free territory, which now embraces nine-tenths of the whole country.

There is no known method that will free any territory of ticks except that of dipping in the manner and with the material prescribed by the U. S. Department of Agriculture, which furnishes trained men to supervise the dipping of cattle, without charge. Under such trained supervision there is no danger of injury to cattle. The cost of the dipping vat for the neighborhood is estimated at from $40 to $50, and the cost of material used in preparing the bath is less than 5 cents a season for each head of cattle dipped. The United States authorities estimate in their official reports that the still infected parts of the South cost this section $50,000,000 annually.

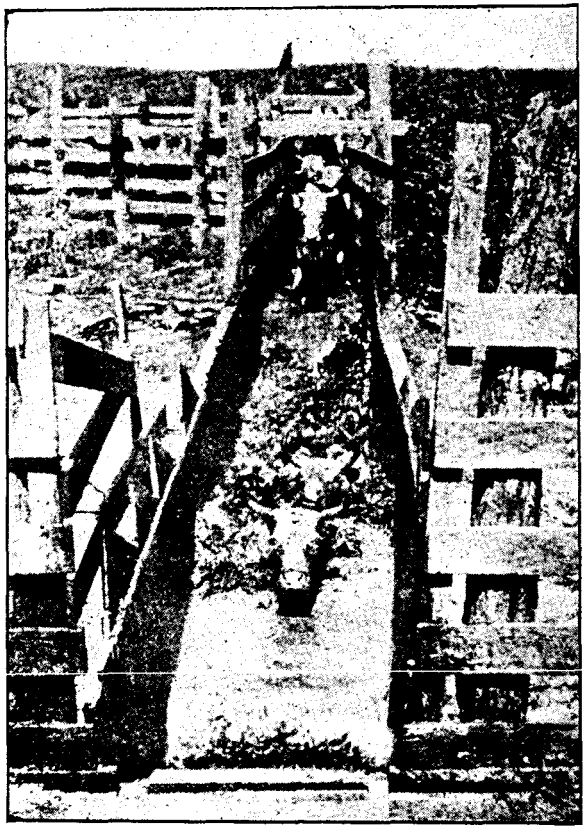
The work that has already been done will be in vain unless it is pushed to completion, for the Government reports show that each tick, as it drops off the animal when full of blood, is also full of eggs, of which it lays from 3,000 to 5,000 on the ground. These, when hatched, lay in the grass and weeds ready to board the first animal that comes along. The Government estimates that dipping makes even a tick-infested steer worth from $5 to $10 more. The effect of the tick pest upon the cows is still worse, as it reduces the flow of milk 42 per cent—a loss of $30 per cow per year. The above data is taken from the official reports issued by the United States Government, which has spent far more in this State for this purpose than the State itself.

The prosecution of the work, until the utter and final elimination of the pest is necessary, for if this destruction is stayed it will return and again occupy the territory which has been freed already at Government expense to the benefit to the whole country.



Map showing areas quarantined on account of tick fever and areas freed from ticks on December 1, 1920. Shaded portions indicate areas under quarantine; the heavy line shows boundary of infected area at beginning of tick eradication in 1906; white area inside heavy line indicates territory that has been freed from ticks and released from quarantine. California, a part of which was originally quarantined but has been free since 1916, is not shown on the map.

From 1906, when this coöperative work was first undertaken, to 1 December, 1920, a total of 510,091 square miles was released from Federal quarantine which had been established to control the situation, and in considerable additional area the work was well under way.



A Swim Through the Arsenical Dipping Vat and the Cattle Are Freed From Blood-sucking Ticks

In view of public policy evinced by Federal and State legislation, and the great benefit that has resulted, the Court should give a wise and liberal construction to the rules and regulations for the eradication prescribed under the statute by the boards of agriculture. The tick is to stock what the hookworm is to children. We think the above regulations are reasonable and well within the intent and purport of the statute. The presumption, if any, is that administrative regulations are valid. The burden is on the State to prove a violation thereof, but that is not denied, and is found as a fact.

Reversed.

CASES FILED WITHOUT WRITTEN OPINIONS

Tarkenton v. Liverman. (16)

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ACCEPTANCE. See Contracts, 13.

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1. *Action—Venue—Parties—Interest in Lands—Cities—Corporations—Nonresidents.*—A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of our statute, Rev., 419, requiring that the venue of such action shall be in the county wherein the land is situated, and where both plaintiff and defendant are corporations, nonresident of the State, an action brought in a different county from the situs of the property, wherein neither has property, nor conduct its business, the case falls within the intent and meaning of Rev., 423 and 424; and upon a proper motion aptly made, is removable to the Superior Court of the county wherein the land is situated, and the cause of action arose. *Lumber Co. v. Lumber Co.*, 12.

2. *Actions—Venue—Estates—Contingent Interests—Sales—Statutes—Dismissal—Contingencies.*—Where lands affected with contingent interests are ordered sold by the court under the provisions of Rev., 1590, the court will afford a complete remedy in the proceeding against one buying under its decree, upon motion in the cause, and where the purchaser does not comply with the terms of sale upon the ground of defective title, an independent action, brought in a different county to compel him to do so, will be dismissed by the court *ex mero motu*, and the independent action, having been brought in another county, cannot be treated as a motion in the original cause. This is especially true in proceedings of this character, where the court, under the provisions of the statute, directs the investment of the funds. Ch. 259, Laws 1919. *Semble*, under the facts of this case the purchaser would acquire a good title to the *locus in quo* upon paying the purchase price as the law directs. *Crawford v. Allen*, 245.

3. *Actions—Stay Bonds—Principal and Surety.*—The plaintiff may recover against the principal and surety on defendant's bond given to stay execution, in accordance with the express covenant required by the statute. *Barnhardt v. Drug Co.*, 436.

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1. *Appeal and Error—Inspection of Papers—Judgments—Orders—Finding of Facts—Presumptions—Statutes—Partnership.*—In an action by a partner for the dissolution of the partnership and accounting against the managing partner, charging him with fraud, it will be assumed on appeal from an order of the Superior Court, judge for an inspection and production of papers, etc., in the possession of the defendant, Rev., 1655, 1657, that the judge found such facts as were sufficient to support his ruling, in the absence of any written finding, and he was not requested by the appellant to find the facts. *Leroy v. Saliba*, 15.

2. *Same—Evidence—Fraud.*—There must be some evidence upon which the trial court bases its order for the inspection and production of papers, etc., in an action to dissolve a partnership, Rev., 1656, 1657; but allegations in an affidavit that the plaintiff had received certain checks from the managing partner of a firm, in which he was a partner, for his share of the partnership profits, which had been paid, and the contents were then unknown to him, and that they related to the merits of the action, are sufficient when there are allegations that the managing partner had committed fraud in the conduct of the partnership affairs and intended to depart from the State and remove his property and effects therefrom for the purpose of defrauding and defeating his creditors. *Ibid.*

3. *Appeal and Error—Exceptions—Brief—Rule of Court.*—The Court will dismiss the appellant's case when she fails to assign error as required by Rules 19, 20, and 21, and fails to file brief required by Rule 34. *In re Bailey*, 30.

4. *Appeal and Error—Objections and Exceptions—Letters—Contents—Records.*—Where the contents of letters introduced on the trial do not appear on appeal an exception thereto cannot be sustained on appeal. *Ibid.*

5. *Appeal and Error—Wills—Devisavit Vel Non—Instructions—Harmless Error.*—Where two paper-writings, each purporting to be a will, are, by consent, passed upon together on the trial of *devisavit vel non*, and

APPEAL AND ERROR—*Continued.*

neither one sustained, an exception to the charge that if both were properly executed, etc., the latter would prevail, becomes immaterial. *Ibid.*

6. *Appeal and Error—Justices' Courts—Supreme Courts—Docketing Case—Laches—Attorneys and Client—Statutes—Courts.*—Defendant appealed from a judgment of a justice of the peace rendered upon condition that plaintiff produce certain receipts, which he did in a few days, the appeal being conditioned upon the rendition of the judgment. The judgment was docketed in the Superior Court; nineteen days after the signing of the judgment, and eleven days after it was docketed in the Superior Court, a term of court was held for the county, and another several months thereafter; but the appeal had not then been docketed, and thereafter the plaintiff had execution issued, and defendant moved and obtained a writ of *recordari*, without notice: *Held*, the writ was improvidently granted, and plaintiff's motion to dismiss should have been granted. Rev., 1492. *Held further*, the defendant's laches, in failing to perfect his appeal, was personal to him, and he could not be relieved by imputing it to his attorney. *Bargain House v. Jefferson*, 32.

7. *Appeal and Error—Instructions—Objections and Exceptions—Record—Statutes.*—Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in apt time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Consolidated Statutes, secs. 643, 641, 640, 590; Rev., 591, 590, 554. *Paul v. Burton*, 45.

8. *Same—Appearance After Verdict—Pleadings—Judgments—Pro Confesso.*—Where one of the defendants in an action appears for the first time after a verdict adverse to himself alone, not having filed an answer, and specifically excepts to the charge of the court, he is entitled to have the trial judge pass upon his exceptions, and, upon their being overruled, to have them incorporated in his case on appeal to the Supreme Court, when he has perfected it according to law, and it is reversible error for the trial court to decree that the allegations of the complaint be taken *pro confesso* against him, and refuse to consider his exceptions to the charge, and confine him to his exceptions to the overruling his demurrer to the complaint and the overruling of his motion for judgment *non obstante veredicto*. *Ibid.*

9. *Same—Certiorari—Procedure.*—Where the trial court erroneously refuses to consider appellant's exceptions to the charge; and in refusing to permit them to be incorporated in the case on appeal, a writ of *certiorari* will issue from the Supreme Court, directing the trial judge to restate the case on appeal so as to set forth these exceptions, and so much of the charge as may be required to show their true significance, and enable the Supreme Court to properly pass on their merits. *Ibid.*

10. *Appeal and Error—Issue Set Aside—Fragmentary Appeal—Final Judgment.*—Where, in his discretion, the trial judge has set aside the verdict on a determinative issue of several issues submitted to the jury, and given the several parties lieve to amend the pleadings upon which

APPEAL AND ERROR—*Continued.*

to try the issuable matters, an appeal from his action is a fragmentary one, and not reviewable until final judgment has been obtained. *Thomas v. Carteret*, 109.

11. *Appeal and Error—Outlet to Lands—Adverse User—Evidence—Title—Damages—Prejudicial Error.*—Where the plaintiff's testimony tends to show title by sufficient adverse user to a way across defendant's land to his farm, it is reversible error for the trial judge to admit evidence in defendant's behalf as to the damages caused him by the location of this outlet, and that he had opened another for the plaintiff's use, these being collateral matters to the question of the title set up, and irrevelant, incompetent, and calculated to mislead the jury, to the plaintiff's prejudice. *Smith v. Jackson*, 115.

12. *Appeal and Error—Judgments—Fires — Damages — Evidence.*—When the trial judge has erroneously calculated the fire damage to plaintiff's land by multiplying the damage per acre, found by the verdict, the number of acres not being admitted nor found by the verdict, the question as to whether the judgment should have been based upon other evidence of a different acreage, without motion therefor, is not presented on appeal. *McRae v. R. R.*, 223.

13. *Appeal and Error—Harmless Error—Instructions—Expression of Opinion.*—An excerpt from the instructions of the court to the jury, in effect, that the one party had offered evidence on the issue to support his contentions, and the other, evidence "which he says" supports his contention, though objectionable as the expression of an opinion, will be regarded as harmless when, construing the charge as a whole, the jury must have correctly understood the law. *Neal v. Yates*, 266.

14. *Appeal and Error—Objections and Exceptions—Evidence—Pleadings—Several Causes of Action—Actions.*—Where, in an action to recover damages of a pullman company, the plaintiff alleges two causes of action, though in one section of the complaint, one as the defendant's ticket agent wrongfully refusing to sell her a lower reservation when he had it for sale at the time, and the other, that his conduct towards her then was wantonly rude and insulting, and there was evidence to sustain either one, a general motion to nonsuit directed to both causes of action, is properly denied. *Lanier v. Pullman Co.*, 407.

15. *Appeal and Error—Objections and Exceptions—Instructions.*—Where the charge of the court, generally objected to, requires the application of more than one principle of law, it will not be held for reversible error, on appeal, that one of them was erroneous if the other was not so. *Ibid.*

16. *Appeal and Error—Assignments of Error — Instructions — Objections and Exceptions.*—Assignments of error must be based upon an exception duly taken, and an exception to the charge, not appearing in the record on appeal, will not be considered. *Ibid.*

17. *Appeal and Error—Evidence—Superior Court—Discretion.*—The Supreme Court, on appeal, may not pass upon the weight or credibility of the evidence introduced on the trial of an action, and will not disturb the judgment appealed from where there is evidence to support it, except for errors of law under exceptions properly taken and presented. *Bernhardt v. Drug Co.*, 436.

APPEAL AND ERROR—*Continued.*

18. *Appeal and Error—Assignments of Error—Objections and Exceptions—Motions—Dismissal.*—An assignment of error cannot have the effect of creating or enlarging an exception taken on the trial, and in making them the appellant after deliberation only selects such of the exceptions taken upon the course of the trial as he then relies upon and desires to present to the Supreme Court, on appeal; and where there are no exceptions in the record as a basis for the assignments of error, a motion to affirm the judgment appealed from will be allowed. *Boyer v. Jarrell*, 479.

19. *Appeal and Error—Reference—Objections and Exceptions.*—On appeal from a judgment upon the report of a referee, the appellant must point out the alleged errors by specific exceptions to the findings of facts and conclusions of law, in apt time, and they will not be considered when taken for the first time in the Supreme Court on appeal. *Ibid.*

20. *Appeal and Error—Reference—Evidence.*—Findings of fact by the Superior Court judge upon the report of a referee are binding upon the Supreme Court on appeal, when supported by evidence. *Ibid.*

21. *Appeal and Error—Objections and Exceptions—Reference—Judgments.*—Exception on appeal that the trial judge did not consider the evidence in passing upon the exceptions to the report of the referee, cannot be considered when contradictory of the judgment stating he had done so. *Ibid.*

22. *Appeal and Error—Reference—Pleadings—Amendments — Findings.*—Exception of the action of the trial judge in striking out amendments to pleadings allowed by the referee becomes immaterial on appeal when the facts so alleged have been found adversely to the appellant, on supporting evidence. *Ibid.*

23. *Appeal and Error—Negligence—Objections and Exceptions—Instructions—Requests.*—Where an instruction to the jury upon the measure of damages recoverable for a negligent personal injury, resulting in a diminution of earning power, is not inherently erroneous, it will not be held as such on appeal for not being sufficiently explicit, in the absence of a correct request for special instruction stating the appellant's view. *Hill v. R. R.*, 490.

24. *Appeal and Error—Record—Findings—Judgments—Motions.*—In passing upon an appeal from the refusal of the Superior Court judge to set aside a judgment, his finding that the motion was solely based upon excusable neglect will preclude the further ground that the judgment was not regularly entered. *Shepherd v. Shepherd*, 494.

25. *Appeal and Error—Objections and Exceptions—Judgments—Motions—Irregular Judgments—Evidence—Findings.*—Exception to the refusal of the Superior Court judge to consider the evidence on a motion to set aside a judgment, relating to its having been irregularly entered, or to grant the motion on that ground, should be taken at that time, with request that the judge find the necessary facts. *Ibid.*

26. *Appeal and Error—Assignments of Error—Exceptions—Attorney and Client.*—It is necessary that assignments of error be based upon exceptions duly taken and in apt time, which it is the duty of appellant's attorneys to do, and an assignment of error not based upon an exception will not be considered on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

27. *Appeal and Error—Divorce—Courts—Contempt—Judgments—Orders—Evidence.*—Where there is no exception to the form of an order of court adjudging the defendant in contempt, or as for contempt in resisting a judgment, in an action wherein an absolute divorce has been granted the wife with the award to her of the children of the marriage, nor to the sufficiency of the findings to sustain the judgment, the action of the trial judge will not be disturbed on appeal when there is any evidence to support it. *Flack v. Flack*, 594.

28. *Appeal and Error—Findings—Depositions—Evidence.*—The findings of the trial judge that a witness, testifying by deposition, was sick and unable to attend court, and had been duly served with subpoena, are conclusive on appeal, where there is evidence to support them and the deposition was properly admitted in evidence. *McMahan v. Spruce Co.*, 637.

29. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objection to an alleged misstatement by the judge of the contention of a party should be made promptly in order to be available by exception on appeal. *Ibid.*

30. *Appeal and Error—Failure to Docket Appeal—Second Term—Dismissal—Motions—Rules of Court.*—The requirement of Supreme Court Rule 17, that the appellee may docket the certificate and, on motion, have the case dismissed, if not docketed by the appellant in time to be heard at the call of the district at the term of the Supreme Court next ensuing that of the trial, applies only to that term; and where the appellant has docketed his case after that term the case will, on motion, be dismissed at the following term of the Supreme Court (Rules 5 and 16), and the failure of the appellee to have previously moved to dismiss is not a waiver of his right. *Howard v. Speight*, 653.

31. *Appeal and Error—Docketing Transcript—Appeal Dismissed—Rules of Court—Dismissal.*—It is the personal duty of appellant to see that the transcript of his appeal is docketed seven days before beginning the call of the docket of the district in the Supreme Court to which it belongs, etc., Rule 5, which neglect of counsel or delay of the clerk of the Superior Court will not excuse; and no later time is given because two districts are heard in one week. *Carroll v. Mfg. Co.*, 660.

32. *Appeal and Error—Harmless Error—Evidence.*—The rejection of evidence having some tendency to show cordial relations between the testatrix and her son, is at most but harmless error when this relation is not controverted, and there is plenary evidence tending to establish it as a fact. *In re Morgan*, 666.

33. *Appeal and Error—Objections and Exceptions—Evidence—Motions—Nonsuit—Instructions.*—The question of the sufficiency of the evidence to sustain a verdict against the defendant in an action against a register of deeds for wrongfully issuing a marriage license, should be raised by a motion to nonsuit or a proper prayer for instruction, for it to be considered on appeal. *Burcham v. Wolfe*, 672.

34. *Appeal and Error—Objections and Exceptions—Instructions—Omissions—Special Requests.*—Exception that the court did not charge the jury in a particular way or omit to give a special instruction on the evidence must be the refusal to give a proper prayer therefor. *S. v. Willoughby*, 676.

APPEAL AND ERROR—*Continued.*

35. *Appeal and Error—Officers—Public Office—Removal from Office—Findings—Evidence—Statutes.*—An appeal from the judgment of the Superior Court judge that a prosecuting attorney be removed for "willful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of facts supported by evidence, Constitution, Art. VI, sec. 8; and the appeal is allowed by C. S., 638. *S. v. Hamme*, 684.

36. *Appeal and Error—Docketing—Dismissal—Rules of Court.*—An appeal to the Supreme Court from a judgment rendered prior to the commencement of a term thereof, must be docketed at the next succeeding term, or, on motion, it will be dismissed. Rule 5. *S. v. Ward*, 693.

37. *Appeal and Error—Objections and Exceptions—Evidence—Argument.*—An exception to evidence not taken until the case on appeal to the Supreme Court was served, will not be considered; as also to the course of the argument, if not taken in apt time. *Ibid.*

38. *Appeal and Error—Harmless Error—Evidence—Negligence—Automobiles.*—The statement of a witness that, in his opinion, the defendant tried for criminal negligence while driving an automobile, which has caused injury, on the street, to a pedestrian endeavoring to cross it, was unskillful in handling the automobile, if erroneously admitted, is harmless, when it appears from all the evidence in the case that this was indisputably the fact. *Semble*, the testimony of the witness in this case was competent as "a shorthand statement of a fact." *S. v. Gray*, 698.

39. *Appeal and Error—Witnesses—Experts—Courts—Findings.*—The findings of fact by the trial judge, upon evidence, as to whether a witness is an expert or not, is not reviewable on appeal. *Ibid.*

40. *Appeal and Error—Evidence—Matters of Law.*—Only errors of law can be considered on appeal to the Supreme Court, and the judgment of the Superior Court will not be disturbed when there is sufficient evidence to support the verdict, upon an exception relating to its weight and credibility. *S. v. Brewer*, 716.

41. *Appeal and Error—Record—Stenographer's Notes—Instructions—Constitutional Law.*—A certificate by a stenographer of his notes taken on the trial of a case, set out in the record, on appeal, is no part thereof, and its variance with the judge's charge, set out in the case settled on appeal, cannot affect it, for the judge, alone, under the provisions of our Constitution, can settle the case. *S. v. Shemwell*, 719.

42. *Appeal and Error—Objections and Exceptions—Brief—Assignments of Error.*—The appellant must set out and discuss in his brief the exceptions he relies on, and his request, in his brief, that the Supreme Court consider all the exceptions set out in the record is not a compliance with the rule. *S. v. Henderson*, 735.

APPEARANCE. See Appeal and Error, 8; Motions, 1; Courts, 17.

ARBITRATION.

1. *Arbitration—Notice—Evidence—Right of Party—Invalid Award.*—A party to an agreement to arbitrate a controversy wherein a third person shall be called in in case of disagreement of the two selected by the parties, is entitled to notice of the disagreement and the selection

ARBITRATION—*Continued.*

of the third person, and to introduce his evidence; and where he has been deprived of this right the award will be invalid. *Starr v. O'Quinn*, 92.

2. *Same—Trial by Jury.*—When an arbitration has been entered upon by the parties to a controversy, and the award arrived at is declared invalid by the court, a party thereto may not rightfully demand that the matter be referred to the arbitrators for their action, or complain of the trial by jury. *Ibid.*

3. *Same—Evidence—Declarations.*—A statement filed by a party before arbitrators as to the amount of his damages is but his own unsworn declaration or statement on a trial by jury, in the Superior Court, where the controversy is being tried after the award has been declared invalid, when offered as substantive evidence alone, and its admission as such is reversible error. *Ibid.*

ARBITRATION AND AWARD.

1. *Arbitration and Award—Arbitrators—Named in Alternative—Fraud.*—Where, under a writing agreeing that I., C., or N., go upon the land and locate and establish the dividing line in dispute between the parties, the submission to arbitrate is to any one of the three designated persons; and where one of them acts, going upon the land for the purpose, with the parties to the agreement, and with their acquiescence establishes the line, they are concluded by the award so made, in the absence of fraud, irregularity, or conduct upon the part of the arbitrator which will avoid the award. *Hemphill v. Gaither*, 604.

2. *Same—Burden of Proof—Evidence—Instructions.*—The burden of proof is on the defendant in the action to show fraud in an award set up in the complaint, and, upon conflicting evidence, a peremptory instruction thereon to answer the issue as to the plaintiff's being estopped in his favor, is reversible error. *Ibid.*

ARGUMENTS. See Appeal and Error, 37.

ARREST OF JUDGMENT.

Arrest of Judgment—Judgments—Indictment—Criminal Law.—The defect in an indictment must appear upon the face of the bill, and the objection that the proof did not conform thereto is not a ground for arresting the judgment. *S. v. Chambers*, 705.

ASSAULT. See Husband and Wife, 4.

ASSAULT WITH INTENT TO KILL. See Criminal Law, 15, 16.

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ASSIGNMENT OF ERROR. See Appeal and Error, 16, 18, 26.

ATTACHMENT. See Courts, 18.

1. *Attachment—Insolvent Corporations—Evidence—Fraud—Insolvency.*—Allegations in affidavits for attachment against an insolvent corporation's property, that executions had been issued against it, and that it had failed to make use of a small piece of its land, and not paid the taxes thereon; or that its president claimed this land, or its pro-

ATTACHMENT—*Continued.*

ceeds is insufficient upon the question of fraud of the corporation, for the granting of the warrant. *Bank v. Cotton Factory*, 128.

2. *Attachment—Libel and Slander—Slander—Injury to Person—Statutes.*—The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and will sustain a proceeding for an attachment within the intent and meaning of Rev., 728 (4), as an "injury to the person by ..... wrongful act." *Tisdale v. Eubanks*, 153.

3. *Same—History of Legislation.*—A history of the statute providing for the writ of attachment and the various amendments to the same. Code of 1868, sec. 197; Code of 1883, sec. 347; Laws of 1893, ch. 77, shows that the present statute is in full support of the above position, and objection that it is but a return to legislation existing under the Code of 1856, ch. 7, sec. 16, granting the writ for injuries only to "proper person and property," is untenable. *Webb v. Bowler*, 50 N. C., 362, cited, distinguished and applied. *Ibid.*

4. *Attachment—Funds—Ownership—Intervenors.*—It is erroneous for the trial judge to vacate an attachment regularly issued and levied on the funds in a resident bank claimed by the plaintiff to belong to its nonresident debtor, but paid upon a draft drawn to the order of a foreign bank, without having determined the issue as to the ownership of the funds attached, if the question had been properly raised by the interpleading of the foreign bank. *Patrick v. Baker*, 588.

5. *Same—Nonresidents—Bonds—Action.*—The court, under the facts in this case, having vacated an attachment on the funds in a local bank derived from the payment of a draft made payable to the order of a foreign bank, all being parties to the action, wherein attachment was levied on the funds alleged to have belonged to the other defendant in an action for breach of contract without the determination of the issue as to ownership of the funds, and having directed that the funds be paid to the foreign bank upon its giving bond: *Held*, should the issue arise, and be determined in the plaintiff's favor, and the funds paid as allowed by the judgment, the plaintiff has a right of action on the bond required to be given by the resident bank in lieu of the funds held by it, which were released. *Ibid.*

ATTORNEY AND CLIENT. See Appeal and Error, 6, 26; Divorce, 5, 1.

AUCTION. See Contracts, 9; Sales, 2.

AUTOMOBILES. See Employer and Employee, 9; Railroads, 2; Evidence, 17; Statutes, 4, 6; Taxation, 1; Appeal and Error, 38; Criminal Law, 6, 10.

AVOIDANCE. See Estates, 11.

AWARD. See Arbitration, 1.

BAGGAGE. See Carriers of Goods, 2; Carriers of Passengers, 2.

BAILMENT. See Carriers of Goods, 2.

BALLOT. See Constitutional Law, 2; Schools, 2.

BENEFICIARIES. See Wills, 12; Principal and Surety, 7.

BILLS AND NOTES. See Husband and Wife; Principal and Surety, 1, 2, 3.

1. *Bills and Notes—Lost Collateral—Trusts and Trustees—Right of Action—Judgments—Rights of Pledgor—Notes.*—Defendant gave its renewal notes to plaintiff for the purchase of shares of stock in a banking corporation, endorsed by its agent and with the consent of all parties concerned except the plaintiff. The shares were placed in the hands of a trustee to be delivered to the endorser, the defendant's agent, upon the payment of the note they secured. The shares of stock were misplaced or lost by the trustees, and it was *Held*, not to be required that the plaintiff produce the shares of stock before her right of action accrued on the past due note, she not being chargeable with, or in default for, the loss of the shares; and a judgment requiring the plaintiff to give sufficient indemnifying bond, both to the defendant and the bank, upon the payment by the defendant of the note and retaining the cause for the plaintiff to take such other steps as she may be advised upon the nonpayment of the note, is a proper one. *Powell v. Terminal Co.*, 17.

2. *Bills and Notes—Endorser—Admissions—Notice—Waiver—Burden of Proof—Instructions—Appeal and Error—Notes.*—The burden of proof is upon the plaintiff in his action against an endorser on a note to show both notice of dishonor or waiver thereof when this defense is relied upon, and an erroneous admission on the trial of the defendant's counsel, that the burden was on him to show want of notice, does not relieve the plaintiff of his burden of showing the defendant's waiver, and an instruction to the jury that placed the burden on defendant to show both the lack of notice and its waiver, is reversible error. *Exchange Co. v. Bonner*, 20.

3. *Bills and Notes—Negotiable Instruments — Covenants — Equities — Statutes.*—The character of a promissory note in the hands of a holder in due course will not be destroyed or impaired by the mere statement thereon of an executory contract on the part of the payer growing out of the transaction in which it is given, when it otherwise complies with the requirements of paper of that class; and where the instrument, given for a horse, otherwise complies with the requirements of negotiability, a certain statement of warranty of the horse therein will not admit of the application of any equities existing between the original parties when the instrument is in the hands of an innocent purchaser for value in due course; and the principle as to whether such person were put upon inquiry of the equity of the matter by the statement he had made upon the face of the instrument has no application to transactions of this character. Rev., 2153. *Critcher v. Ballard*, 111.

4. *Bills and Notes—Negotiable Instruments—Title—Endorsement.*—In order to a proper negotiation of a commercial instrument payable to order, so as to shut off equities and defenses existing between the original parties, it must be endorsed by the holder, or by some one for him duly authorized, by writing the name of the holder on the instrument itself, usually on the back thereof, or on some paper physically attached thereto at the time the endorsement was made. Rev., 2178, 2198, 2206, 2212. *Ibid.*

5. *Same—Equity.*—Where the title to a negotiable instrument, payable to certain person, or order, has not been transferred to a purchaser, by endorsement, the latter has acquired only an equity to have the trans-

BILLS AND NOTES—*Continued.*

action completed by endorsement, and until then he takes subject to the equities existing between the original parties. *Ibid.*

6. *Bills and Notes—Notes—Negotiable Instruments—Fraud—Burden of Proof—Evidence.*—Evidence that a note sued on was not to be delivered until certain other signatures were placed thereon, which were not obtained, and the property for which the note was given had never been delivered to the signers, and that the person thus negotiating for the sale had left the State, and the plaintiffs claimed to be innocent purchasers for value, in due course, etc., is sufficient to sustain an affirmative finding upon the issue of fraud, and to put upon the plaintiff the burden of proving that he had purchased in due course without notice of the defect in the title of the notes. *Dennison v. Spivey*, 220.

7. *Same, Infirmity of Instrument—Notice—Rule of the Prudent Man.*—When the plaintiff claims to be an innocent purchaser for value of the note sued on, by endorsement, before maturity, and without notice of fraud between the original parties, evidence that he lived in another State, and asked no questions of the original payee, living near him. and had made no demands on them, is sufficient to sustain a verdict against him upon the question as to whether he was a purchaser without notice of the infirmity of the instrument, or purchased under circumstances so suspicious as to put a man of reasonable prudence upon inquiry, and affect him with notice. *Ibid.*

8. *Bills and Notes—Negotiable Instruments—Actions—Defenses—Payment—Evidence—Judgments—Appeal and Error—Issues—Verdict.*—There were allegations in the complaint, in an action upon a note, that the plaintiff was a holder for value by endorsement, before maturity; and the answer denied the execution of the note, and alleged that the defendant had executed a prior note to the same payee in a different amount which he had paid, on which defense the evidence was excluded. There were only two issues, sumitted without exception, one as to the execution of the note and the other as to the validity of its endorsement to plaintiff, under agreement between parties, that if the jury found the note sued on had been executed by defendant they should find for the plaintiff in that amount: *Held*, no error in the judgment accordingly rendered in plaintiff's favor upon an affirmative finding of the jury on the issue as to whether defendant had executed the note sued on. *Bank v. Harris*, 238.

BONDS. See Estates, 6; Courts, 16; Actions, 3; Municipal Corporations, 12, 13, 14, 15, 16; Constitutional Law, 6, 13; 15; Usury, 1; Principal and Surety, 7; Attachment, 5; Official Bonds, 1.

BOUNDARIES. See Deeds and Conveyances, 5; Surveys, 1.

BREACH. See Contracts, 3, 4, 13; Courts, 12; Evidence, 1; Instructions, 1; Vendor and Purchaser, 1, 2; Estates, 11; Removal of Causes, 5.

BRIEFS. See Appeal and Error, 3, 42.

BURDEN OF PROOF. See Bills and Notes, 2, 6; Fires, 1; Municipal Corporations, 3; Railroads, 11; Judgments, 10; Mortgages, 11; Arbitration and Award, 2; Subornation of Perjury, 4.

CANCELLATION. See Wills, 19.

CARRIERS OF GOODS.

1. *Carriers of Goods—Express Companies—Special Damages—Notice—Tobacco Flues—Damages.*—An express company receiving tobacco flues so crated that the piping is exposed to view, and may be seen and understood as being only for the purpose of curing tobacco, and in a section of country where tobacco is largely grown and cured, and in the tobacco curing season, is evidence of the special circumstances that the consignee's tobacco will be injured in its curing by the negligent delay in the transportation by the carrier, which the jury may consider in passing upon the amount of damages recoverable in the consignee's action. *Thompson v. Express Co.*, 42.

2. *Carriers of Goods—Baggage—Gratuitous Bailee—Negligence—Railroads.*—Where baggage through no dereliction of a carrier fails to accompany the passenger and is forwarded by it at a later date without charge, the contract is one of bailment for the exclusive benefit of the bailor, and the obligation of the carrier is that of a gratuitous bailee, depending only upon its exercise of the care of a person of ordinary prudence under the circumstances. *Midgett v. Transportation Co.*, 71.

3. *Same—Instructions—Appeal and Error.*—Where the carrier is only held to the liability of a gratuitous bailee in transporting a trunk for its passenger, proof of delivery to the carrier of the trunk on the day following that of his passage, and the failure of the carrier to deliver, is evidence of its negligence sufficient to take the case to the jury, requiring an instruction as to the law relating to a gratuitous bailment and making a direction of an affirmative verdict on the issue of negligence reversible error. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Contracts—Principal and Agent—Tort of Agent—Pullman Companies.*—The act of a ticket agent of a Pullman company in tossing a railroad ticket back in the face of a woman endeavoring to get a reservation on its car, in a rude and insolent manner, renders the company liable for an assault by its agent sufficient to sustain an action for damages against it, under implication from the contract of carriage that the passenger will receive proper treatment by the carrier's employees, and reasonable protection from insult or injury. *Lanier v. Pullman Co.*, 407.

2. *Carriers of Passengers—Baggage—Government Control—Director General—Damages—Rules—Railroads.*—The rule of the Director General limiting the amount of the recovery for lost baggage, etc., to one hundred dollars, both in intrastate and interstate commerce, on railroads under Government control, is valid and enforceable. *Powell v. Hines*, 665.

CATTLE. See Health, 1.

CAUSES OF ACTION. See Appeal and Error, 14.

CAUSA MORTIS. See Gifts, 1.

CAVEAT. See Limitation of Actions, 1; Pleadings, 3; Wills, 10, 15, 16, 17, 18, 19, 20.

CAVEAT EMPTOR. See Lessor and Lessee, 1.

CERTIORARI. See Appeal and Error, 9.

CHARACTER. See Homicide, 11, 14.

CHARTER. See Railroads, 4.

CHATTELS. See Usury, 1.

CHECKS. See Statute of Frauds, 1.

CHILDREN. See Wills, 9, 22; Estates, 13; Criminal Law, 10.

CITIES AND TOWNS. See Municipal Corporations, 2, 3, 4, 6, 7, 9, 10, 14, 17, 18, 19; Railroads, 4; Negligence, 4; Explosives, 2; Actions, 1.

CLERKS OF COURTS. See Courts, 2; Summons, 2.

Clerks of Court — Processioning—Transfer to Term—Entry — Order.— An entry on the docket by the clerk that proceedings to procession land had been transfered for trial, in term, in the Superior Court, is sufficient order to transfer it. *Exum v. Chase*, 95.

CLOUD ON TITLE. See Judgments, 6.

COLLATERAL. See Bills and Notes, 1; Judgments, 7.

COLLATERAL ATTACK. See Wills, 6; Judgments, 6.

COLLATERAL CONTROVERSIES. See Statute of Frauds, 2.

COLLATERAL MATTERS. See Contracts, 6.

COLLISION. See Railroads, 2, 6, 7, 8.

COMMON LAW. See Husband and Wife, 1.

COMMUNICATIONS. See Libel and Slander, 1, 2.

COMPROMISE. See Evidence, 16.

CONDEMNATION. See Municipal Corporations, 2.

CONDITIONS. See Insurance, Life, 2; Judgments, 19; Deeds and Conveyances, 2; Estates, 8, 11.

CONFESSION AND AVOIDANCE. See Subornation of Perjury, 4.

CONGRESS. See Intoxicating Liquors, 5.

CONSENT. See Wills, 5; Judgments, 7, 10, 11, 12; Courts, 15; Parties, 2.

CONSIDERATION. See Contracts, 9; Mortgages, 7; Waiver, 2.

CONSOLIDATED STATUTES. (See Revisal.)

SEC.

441(9). This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. *Chatham v. Realty Co.*, 500.

449. Judgment assigned absolutely or in trust, estops parties, privies, or *cestui que* trustees, 7. *Chatham v. Realty Co.*, 500.

468, 469. These sections do not apply to the courts taking jurisdiction of transitory causes of action. *McGovern v. R. R.*, 219.

CONSOLIDATED STATUTES—*Continued.*

SEC.

590, 640, 641, 643. Errors in the charge and refusal to give special instructions do not require formal objections when appellants exceptions properly appear in the record on appeal. *Paul v. Burton*, 45.

608. A consent degree for recovery of land, has the effect of the conveyance of the legal estate, as between the parties. *Morris v. Ferguson*, 484.

638. Proceedings in Superior Court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. *S. v. Hamme*, 684.

854, 855. Recovery not limited to amount of injunction bond sued out with malice in and without probable cause, and injured party may elect to sue for excess of damages by independent action. *Shute v. Shute*, 386.

938. A parol trust cannot be established in favor of grantor in a deed; nor can deed be converted into a mortgage without allegation and proof that defeasance clause was omitted by reason of ignorance, fraud, mistake, or undue influence. *Chilton v. Smith*, 472.

1436. A nonresident plaintiff may maintain action against initial and nonresident carrier, the cause being transitory. *McGovern v. R. R.*, 219.

1661. In action absolute divorce, it is only necessary to allege residence in affidavit. *Williams v. Williams*, 273.

1668, 1664. Where consent judgment in action for divorce, a mensa, operates as a gift to wife of an estate in husband's land, the courts awarding custody of children does not affect it, and writ of possession may issue. *Morris v. Patterson*, 484.

2529. Consent judgment in action for divorce, *a mensa*, giving wife a life estate in husbands lands, is valid as a gift. *Morris v. Patterson*, 484.

2208. The proceedings under this section are of a civil nature for the public good, and to not require an issue for the jury; an appeal from Superior Court, the question is one of law or legal inference if justified by the facts found upon sufficient evidence. *S. v. Hamme*, 684.

3208. Admissions by a public officer that he induced another to violate a criminal statute, is sufficient to remove him from office, whatever his intent, and he may not complain that it was not according to the allegations of the petition. *S. v. Hamme*, 684.

4640. Under an indictment for assault with a deadly weapon with intent to kill, a verdict of a less offense is permissible. *S. v. Shemwell*, 718.

4688(3), 4873. The regulations of our quarantine law for eradication of the tick disease for cattle, are reasonable and valid. *S. v. Hodges*, 751.

5626. County Commissioners may establish school districts regardless of county lines and the majority vote in the entire new district, embracing old districts, will control the result. *Riddle v. Cumberland*, 321.

5979. Our Constitution gives the voter the right to declare his choice, openly, if he so desires, or have the judge of elections deposit it for him. *Jenkins v. State Board of Elections*, 169.

CONSOLIDATED STATUTES—*Continued.*

ART.
VIII, ch. 95. There being no constitutional restrictions, the enactment of absentee voters law is constitutional and gives ample protection against fraud. *Ibid.*

VIII, ch. 95. An absentee voter offers to vote when he sends in his ballot *as the statute requires. Ibid.*

CONSTITUTION, STATE.

ART.
I, secs. 13, 2. Trial in Superior Court on appeal from justice's court is *de novo*, giving defendant the right to jury trial, and without this the former court may not affirm justice's judgment taxing defendant with costs. *S. v. Pasley*, 695.

I, sec. 7. An act relating to the political divisions of a county allowing them to sell bonds at less than par, does not contravene this article. *Kornegay v. Goldsboro*, 442.

I, sec. 19. Removal of public officer for willful misconduct, etc., in office, does not require an issue for the jury, and in this case the prosecuting attorney was removable on his admissions. *S. v. Hamme*, 684.

IV, sec. 27. Justices' jurisdiction over matters in contract is not disturbed by element of false warranty or deceit or upon the theory that it sounds in tort. *Newell v. Bailey*, 432.

IV, sec. 27. Justice courts without jurisdiction in possessory action of ejectment when title is involved, and should be dismissed in Superior Court, on appeal. *Hargrove v. Cox*, 360.

VI, secs. 2, 3, 6. The absentee voters law, Art. 8, ch. 95, as amended by Laws of 1919 is not in contravention of these provisions, the Constitution and the elector offers to vote when he sends in his sealed ballot. *Jenkins v. Board of Elections*, 169.

VI, sec. 6. Choice is given the elector to deposit his ballot secretly or declare his choice openly when depositing it, or to have the registrar or a judge of election deposit it for him. *Jenkins v. Board of Elections*, 169.

VI, sec. 8. A prosecuting attorney is removable from office as a matter of law or legal inferrence upon findings that of his willful misconduct or maladministration in office, supported by evidence. *S. v. Hamme*, 684.

VII, VIII. Art. VII relates to the establishment of school district, and Art. VIII to other corporations and school districts may be established by a special legislative act. *Dickson v. Brewer*, 403.

VIII, sec. 1, construed with the other related points of the Constitution leaves the legislature discretionary powers to enact special laws to meet the requirements of municipal corporations, with certain specified restrictions. *Kornegay v. Goldsboro*, 442.

VIII, sec. 1. This section refers to private corporations and not to public or *quasi*-public corporations, or municipal corporations. *Kornegay v. Goldsboro*, 441.

CONSTITUTIONAL LAW. See Schools, 1; Appeal and Error, 41; Evidence, 8; Statutes, 1; Health, 1; Intoxicating Liquors, 5; Officers, 2; Criminal Law, 5.

1. *Constitutional Law—Courts—Void Statutes.*—Legislative enactments are presumed to be constitutional, and for the courts to declare them otherwise the statutes should plainly conflict with same constitutional provision; and the court should exercise its power to declare a statute unconstitutional with extreme caution, resolving every doubt in favor of the statute. *Jenkins v. Board of Elections*, 169.

2. *Constitutional Law—Statutes—Absentee Voters Law—Elections.*—There being no provision in the Federal Constitution restricting the power of the State Legislature to enact statutes on the subject, our absentee voters law, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, known as the absentee voters law, are valid unless in contravention of the Constitution of our State. *Ibid.*

3. *Same—Elections—Secret Ballots—Choice of Elector.*—The provisions of our State Constitution, Art. VI, sec. 6, making the distinction that the elector shall vote by ballot, and an election by the General Assembly shall be *viva voce*, gives under our statute, the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. Consolidated Statutes, 5979. *Ibid.*

4. *Same—Fraud.*—Our statutes, Art. 8, ch. 95, Consolidated Statutes, as amended by ch. 322, Public Laws of 1919, give ample protection against fraud, by requiring that the absent voter must have been lawfully registered and entitled to vote, and supplying him when physically unable to attend, etc., with a blank to be sealed in an envelope, to be sent to and held by the registrar until three o'clock of the day of election, and cast for the absent voter by the registrar, subject to the usual challenge, as if the voter himself had been present; and the statutes are not void as being in contravention of our State Constitution, Art. VI, secs. 2, 3, and 6. *Ibid.*

5. *Constitutional Law—Absentee Voters Law—Offer to Vote—Statutes—Elections.*—The provisions of Art. VI, sec. 2, of our State Constitution, requiring that the voters at an election shall have resided in the State for two years, in the county 6 months, and in the precinct, ward, or other election district, in which he offers to vote, 4 months next preceding the election; and of sec. 3 of the same article, that every person offering to vote shall be at the time a legally registered voter, does not require that the elector shall cast his vote in person, and under our absentee voters law, he complies with the constitutional provisions that he shall offer to vote, when he transmits his vote to the registrar to be cast for him in accordance with the methods prescribed by the statutes. Consolidated Statutes, Art. 8, ch. 95, as amended by ch. 322, Public Laws of 1919. *Ibid.*

6. *Constitutional Law—Municipal Corporations—Corporations—Special Acts—Bonds—Taxation—Trustees.*—The establishing a school district relates to public municipal corporations, which may be done by special legislative enactment under Art. VII of our Constitution, entitled "Municipal Corporations," and it is not prohibited by Art. VIII thereof, relating to "corporations other than municipal"; and a

CONSTITUTIONAL LAW—*Continued.*

special act creating a school district or amending an existing one, providing for the election of trustees to manage its affairs, and for bonds and taxation relating thereto, is not in contravention of our Constitution, when properly passed upon an "aye" or "no" vote. *Dickson v. Brewer*, 403.

7. *Constitutional Law—Defenses—Judgments.*—The defense of a constitutional right comes too late, for the first time after judgment rendered, and especially so when it has not been properly presented either by the request for the submission of an issue, or for an instruction. *Lanier v. Pullman Co.*, 407.

8. *Constitutional Law—Amendments—Municipal Corporations—General Laws.*—Sec. 1, Art. VIII, of our State Constitution, requiring that the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending their charters, except charitable, etc., corporations, refers to private or business corporations, and not to public or *quasi*-public corporations acting as governmental agencies, such as cities, counties, towns, and the like. *Kornegay v. Goldsboro*, 441.

9. *Same—Statutes.*—In the interpretation that sec. 1, Art. VIII, of our Constitution refers to private or business corporations, and not to municipal corporations as governmental agencies, the section should be construed in connection with sec. 2, dealing with "dues from corporations"; sec. 3; defining corporations as including "associations and joint stock companies," and it should be noted that if sec. 4 (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless. *Ibid.*

10. *Same—Special Acts—Counties.*—An act which relates to all municipal corporations of a county, including cities, towns, townships, and school districts, is not a "special act" within the intent and meaning of sec. 1, Art. VIII, of our State Constitution. *Ibid.*

11. *Same—Local and Private Acts.*—Construing sec. 1, Art. VIII, of our Constitution, in connection with the amendments of 1916, and the related subject-matters in sec. 2, dues from corporations, sec. 3, defining corporations as joint stock companies, and sec. 4, that its subject-matter shall be legislated upon by general laws, excluding municipal corporations from such positive inhibition, except changing the names of cities, incorporated towns, etc.: *Held*, the legislative intent was to leave it to the discretion of the Legislature to enact special acts as the needs of municipal corporations may require, with the reservation as to changing the names; and the positive restriction as to "local, private, or special acts," applies to business corporations. *Ibid.*

12. *Constitutional Laws—Statutes—Repealing Acts—Legislative Opinion.*—While the preamble to the Municipal Finance Act of 1917 evidences the opinion that the provisions of the amendments to the Constitution adopted at the election of 1916 was mandatory as to a general law affecting municipal corporations or governmental agencies, this preamble was repealed by the act of 1919, showing that the later Legislature construed the amendment as applying only to private or business corporations, with the exception stated, and the opinion of the Legislature may be considered by the courts in passing upon the meaning of the Constitution. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

13. *Constitutional Law—Local Statutes—Counties—Bonds—Special Privileges.*—A special enactment applying to the municipal or governmental agencies within a county allowing them to sell their bonds at less than par, in an emergency, is not in conflict with sec. 7, Art. I, as allowing special privileges under a general statute requiring such corporations not to sell their bonds at less than par. *Ibid.*

14. *Constitutional Law—Statutes—Courts.*—The courts may not declare an act void except upon constitutional grounds. *Ibid.*

15. *Constitutional Law—Discrimination—Municipal Corporations—Bonds—Local Laws—General Laws.*—It is not objectionable, or in contravention of our State Constitution as discriminatory, for the Legislature, owing to unusual or compelling local conditions, to permit municipalities within the limits of a certain county to sell their bonds for less than par when the same privilege is not granted in other counties. *Ibid.*

16. *Constitutional Law—Statutes—Judgments.*—Where a statute is susceptible of more than one construction, that which will reconcile it to the organic law will be adopted; and, *Semble*, in this case a different construction put upon ch. 194, Laws of 1919, than that the judgment creditor will not lose the right to execution thereunder, if after refusing to make the assignment of the judgment he is afterwards willing to comply, and offers to do so when the status of the parties remain unchanged, is contrary to the construction guaranteeing protection to the rights of existing judgment creditors.—*Davie v. Sprinkle*, 580.

17. *Same—Remedy—Adequate Relief—Statutes.*—While a judgment is a feature of the remedy sought in an action, and is to some extent subject to legislative regulation, the rights accruing thereunder cannot be entirely withdrawn or so impaired or interfered with as to leave the owner without adequate relief, as in this case, to destroy the issuing of an execution before the status of the parties is changed, or their rights changed or lost. Ch. 194, Laws of 1919. *Ibid.*

CONTEMPT. See Courts, 5, 21; Appeal and Error, 27.

CONTINGENT REMAINDERS. See Estates, 3.

CONTINGENCIES. See Actions, 2; Estates, 2, 4, 5, 6, 7; Wills, 18.

CONTINUANCE. See Courts, 23.

CONTRACTS. See Mortgages, 7, 10; Judgments, 7; Principal and Surety, 8; Carriers of Passengers, 1; Pleadings, 1, 4; Novation, 1; Principal and Agent, 4; Vendor and Purchaser, 1, 2; Statute of Frauds, 1, 3; Estates, 11; Deeds and Conveyances, 4; Courts, 12; Employer and Employee, 7; Evidence, 1, 2, 4; Waiver, 1, 2; Instructions, 1; Removal of Causes, 5; Insurance, Life, 3; Landlord and Tenant, 1.

1. *Contracts—Customs—Evidence—Presumptions — Timber — Sawmills — Lumber—Slabs.*—A lawful and existing business custom or usage, clearly established, concerning the subject-matter of a contract, may be received in evidence to explain ambiguities therein, or to add stipulations about which the contract is silent, and where such a custom is known to the parties, or its existence is so universal and prevailing that knowledge will be imparted, the parties will be presumed to have

CONTRACTS—*Continued.*

contracted in reference to it, unless excluded by the express terms of the agreement between them. *Cohoon v. Harrell*, 39.

2. *Same.*—A parole contract of purchase for timber specified that the purchaser was to cut the timber from the vendor's land, and to pay the latter, the plaintiff in this action, a certain price per thousand feet when sawed into lumber; that the purchaser had the timber sawed at the defendant's mill, who used or sold the slabs, and the plaintiff sues to recover them or their value. There was nothing said either in the plaintiff's contract with the purchaser or the latter's contract with the defendant about the disposition to be made of the slabs, and there was an established custom in this locality that they should belong to the mill sawing the logs: *Held*, it appeared from the contract between the plaintiff and the purchaser that the timber was to be sawed at some mill, and the defendant was entitled to the slabs under the prevailing custom. *Ibid.*

3. *Contracts—Breach—Options—Measure of Damages—Crops.*—Plaintiff sued to recover damages for breach of contract, alleging failure of defendant to furnish the money to take up an option on lands expiring at a certain date, with a further agreement to sell the land and pay the plaintiff one-half the profits less one-half the expense of sale, and to furnish the money for the cultivation of crops for a year under plaintiff's management with a division of the profits on the crops: *Held*, upon establishing the contract, and defendant's breach, the measure of plaintiff's damage is one-half the profits which would have been made upon a resale of the property in the exercise of a reasonable care and judgment, and one-half of the loss sustained for the failure to make the crops which might naturally be supposed to have followed its violation, certain both in its nature and in respect to the cause. *Newby v. Realty Co.*, 51.

4. *Same—Instructions—Appeal and Error.*—Where the measure of damages for a breach of contract of the defendant to take up an option at a certain date, is such as would arise from profits prevented in the resale of the land, at a future date, and also from crops to be raised on the land during a certain year, etc., it is reversible error for the judge to charge the jury that it would be the difference between the purchase price in the option and the market value of the land at the expiration period thereof, as such was not within the contemplation of the parties, or within the purview of the contract. *Ibid.*

5. *Contracts—Breach—Options—Prospective Profits—Crops—Measure of Damages.*—Where the recovery of damages in an action depends upon the breach of defendant's agreement to take up plaintiff's option on lands before its expiration, and the profit that could have been made thereon by reselling the land, the market value of the land and the contemplated sales is material but not controlling, and the circumstances, such as the size of the land, the opportunity to secure purchasers, etc., and the condition of the money market, etc., may be considered. *Ibid.*

6. *Contracts, Written—Evidence—Parol—Collateral Matters.*—The rule excluding parol evidence as to the contents of a written contract does not apply when the contract is merely collateral to the issue, and its contents is not directly involved therein, and is not the subject-matter in dispute. *Davis v. Shipbuilding Co.*, 75.

CONTRACTS—*Continued.*

7. *Contracts—Novation—Substitution of Paymaster—Agreements—Evidence—Implied Contracts.*—A contract may be discharged by agreeing to the substitution of a new party in the place of one of the original ones, although the terms of the agreement otherwise remain the same; and such assent may be implied or evidenced by circumstances and by the conduct of the parties. *Hamilton v. Benton*, 79.

8. *Contracts, Written—Parol Evidence—Vendor and Purchaser—Damages—Counterclaim—Principal and Agent.*—The defendant sold fertilizer as plaintiff's agent under a written contract containing the statement that no conflicting verbal promise would be recognized, and that no agreement would be valid and binding unless countersigned by an officer of the plaintiff corporation. The action is to recover upon notes given for the sale of the fertilizer: *Held*, there was not sufficient evidence to sustain defendant's counterclaim for damages for failure of plaintiff to ship a carload of fertilizer for his own use subsequently ordered, which the plaintiff promptly declined, and of which the plaintiff's agent had said that he would see that the defendant would get it. *Guano Co. v. Bryant*, 96.

9. *Contracts—Options—Sales—Commissions—Auction Sales—Consideration—Vendor and Purchaser.*—Plaintiff took an option on defendant's entire tract of land at a fixed minimum price, and agreed with real estate agents that they would divide it into lots to be sold at auction within the option period on commission to the selling agents, and thereafter contracted with the defendant that plaintiff was to have a certain sum in cash and a certain allowance on any lots he himself should purchase at the agreed sale. He bid in one of these lots, and the sale as to the others failed for lack of bidders. The plaintiff was not ready, able, and willing to comply with his bid: *Held*, plaintiff's compensation was conditioned by the terms of the contract, upon the success of the sale of all the lots in the entire subdivided tract to be taken from the proceeds of sale and not in consideration of his release of his option within the stated period, and he cannot recover in his action. *Dunning v. Powell*, 100.

10. *Contract—Option—Description of Land—Evidence—Identification—Equity—Specific Performance.*—An option to sell the owner's only farm for a certain price, within a specified time upon the payment of the sum named, sufficiently describes the land to admit of parol evidence of identification of the subject-matter of the contract, in an action for specific performance by the purchaser. *Sessoms v. Bazemore*, 102.

11. *Contracts—Deeds and Conveyances—Expressions of Parties—Ambiguity—Evidence.*—The designation of the character of a written contract, as therein expressed by the parties, may be received as evidence thereof in case of ambiguity permitting an interpretation of the instrument. *Lewis v. Nunn*, 159.

12. *Contracts, Written—Evidence—Parol—Rebuttal—Equity—Estoppel in Pais.*—Parol evidence is admissible, in defense to an action for specific performance of a written contract to convey land, that after the execution of the contract sued on, the parties had agreed that a survey of the lands should be made in two weeks, and the purchase money then paid, and in default thereof the plaintiff should lose all his rights, under the principles that parties to a written contract may

CONTRACTS—*Continued.*

rescind it by parol or abandon it by matters *in pais;* and that, in equity, such testimony may rebut, but not raise a suit for specific performance. *Thompson v. Clapp*, 247.

13. *Contracts—Offer—Acceptance—Breach—Damages—Counterclaim.*—The acceptance of an offer must be unequivocal to make a contract, so that the minds of the contracting parties may agree upon the subject; and where three carloads of lumber are ordered, and the seller replies, "We will ship you one carload within the next ten days and possibly three," it is not sufficiently definite to establish a contract for the three carloads, or to sustain a counterclaim for damages for the failure of the seller to ship more than one of them. *Wilson v. Lumber Co.*, 271.

14. *Contracts—Sale of Lands—Price Per Acre—Purchase Price.*—Defendant's contract to sell about 204 acres of land known as a certain farm, adjoining named owners and others, at a certain price per acre, is a sale by the acre, and plaintiff is entitled to a rebate, or a return of the amount he has overpaid on account of less acreage than that specified in the contract. *Duffy v. Phipps*, 313.

15. *Same—Deeds and Conveyances—Merger—Pleadings—Demurrer.*—A contract for the sale of about 204 acres of land at a certain price per acre does not merge in a deed given for the tract specifying 197 acres, in assumed execution of the contract, and the plaintiff may recover of the defendant for the shortage of acres ascertained; and a demurrer to the complaint with these allegations is bad. *Ibid.*

16. *Contracts—Debtor and Creditor—Mortgages—Purchaser—Assumption of Debt—Actions—Parties.*—Under the present equitable doctrine, the mortgagee may directly sue the grantee of the mortgagor owing the debt, who has assumed the debt for a consideration, without joining the mortgagor in the action, or first foreclosing the mortgage and applying the proceeds of the sale to the debt, upon the principle that one for whose benefit a promise had been made to another upon a consideration may maintain an action upon the promise, though not a party or privy to the contract. *Rector v. Lyda*, 577.

17. *Contracts—Negligence—Release—Infants—Evidence.*—Where a release has been obtained from an employee, discharging his employer from liability for a personal injury, alleged to have been caused by negligence, a family record containing the ages of employees, including that of the plaintiff, showing that he was a minor at the time of signing the release, is competent in corroboration of other evidence to the same effect upon the question of the validity of the release. *McMahan v. Spruce Co.*, 638.

18. *Contracts—Negligence—Release—Fraud—Evidence—Employer and Employee—Master and Servant.*—Upon allegations of fraud in the procurement of a release from damages for a personal injury resulting from malpractice of a physician in setting a broken arm of defendant's employee, and for which the defendant is responsible, evidence that the defendant, and the physician employed by him, misrepresented the condition and effect of the injury and its probable consequences, which was calculated to and did mislead the plaintiff in taking a small sum of money in giving a release, altogether disproportioned to any reasonably adequate sum, is sufficient to be considered upon the issue as to the validity of the release. *Ibid.*

CONTRACTS—*Continued.*

19. *Same—Physicians and Surgeons—Malpractice.*—Where the employer is responsible in damages for malpractice of his physician in charge of an injured employee, and there is evidence that he afterwards had called in another physician, who properly treated the case, recovery can only be had for the injury and damages occasioned by the malpractice of the first physician; and where the judge clearly and properly so charged the jury, and the jury has so confined the damages, his reference to the second physician called in is not prejudicial, but harmless. *Ibid.*

20. *Contracts, Written—Parol Evidence—Landlord and Tenant—Leases.*—Where there is a written lease between the landlord and tenant and under a separate and distinct agreement the latter has built a barn on the lands for the former, parol evidence of the agreement to bubild the barn is competent. *Bunn v. Wall*, 662.

CONTRIBUTORY CAUSES. See Negligence, 12.

CONTRIBUTORY NEGLIGENCE. See Employer and Employee, 5; Railroads, 6, 7, 10, 14; Issues, 2; Instructions, 7.

CONTROVERSY WITHOUT ACTION.

1. *Controversy Without Action—Statutes—Interrogatories.*—The effect of a submission of a controversy without action on a case agreed, Rev., 803, to dispense with the formalities of a summons, complaint, and answer, and to submit the case to the court for decision; and no right is conferred on the parties to propound to the court interrogatories upon the matters in dispute between them. *Herring v. Herring*, 165.

2. *Same—Wills—Courts—Equity—Widow's Dissent.*—Courts of equity have no general jurisdiction of the constructions of wills, and will not entertain actions or proceedings merely for the purpose of settling disputes between legatees and devisees; and this is especially so when the widow's right to dissent is reserved, and the right thus reserved in her to destroy the effect of the judgment of the court. *Little v. Thorn*, 93 N. C., 71, cited as controlling. *Ibid.*

CONVERSION. See Wills, 11.

CONVICTION. See Officers, 4; Criminal Law, 5.

CORPORATIONS. See Actions, 1; Attachment, 1; Sales, 3; Removal of Causes, 4, 5, 7; Mandamus, 1, 2; Evidence, 8; Constitutional Law, 6; Summons, 1; Munipical Corporations, 17.

1. *Corporations—Public-service Corporations—Discrimination — Courts—Inherent Powers—Corporation Commission—Electricity.*—The courts have inherent power to enforce, by *mandamus*, a public-service corporation to perform its public duty to furnish electricity among its customers without discrimination as to rates or charges, independent of the powers conferred on the corporation commissioners, whose authority is to fix indiscriminative rates; and the objection that this commission has not established the rates on the subject is without force when the public-service corporation has contracts with other like customers, for the lowest rate of charges therein will automatically take effect as the proper charges to be made. *R. R. v. Power Co.*, 422.

CORPORATIONS—*Continued.*

2. *Corporations—Judgments—Dividends — Fraud—Execution—Limitation of Actions.*—Pending an action to compel the refund of moneys of a corporation wrongfully distributed as dividends among its stockholders, by the assignees of a judgment against it, and attempted liquidation by the corporation is in fraud of the plaintiffs, but the running of the statute of limitations does not begin until execution has been issued against the corporation and returned unsatisfied; and C. S., 441 (9), as to the time for commencing an action after the discovery of the fraud, has no application. *Chatham v. Realty Co.*, 500.

3. *Corporations—Parties Receivers.*—It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those thereunder beneficially interested, to maintain an action against its officers and stockholders for misapplication of its funds in distribution among the shareholders as dividends. *Ibid.*

CORPORATION COMMISSION. See Corporations, 1.

1. *Corporation Commission—Courts—Discrimination—Public-service Corporations—Rates and Charges.*—The Corporation Commission has no power or authority to fix rates of charges for a public-service corporation discriminative among its customers for the same or substantially similar service, and in the event of such discrimination, relief will be afforded by the court in the exercise of their inherent jurisdictional powers over the subject. *R. R. v. Power Co.*, 422.

2. *Same—Public Service—Evidence—Statutes — Motions.*—Where public-service corporations have dedicated property to the public for the resale of its electric current to the public-service corporations, a motion (Pell's Revisal, 1656) for it to furnish copies of contracts it is alleged to have made with others for a discriminating rate of charges against the plaintiff for the same or similar services, is material to the issue, not only upon the question of unlawful discrimination, but also upon the question as to whether, in fact, the defendant had so dedicated its property to the public use. *Ibid.*

CORROBORATION. See Evidence, 3; Criminal Law, 2.

COSTS. See Criminal Law, 5.

1. *Costs—Criminal Law—Prosecution—Findings—Statutes.*—In order to tax the prosecuting witness with the cost of a criminal action, and for his imprisonment, a finding is necessary that the prosecution was frivolous and malicious. Rev., 1297. *S. v. Cole*, 682.

2. *Same—Justices' Courts—Appeal—Superior Court—Trial de Novo—Courts.*—An appeal from an order of a justice of the peace taxing the cost against the prosecutor in a criminal action does not involve again the guilt or innocence of the prisoner, who has been acquitted, or violate his constitutional immunity from a second jeopardy, but presents a substantial question to some extent in the nature of a "civil controversy," and comes within the intent and meaning of Rev., 607, 608, which provides for a hearing *de novo* on appeal, and prevails also in matters of strictly criminal nature by our statute. Rev., 3274, *et seq. Ibid.*

3. *Same—Jurisdiction—Additional Findings—Orders — Judgments.*—The provisions of our statute, Rev., 1297, conferring on the courts of jus-

COSTS—*Continued.*

tices of the peace, and other courts, who heard the case originally, to presently make the necessary findings, before imprisoning the prosecutor, that the prosecution "was frivolous and malicious," does not prevent, on appeal to the Superior Court, an inquiry into the matter by the latter court, *de novo*, or the making additional findings and such further orders and decrees therein as the right and justice of the case may require. *Ibid.*

4. *Same.*—On appeal to the Superior Court from an order of a justice of the peace, in a criminal action, taxing the prosecutor with cost, the proceedings may be entered into *de novo*, and the court may proceed to find upon the evidence that the prosecution was frivolous and malicious, and adjudge that the prosecutor pay the cost, and order that unless he should have done so within a certain time he be imprisoned until he pay them, or discharged according to law. *Ibid.*

COUNTERCLAIM. See Contracts, 8, 13; Pleadings, 1.

COUNTIES. See Constitutional Law, 10, 13.

COUNTY COMMISSIONERS. See Elections, 5.

COURTESY. See Wills, 11.

COURTS. See Appeal and Error, 6, 27, 39; War, 2; Constitutional Law, 1, 14; Costs, 2; Controversy Without Action, 2; Summons, 2; Estates, 4; Intoxicating Liquors, 5; Mortgages, 1; Pleadings, 3; Criminal Law, 5; Removal of Causes, 1, 6, 7, 9; Judgments, 7, 11, 20; Trespass, 2; Negligence, 5; Wills, 6, 36; Statute of Frauds, 3; indictment, 2; Corporations, 1; Corporation Commission, 1; Railroads, 14; Instructions, 8.

1. *Courts—Discretion—New Trials—Appeal and Error.*—A motion to set aside a verdict and grant a new trial is made to the discretion of the trial judge, and not reviewable on appeal. *Coats v. Norris*, 77.

2. *Courts—Jurisdiction—Clerks of Court—Statutes—Issues—Processioning Title.*—When, upon answer filed in a processioning proceeding, the clerk, without objection, transfers the cause for trial, the Superior Court acquires jurisdiction under Rev., 614, to determine the matter, and a motion to remand for failure of the defendant to raise an issue as to title is properly refused. *Exum v. Chase*, 95.

3. *Same—Pleadings.*—A denial of the boundaries of the land in a processioning proceedings, and allegation in the answer of title to a strip of the land by adverse possession, raise an issue of title upon which the clerk should transfer the cause for trial to the Superior Court. *Ibid.*

4. *Courts—Jurisdiction—Waiver—Processioning.*—Where a processioning proceedings has been transferred for trial to the Superior Court, and set for trial three times without objection, the objection that an issue of title had not been raised is waived, and a motion to remand to the clerk is properly denied. *Ibid.*

5. *Courts—Contempt—Notice to Show Cause—Insufficient Compliance—Alleys—Obstruction.*—Under a rule to show cause why the defendant should not be attacked for contempt in failing to obey an order of court for him to remove a building from an alley way, which he was thus unlawfully and wrongfully obstructing, it is an insufficient

COURTS—*Continued.*

answer that the defendant had cut an opening through the building in his own opinion sufficient for the plaintiff's purposes, as such would not be in full compliance with the order of the court. *Croom v. Groves*, 134.

6. *Courts—Jurisdiction—Special Appearance—Motions to Discharge—Attachment—Slander.*—Where the jurisdiction of the court in an action for slander depends upon the validity of the attachment under our statute, Rev., 728 (4), the defendant may challenge the right of the court to proceed by special appearance, and move to discharge the attachment and dismiss the case without subjecting himself, generally, to the jurisdiction of the court. *Tisdale v. Eubanks*, 153.

7. *Courts—Conduct of Witness—Trials—Appeal and Error.*—The emotional conduct of a witness on the stand interested in the result of a trial of *devisavit vel non*, is a matter within the discretionary control of the trial judge, who should see that no undue prejudice is thereby caused, and will not ordinarily be considered in the Supreme Court on appeal. *In re Hinton*, 207.

8. *Courts—Jurisdiction—Transitory Actions—Actions — Railroads — Statutes—General Orders—Director General.*—The courts of our State have jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina, to recover an injury to, or loss of goods caused by an initial and connecting carrier, a foreign corporation, in another State (Rev., 1500; C. S., 1436), the cause of action being transitory; and Rev., 423, 424; C. S., 468, 469, and General Orders of Director General of Railroads, Nos. 18 and 18-a, relate solely to venue and have no application to taking jurisdiction of an action. *McGovern v. R. R.*, 219.

9. *Courts—Discretion—Verdict Set Aside—Weight of Evidence—Motions—Appeal and Error.*—Where there is evidence to sustain a verdict, objection that it should be set aside as against the clear preponderance of the testimony is a matter within the legal discretion of the trial judge, and his refusal to do so is not reviewable on appeal. *Page v. Mfg. Co.*, 330.

10. *Courts—Jurisdiction—Landlord and Tenant—Justices of the Peace—Superior Courts—Appeal.*—The courts of a justice of the peace have no jurisdiction when in a possessory action of ejection, the issue of the landlord's title is involved in the disposition of the case, and the jurisdiction of the Superior Court, being derivative, it cannot acquire such jurisdiction on appeal; and the action being without the jurisdiction of the former court, it should be dismissed in the latter one. Const., Art. IV, sec. 27. *Hargrove v. Cox*, 360.

11. *Courts—Justice's Courts—Jurisdiction—Landlord and Tenant—Title.*—Where the plaintiff, in a possessory action of ejection in a justice's court, makes out a *prima facie* case of jurisdiction, it is not ousted merely by reason of an answer setting forth a controversy as to the title to the land or other jurisdictional question; but the court will proceed to hear the testimony and determine whether, in fact, such controversy is presented in the action, and in this case it is held sufficient. *Ibid.*

12. *Courts—Jurisdiction—Justices' Courts—Contract — Breach — Torts.*—Rev., 1419, passed in conformity with our State Constitution, Art. IV,

COURTS—*Continued.*

sec. 27, confers jurisdiction on the justice's court over an action to recover unliquidated damages for breach of contract when the principal sum demanded does not exceed two hundred dollars; and such is not disturbed by elements of false warranty and deceit being also involved, on the ground that over an action sounding in tort such jurisdiction is limited to a recovery of not exceeding fifty dollars. *Newell v. Barley*, 432.

13. *Same—Summons—Amount Involved.*—The amount demanded in the summons controls the jurisdiction in an action upon contract in a justice's court, and, when the debt is claimed in a larger sum, the creditor may remit the excess, over two hundred dollars, in which event the jurisdiction as to the amount involved will be upheld. *Ibid.*

14. *Courts—Amendments—Parties—Justices' Courts—Superior Courts.*—The court may allow an amendment to process and pleadings, within its statutory power, either before or after judgment, to correct a misnomer of parties or a mistake in any other respect, by inserting other material allegations when they do not substantially change the claim or defense; or to make the pleading or proceeding conform to the facts proved, Pell's Revisal, sec. 507; and especially so in the Superior Court on appeal from a justice of the peace. Rev., 1467 (Rule II.) *Barnhardt v. Drug Co.*, 436.

15. *Courts—Jurisdiction—Judgments—Consent.*—While the consent of the parties cannot confer jurisdiction on the courts, a consent judgment entered by a court having jurisdiction over the parties who had the power to consent, and over the subject-matter, is conclusive. *Morris v. Patterson*, 485.

16. *Courts—Judicial Notice—Admissions—Bonds—Sales—Notice—Publication—Newspapers—Statutes.*—Under the principle that the courts will take judicial notice of a rule or custom in the general business of the country when of sufficient notoriety to make it safe and proper to do so, it is *Held*, that, notwithstanding an admission of record of the parties to the contrary, the courts of this State will take judicial notice that there are newspapers of general circulation published here, within the intent and meaning of our statute requiring notice of the sale of municipal bonds to be given in a "financial paper or trade journal," etc. *Comrs. v. Prudden*, 497.

17. *Courts—Appearance—Jurisdiction—Motions.*—Where a nonresident defendant enters a special appearance and denies the jurisdiction of the court, it is the court's first duty to ascertain its own jurisdiction to try and determine the case. *Patrick v. Baker*, 588.

18. *Same—Attachment—Intervenor—Ownership — Issues* — Proceedings in *Rem—Nonresidents.*—Where proceedings in attachment are brought in an action for damages for breach of contract, and the funds attached are in a local bank, collected upon a draft sent to it by and drawn to the order of a foreign bank, it is the duty of the foreign bank, and other claimants to the fund, to intervene and assert their rights so that the issue as to ownership may be determined, otherwise this being of the nature of a proceeding *in rem*, the court would acquire jurisdiction to the extent only of the property attached, and a personal judgment against the nonresident defendant may not be properly rendered. *Ibid.*

COURTS—*Continued.*

19. *Same—Parties.*—Where the proceeds of the collection of a draft payable to the order of a foreign bank has been attached in a local bank by the plaintiff as the funds of the nonresident bank, in an action for damages for breach of contract, and the issue of ownership has not been determined, and the defendant, the defaulting party to the contract, enters a special appearance and moves to dismiss for the want of jurisdiction of the court, on the ground alone that the proceeds of the draft were owned by and payable to the foreign bank, not connected with the contract, for the breach of which the plaintiff claims damages: *Held*, it was unnecessary that the foreign bank, which was not connected with the contract or its breach, should be made a party, and service by publication having been made, and the court having jurisdiction over the subject-matter by the proceedings, *quasi in rem*, the defendant's motion to dismiss, for want of the court's jurisdiction, was properly denied. *Ibid.*

20. *Courts — Jurisdiction — Special Appearance — General Appearance — Pleadings—Waiver.*—Where, after entering a special appearance and pleading to the jurisdiction of the court, a nonresident defendant files an answer to the merits, the filing of the answer is equivalent to a general appearance, and the court may proceed to hear and determine the matter as if the said defendant had been personally served with process. *Ibid.*

21. *Courts— Contempt— Judgments— Orders—Divorce—Marriage.*—Where the court of record, having jurisdiction of the cause and the parties, enters judgment for an absolute divorce in the wife's favor, in her action, and awards the children of the marriage to her care and custody, it may adjudge the defendant in contempt, or as for contempt of court, in the exercise of its legal and equitable powers, for concealing one of the children so as to prevent the sheriff from carrying into effect the order of the court, rendered at a subsequent term, to deliver the child to the plaintiff, and commit the offender to jail until he shall desist therefrom, and give to the sheriff the information found to be within his knowledge or command, that would enable him to carry out the order of the court under the execution. *Flack v. Flack*, 594.

22. *Courts—Justices' Courts—Appeal—Motions—Recordari — Dismissal.*—when the appellant from a judgment of a justice of the peace has properly given his notice of appeal, paid the fee, but has not moved in time for a *recordari* in the Superior Court, a motion to dismiss should be allowed. *Powell v. Rogers*, 657.

23. *Courts—Continuance of Case—Discretion—Appeal and Error.*—A motion of the defendant, indicted for a crime, to continue his case because he had not had time to prepare his defense is addressed to the sound discretion of the trial judge, and is not reviewable on appeal in the absence of abuse of this discretion. *S. v. Henderson*, 735.

COURTS DISCRETION. See Verdict, 1; Evidence, 9; Divorce, 6.

COVENANT. See Bills and Notes, 3; Estates, 9.

COVERTURE. See Limitation of Actions, 1.

CRIMINAL LAW. See Intoxicating Liquors, 2; Judgments, 19; Homicide, 1, 3; Arrest of Judgment, 1; Costs, 1; Officers, 1; Verdict, 2; Statutes, 2; Instructions, 14, 15; Indictment, 1.

1. *Criminal Law—Directing Verdict—Instructions.*—A verdict may not be directed by the trial judge in a criminal action. *S. v. Alley*, 663.

2. *Criminal Law—Evidence—Corroboration—Demurrer.*—When, upon demurrer to the State's evidence, the evidence up to that time is insufficient for conviction of the sale of intoxicating liquors, and the defendant puts on his evidence, and thereafter under the State's evidence it becomes sufficient, defendant's demurrer after the close of all the evidence will be overruled. *S. v. Ingram*, 672.

3. *Criminal Law—Evidence—Declarations—Admissions.*—The prosecuting witness may give a list of all the goods lost from the store which the defendant is being tried for breaking into and robbing, so that they may be traced by the State; and the declaration of a witness as to the identity of one of them, made in defendant's presence, and not denied by him, is competent as his *quasi* admission. *S. v. Willoughby*, 676.

4. *Criminal Law—Verdicts — Murder—Lesser Offense — Manslaughter—Statutes.*—While a general verdict of "guilty" on a trial for murder may be considered in connection with the evidence and the charge a sufficient compliance with our statute, the profession and officials engaged in trials of this supreme importance are admonished that verdicts should be rendered in the precise form required by the Statute, and specify in terms the degree of the crime of which the prisoner is convicted. Rev., 3271. *S. v. Bryant*, 690.

5. *Criminal Law—Costs—Conviction—Trial by Jury—Justice's Court—Appeal—Superior Court—Courts—Constitutional Law.*—An appeal from a court of a justice of the peace by the defendant in a criminal action, carries with it the constitutional right to a trial by jury in the Superior Court, where the trial is *de novo*, and the latter court may not affirm that part of the justice's judgment taxing the defendant with cost, over his objection, without conviction before the jury upon the merits of the case. Constitution of N. C., Art. 1, secs. 13 and 2. *S. v. Pasley*, 695.

6. *Criminal Law—Automobiles—Negligence—Evidence—Homicide — Statutes.*—Evidence tending to show that one of the defendant's was instructing the other how to drive an auto truck, with the hands of both on the steering wheel, on a street much used by pedestrians in a populous part of the city, and while running at a speed exceeding the speed law and without looking ahead or warning, they ran upon, injured, and killed a child three years of age, endeavoring to cross the street, which a slight deflection of the machine from its course could have saved, is sufficient to sustain a verdict of manslaughter, irrespective of whether the death of the child was willfully or intentionally caused. Public Laws of 1917, ch. 140, secs. 15 and 17. *S. v. Gray*, 697.

7. *Same—Prior Negligence.*—Where one driving an automobile in a reckless manner and in violation of the requirements of the statutes as to speed and care intended to prevent injury (Public Laws of 1917, ch. 141, secs. 15 and 17) runs upon and kills a three-year-old-child crossing a street in a populous portion of a city, he is guilty of man-

CRIMINAL LAW—*Continued.*

slaughter at least, and under some circumstances, murder, though as soon as he has seen the danger of the pedestrian he has used every effort to avoid injuring him, if his prior recklessness had rendered him unable to control the car and prevent the injury. *Ibid.*

8. *Same.*—While the negligence of one driving an automobile causing death must be of a greater degree in the criminal action than is required in a civil one, it is sufficient if it was likely under the circumstances to produce the death, or great bodily harm, as in this case, where the defendant, driving in a reckless manner, in violation of the statute, could reasonably have anticipated the result that actually followed. *Ibid.*

9. *Same—Contributory Negligence.*—The doctrine of contributory negligence has no application in the criminal law, and constitutes no defense for one who has recklessly and in violation of our statute enacted for the purpose of protecting pedestrians, etc., caused injury or death. *S. v. Oakley*, 176 N. C., 755, as to whether evidence of this character may be considered upon the question of negligence, cited and distinguished. *Ibid.*

10. *Criminal Law—Automobiles—Negligence—Children—Infirm Persons.*—The vigilance and care required of the operator of an automobile vary in respect to persons of different ages and physical conditions who are to be met upon the streets, and he is required to increase his exertions and use more care to avoid danger to children whom he may see, or, by the exercise of reasonable care, should see, on or near the highway. *Ibid.*

11. *Same—Contributory Negligence.*—The law will not impute contributory negligence to a child of three years of age, who has been injured by the negligence of one driving an auto truck. *Ibid.*

12. *Criminal Law—Misnomer—Idem Sonams.*—A mistake in the spelling of the defendant's name, in an indictment for subornation of perjury where it is as slight as in this case, comes within the maxim *idem sonans*, and is not reversible error on appeal. *S. v. Chambers*, 705.

13. *Criminal Law—Indictment—Motions to Quash—Pleas—Abatement.*—Where the defect does not appear on the face of the record, but requires extraneous evidence to support the motion, the remedy is by plea in abatement, and not by motion to quash. *S. v. Brewer*, 716.

14. *Criminal Law—Indictment—Solicitor's Signature—Motions to Quash.*—It is not necessary that a true bill found by the grand jury should have been signed by the solicitor, and a motion to quash it on that account will be denied. *S. v. Shemwell*, 718.

15. *Criminal Law—Instructions—Assault With Intent to Kill—Self-defense.* Where, on the trial of an assault with intent to kill, the defendant has not introduced any evidence, and there were only two witnesses for the State whose evidence was uncomplicated, tending to show that the defendant had entered the law office of the prosecuting witnesses and on account of his behavior they had ordered him out, without threats of violence, whereupon he said no one could make him leave, drew two pistols, aiming at each of the prosecutors, one of them throwing a paper weight, which hit the defendant on the head, and he fired after the prosecutors had hold of him trying to disarm him:

CRIMINAL LAW—*Continued.*

Held, a charge to the jury, placing on the State the burden of showing defendant's guilt beyond a reasonable doubt, and instructing them to find a verdict of guilty of an assault with a deadly weapon should they find the facts to be as testified, is not objectionable as directing a verdict, there being no element of self-defense. *Ibid.*

16. *Criminal Law—Indictmnts—Less Offense—Assault With Intent to Kill Deadly Weapons.*—Upon the charge in an indictment of an assault with a deadly weapon, with intent to kill, a verdict of the less offense of an assault with a deadly weapon, is authorized by our statute, C. S., 4640. *Ibid.*

17. *Criminal Law—False Pretense.*—In order to convict of the crime of obtaining goods under false pretense it is necessary for the State to show, beyond a reasonable doubt, the procurement with fraudulent intent of the thing charged, or that it was done under a false representation as to existing facts, false within the knowledge of the party making them, or made recklessly without belief or any fair and just reason to believe in their truth, calculated and intended to deceive and which does deceive the person from whom money or things of value is taken, and reasonably relied on by such person at the time of the taking. *S. v. McFarland*, 726.

18. *Same—Instructions—Evidence.*—An instruction in an action for obtaining money or other thing of value under false pretense, which would make the defendant guilty if he had notice which would have put a reasonable man upon inquiry that would have revealed the truth of his misrepresentations, is reversible error, which is not cured because in other parts of the charge the correct principle of law relating thereto had been given. *Ibid.*

19. *Same—Moving Cause.*—Where there is evidence that other conditions induced the transaction than the representations made by the defendant, upon trial for obtaining a thing of value under false pretense, an instruction to find the defendant guilty if his false statement in any way influenced the trade is reversible error, it being necessary that it be a moving cause and one without which the transaction would not have been made. *Ibid.*

CROPS. See Contracts, 3, 5; Lessor and Lessee, 1.

CROSSINGS. See Railroads, 1, 2, 6, 7, 10.

CUSTOMS. See Contracts, 1.

DAMAGES. See Appeal and Error, 11, 12; Husband and Wife, 4; Carriers of Goods, 1; Mortgages, 5; Contracts, 3, 5, 8, 13; Employer and Employee, 2; Evidence, 7; Lessor and Lessee, 1; Municipal Corporations, 2; Negligence, 1, 11; Principal and Agent, 2; Vendor and Purchaser, 1; Estates, 10; Injunction, 1; Carriers of Passengers, 2.

1. *Damages—Negligence—Personal Injury.*—The measure of damages to be awarded for a negligent personal injury, resulting in a diminution of earning power, is a sum equal to the present worth of such diminution, for the plaintiff's expectancy of life. *Hill v. R. R.*, 490.

DANGEROUS INSTRUMENTALITIES. See Employer and Employee, 8.

DEADLY WEAPON. See Criminal Law, 16.

DEBTOR AND CREDITOR. See Contracts, 16.

DECEASED PERSONS. See Evidence, 11.

DECLARATIONS. See Arbitration, 3; Evidence, 1, 3, 6; Wills, 4; Homicide, 13; Criminal Law, 3.

DEDICATION. See Municipal Corporations, 3, 4, 8, 9; Deeds and Conveyances, 9.

DEEDS AND CONVEYANCES. See Contracts, 11; Evidence, 12; Descent and Distribution, 1; Mortgages, 11; Election, 1; Estates, 7, 8, 11, 14; Mortgages, 1, 2, 4; Divorce, 4; Sales, 2; Wills, 8, 9, 34; Official Bonds, 1; Contracts, 15; Landlord and Tenant, 1; Judgments, 12; Trusts, 1.

1. *Deeds and Conveyances—Timber Deeds—Contracts—Cutting and Removing Timber.*—A contract for the sale or purchase of timber standing upon lands specifying a certain size, when cut, then standing, or which may be standing or growing during the term of two years from its date, or such time as may be necessary for the removal of the timber not exceeding five years, vests the title and the right to cut and remove the timber in the purchase for the five-year period when he had begun to cut it within the time specified in the contract, and the delay was not caused by any default of his own, but by conditions he could not control. *Hudnell v. Lumber Co.*, 48.

2. *Same — Extension Perior for Cutting — Conditions Precedent.*—Where five years is given a purchaser of timber growing upon lands, if without delay attributable to him, it cannot be cut and removed in two years, the principal requiring the performance of a condition precedent or notice, within the first period, as upon the exercise of an option, has no application. *Ibid.*

3. *Deeds and Conveyances—Warranties—Encumbrances.*—A warranty in a deed against claims of the grantors and their heirs forever is not a warranty against encumbrances. *Berry v. Boomer*, 67.

4. *Deeds and Conveyances—Contracts—Descriptions — Evidence — Parol Evidence—Maps—Plats.*—A description in a contract to convey land, "Farm No. 19,020, in block No. ..... of the tract of land subdivided into tracts containing 55 and 56 acres belonging to Louis Goodman and known as the Swain land," is sufficiently definite to admit of parol evidence of identification, and the registration of the map thereof is immaterial. *Goodman v. Robbins*, 239.

5. *Deeds and Conveyances — Adverse Possession — Presumptions — Outer Boundaries — Boundaries — Title.*—When, in an action of trespass *quare clausum fregit*, the plaintiff's evidence tends to show that he and those under whom he claims have been in sufficient adverse possession of a part of the *locus in quo* under a paper chain of title antedating that set up by the defendant, an adjoining owner, who had about two years prior to the commencement of the action entered upon the lands and had cut timber therefrom, claiming that the plaintiff's deed did not cover it, and the evidence thereon is conflicting: Held, an instruction is correct, that the rights of the parties depended largely on whether the boundaries of plaintiff's deed, by correct location, covered the land in dispute, under the principl that when one enters possession of a part of the lands within the boundaries of his deed, claiming the ownership of the whole, there being no adverse

DEEDS AND CONVEYANCES—*Continued.*

occupation of the whole, the force and effect of such occupation will be extended to the outer boundaries of his deed, and his sufficient adverse possession will ripen his title to the whole. *Ray v. Anders*, 164 N. C., 311, cited and applied. *Hayes v. Lumber Co.*, 252.

6. *Same—Trespass—Wrongdoer—Lappage.*—The principle that extends the possession of one entering a part of the lands within the boundaries of his deed, or to outer boundaries therein given, is not affected by the fact of a casual entry of a wrongdoer, nor by a lappage created merely by a line of deeds covering the land, without more, when the opposing deeds do not contain the true title. *Currie v. Gilchrist*, 147 N. C., 648, cited and applied. *Ibid.*

7. *Deeds and Conveyances—Ponds—Streams—Words and Phrases—"On"—Fishing—Sawdust.*—Where a deed to timber standing on lands is accepted "on condition" that the grantee "will not erect a mill on a stream leading into a fish pond," etc., which, with a certain number of acres of land, the grantor had leased to another, the meaning of the words "on a stream" is not confined to the margin of the stream or the water's edge, but will be construed as within such proximity as to cause injury to the fish or fishing from the sawdust of the mill, and thereby impair the value of the fish pond. *Hinton v. Vinson*, 394.

8. *Deeds and Conveyances—Rule in Shelley's Case—Heirs of the Body—Estates.*—An estate to S. "for life, and after her death to the heirs of her body in fee, to their only use and behoof," in the *habendum* clause of the deed, conveys to S. a fee-simple estate, under the rule in *Shelley's case*, and the fact that this same language appears in the introductory part does not bring the case without the rule, there being no expression elsewhere in the deed to affect this interruption. *Starling v. Newsom*, 440.

9. *Deeds and Conveyances—Plats—Streets—Lots—Purchaser—Dedication.*—Where the owner of lands plats it into lots, streets, etc., stakes them off in accordance with the plat, and offers the lots for sale as so marked, and a purchaser buys one of these lots in accordance with the representations thus made, he acquires the right to the use of the streets, which will not be lost as against other purchasers in the absence of his consent, whether the dedication of the streets had been accepted by the municipal authorities or not; and a purchaser of such lots may not close a street beneficial to the use or enjoyment by another such purchaser. *Eller v. Star*, 514.

10. *Deeds and Conveyances—Reformation—Marriage—Annulment of Marriage—Mistake—Fraud—Divorce—Equity.*—Where a marriage has been annulled because the wife had a living husband at the time, and the husband has made a conveyance of his own land, reserving a life estate for himself and the woman as his wife, equity will reform the deed so as to exclude the wife, either upon the ground of mistake of the husband, or for the fraud of the wife in going through the marriage ceremony knowing she then had a living husband, and the plaintiff will recover the land in his suit against her. *Burleson v. Stewart*, 584.

DEFAULT. See Judgments, 1, 18; Mortgages, 8.

DEFECTIVE APPLIANCES. See Employer and Employee, 6.

DEFECTS. See Municipal Corporations, 18, 19.

DELIVERY. See Evidence, 12.

DEMURRER. See Sales, 3; Contracts, 15; Common Law, 2.

DEPOSITION. See Appeal and Error, 28.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Deeds and Conveyances—Warranty—Heirs.—A paper-writing, whether operating as an absolute fee-simple or quitclaim deed, with covenants of title against any claims of the grantors and heirs, and purporting to bar them, made by a son concerning the lands of his father whom he predeceased, cannot deprive his own children of their inheritance, for they take directly from their grandfather as his heirs, and not as the heirs of their own father. *Benson v. Benson*, 106.

DESCRIPTION. See Contracts, 10.

DEVISE. See Wills, 12, 21, 24, 29, 30, 35.

DIRECTOR GENERAL. See Courts, 8; Railroads, 3, 13; War, 3; Parties, 3; Carriers of Passengers, 2.

DISCRETION. See Courts, 1, 2, 3; Statute of Frauds, 3; Appeal and Error, 17; Judgments, 19; Indictment, 2.

DISCRIMINATION. See Corporations, 1; Corporation Commission, 1; Constitutional Law, 15; Wills, 30.

DISMISSAL. See Wills, 34; Appeal and Error, 18, 30, 31, 36; Courts, 22.

DIVERSITY OF CITIZENSHIP. See Removal of Causes, 5, 7.

DIVORCE. See Judgments, 5, 8; Deeds and Conveyances, 10; Courts, 21; Appeal and Error, 27.

1. *Divorce—Pleadings—Residence—Affidavit—Statutes.*—It is not required that the two years residence in the State of the plaintiff in his action for absolute divorce he alleged in the complaint to confer jurisdiction, for it is sufficient when it is set out in the accompanying affidavit. C. S., 1661; Rev., 1565. *Williams v. Williams*, 273.

2. *Divorce—Marriage — Alimony — "Subsistence" — Statutes — Attorney's Fees.*—Ch. 24, Laws of 1919, amending sec. 1567 of the Revisal, in reference to alimony or support, provides, in the sound discretion of the court, for an order for the necessary "subsistence" of the wife *pendent lite*, and supersedes the allowance for alimony, which latter included an allowance for attorney's fees, and under the amendment an allowance for attorney's fees is not permissible. *Allen v. Allen*, 465.

3. *Divorce—Marriage—"Subsistence" — Alimony — Defenses — Statutes.*—Under the provisions of ch. 24, Laws of 1919, amending sec. 1567 of the Revisal, it is immaterial what counter charges the defendant makes against the plaintiff, his wife, in her application for her necessary "subsistence" *pendente lite*, for if he has separated from her, he must support her according to his means and condition in life, taking into consideration the separate estate of his wife, until the issue has been submitted to the jury. *Ibid.*

DIVORCE—*Continued.*

4. *Divorce—Marriage — Annulment of Marriage — Husband and Wife—Deeds and Conveyances—Living Husband.*—After a conveyance reserving an estate for life in the grantors, supposedly husband and wife, it was ascertained and decreed in a former action that at the time of the marriage the wife had a living husband, and the second contract of marriage was afterwards annulled by decree. The plaintiff was the owner of the land, and the defendant joined in his deed as his wife, and as such only was intended by the reservation of the life estate, construing the deed as a whole in the light of surrounding circumstances: *Held*, there being no one to take her estate, the title thereto remained solely in her husband. *Burleson v. Stewart*, 584.

5. *Divorce—Marriage—Alimony—Attorney and Client—Attorney's Fees.*—Where the allegations of the complaint are sufficient under the terms of our statute, Rev., 1566, and are found to be true and sufficient by the judge of the Superior Court, in the wife's action for divorce, *a mensa et thoro*, the court may leave open the charges made by each of the parties against the other, and award alimony *pendente lite*, including reasonable attorney's fees, taking into consideration the circumstances of the case. *Hennis v. Hennis*, 606.

6. *Same—Appeal and Error—Court's Discretion.*—The question of the amount allowed, in proper instances, by the Superior Court judge to the wife, in her action for divorce *a mensa et thoro*, is addressed to his sound judgment and discretion, and not reviewable on appeal, unless his discretion is abused. *Ibid.*

DOCKET. See Appeal and Error, 6, 30, 31, 36.

DOMICILE. See Elections, 4.

DRUNK. See Homicide, 5; Trials, 3.

DYING DECLARATIONS. See Evidence, 10.

EASEMENTS. See Municipal Corporations, 7, 9.

ELECTIONS. See Constitutional Law, 2, 3, 5; Mortgages, 10; Municipal Corporations, 1; Schools, 1; Wills, 30.

1. *Election—Husband and Wife—Deeds and Conveyances—Statutes—Void Deeds.*—A testator devised generally, without specific description, to his wife, among other things, the lands of which he should be seized at the time of his death, his wife having previously conveyed to him certain of her own lands under a deed void for the lack of her privy examination as provided by Rev., 952, and the want of her special examination under the provisions of Rev., 2107. She qualified as executrix under the will of her husband: *Held*, her qualification as executrix would have put her to her election were this equity otherwise applicable; but as her deed to her husband was void, he was not seized of this land at the time of his death, and the right of election was not within the terms or expression the husband had employed in making his will, as none of her land was devised by him. The principles of the equity of election discussed by Walker, J. *Elmore v. Byrd*, 120.

2. *Elections — Schools — Special Districts — Taxation — Voters.* — Where school-tax districts already exist within the territory embraced by

ELECTIONS—*Continued.*

a proposed new district to be created for the entire township under the provisions of Consolidated Statutes, sec. 5626, the majority vote of the proposed new district will control the result of the election fairly and freely held, and the contention that a separate election should have been held in the territory not embraced in the old districts is without merit. *Riddle v. Cumberland*, 321.

3. *Elections—Majority—Tie—Taxation.*—It requires a majority of the qualified voters in favor of an election upon the question of adopting a special tax to carry it, and the tax cannot be declared as carried when by striking from the registration disqualified voters the result is a tie. *Groves v. Comrs.*, 568.

4. *Elections — Voters — Animus Revertendi — Registration — Domicile.*—One who has registered for an election upon the question of a special tax, is not disqualified to vote thereat because of his temporary absence from the county to perform a contract he is obliged to perform, and has not taken his household goods, or changed his place of actual residence, but had always the *animus revertendi*. *Ibid.*

5. *Elections—Taxes—Tender—Voters—Soldiers—County Commissioners—Exemptions.*—The county commissioners are without authority to exempt from taxes one is abroad in the service of his country as a soldier in the army; but when he has sent the money to his father, who told the sheriff that he had the money in the bank, and was informed by the sheriff that his son had been exempted by the commissioners, and in fact the father had the tax money and otherwise would have paid it, it is unnecessary that the actual cash should have been tendered in order for the vote of the son to have been taken, and it is erroneous for the election officers to have stricken his name from the register. *Ibid.*

ELECTOR. See Constitutional Law, 3.

ELECTRICITY. See Corporations, 1; Negligence, 12.

EMPLOYER AND EMPLOYEE. See Instructions, 3; Railroads, 15; Contracts, 18; Negligence, 15.

1. *Employer and Employee—Master and Servant—Fellow-servant Act—Negligence of Vice Principal—Statutes.*—The plaintiff was employed by defendant logging railway company at a steam power-driven "rigged skidder," used for drawing logs attached to a rope from the woods to be loaded on cars, the duty of plaintiff being to give signal for the skidder" to start. While acting under the supervision of the defendant's superintendent regarding a log that had been caught between stumps, the skidder started, causing a personal injury to the plaintiff. The evidence was conflicting as to the plaintiff's contributory negligence, and whether the "skidder" accidentally started or signal was given negligently by other employees of defendant: *Held*, though the fellow-servant act would not apply, still, if the plaintiff was injured by the negligence of the defendant's vice principal, the defendant would be liable unless the plaintiff was guilty of contributory negligence, and under the conflicting evidence this question was properly submitted to the jury. Rev., 2646. *Midgett v. Mfg. Co.*, 24.

2. *Employer and Employee—Master and Servant—Negligence—Fellow-servant Act—Actions—Damages.*—When the negligence of the em-

EMPLOYER AND EMPLOYEE—*Continued.*

ployer and a fellow-servant concurs in producing an injury, the injured employee can recover from either, if he himself is free from negligence. *Ibid.*

3. *Employer and Employee—Master and Servant—Evidence—Safe Place to Work—Opinion—Witnesses.*—Where the negligence of the defendant depends upon whether he failed in his duty to furnish his employee the plaintiff in the action, a safe place to oil his machinery, it is competent for a witness to testify in the defendant's behalf that a person of the plaintiff's height could have safely stood on a box provided for the purpose and have thus oiled the machinery, the witness being an experienced and trained machinist, familiar with this type of machine, both as to its operation and upkeep, and had made personal observation of the condition at this plant, and the very machine in question, whether the evidence be considered as a statement of a fact, or of the opinion of the witness thus qualified to speak. *Hassell v. Daniels*, 37.

4. *Employer and Employee—Master and Servant—Negligence—Duty of Servant.*—Where the employer and employee have equal opportunity to see and understand the danger of an occurrence, which results in injury to the latter, which he could have avoided by the exercise of reasonable care, he cannot recover the resulting damages. *Williams v. Mfg. Co.*, 64.

5. *Same—Instructions—Evidence—Contributory Negligence—Verdict Directing.*—In an action by an employee to recover damages against an employer for a personal injury, alleging the latter's negligence, there was evidence tending to show that the plaintiff was engaged to saw logs after they had been placed by defendant's other employees, in his own way, and while sawing a log it rolled on him, causing the injury complained of by reason of its not having been checked, which he could have done, or by his failing to call on other employees, whose duty it was to fix it; and that he could have placed himself in such position with reference to the log that the injury would not have occurred: *Held*, a question for the jury under an instruction to find for the defendant, upon the issue of contributory negligence, if they found the facts to be as testified. *Ibid.*

6. *Employer and Employee—Master and Servant—Negligence—Vice Principal—Direct Orders—Defective Appliances.*—Evidence that defendant's employee, acting under the immediate order of his superior, and defendant's vice principal, went beneath a heavy piece of timber to unfasten it so as to be drawn by defendant's derrick crane to position, with evidence that by reason of its defective condition the crane should not have been used on the occasion in question, is sufficient to take the case to the jury upon the question of the defendant's actionable negligence. *Davis v. Shipbuilding Co.*, 74.

7. *Employer and Employee—Master and Servant—Question of Employment—Policy of Indemnity—Contracts—Evidence—Insurance.*—Where the defendant has denied that the plaintiff's intestate was employed by him, and the action is to recover damages under the alleged negligence of the defendant as the employer of the intestate, it is competent to show that the defendant had taken out a policy indemnifying it against loss for personal injuries received by its employees, including the intestate. *Clark v. Bonsal* cited and distinguished. *Ibid.*

EMPLOYER AND EMPLOYEE—*Continued.*

8. *Employer and Employee—Master and Servant—Dangerous Instrumentalities—Safe Place to Work—Scope of Employment—Negligence.*—Where an employee at a machine shop, at the dinner hour, connects a hose for compressed air used in driving certain implements in the shop, to a valve several feet from the ground, on an iron supply pipe running down from the roof, that would otherwise have been harmless, and, as was frequently done, therewith dusts off his own clothes, and, at the request of another employee, a boy of 15 or 16 years of age, both experienced, also dusts off the latter's clothes, and then recklessly and wantonly places the nozzle so as to penetrate the boy's body with the compressed air, causing injury and death, the injurious act is not within the course of employment of the employee causing the injury, and the employer not being in default of any duty, is not responsible for the resulting damages. *Robinson v. Mfg. Co.*, 165 N. C., 495, cited and distinguished. *Rivenbark v. Hines*, 240.

9. *Employer and Employee—Master and Servant—Scope of Employment—Negligence—Automobiles.*—The owner of an automobile, who has lent it to his servant employed for his own purposes, is not liable in damages for the servant's negligence, when it appears that the servant is competent to drive the car, and was not engaged, at the time, in his employer's service. *Reich v. Cone*, 267.

10. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Duty of Employer.*—Where an employee is injured under dangerous conditions of which the employer has better opportunity to be aware of, the obligation to exercise care rests to a greater degree upon the employer, upon the principle which requires him to provide the employee a safe place to work in the performance of his duties. *Hill v. R. R.*, 490.

11. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Tools and Appliances—Order of Vice Principal—Inspection—Principal and Agent.*—Evidence that defendant sent logs down the mountain side in a "chute" to its sawmill, and at a depression requiring the logs to be handled in order to get them to the next incline, the vice principal ordered the plaintiff, an inexperienced 17-year-old lad, to assist in moving the logs with a pevie, while an unruly horse drew them forward by a chain attached to the end of the log with a swamp hook; and that the use of this horse had heretofore been found dangerous for such purpose, and that the chain was too small, and broke, inflicting injury upon the plaintiff as the unruly horse surged along the toe-path *Held*, the defense was untenable which limited the question of actionable negligence to the question of the chain being a simple tool, and as to whether the defect and danger arising from its use should have been better known to the plaintiff, and that defendant should have been notified thereof; as this disregarded the different elements of negligence arising under the other evidence in the case. As to whether it was defendant's duty to have inspected the chain. *Quaere? Hensley v. Lumber Co.*, 573.

12. *Employer and Employee—Master and Servant—Third Persons—Minors—Infants—Safe Place to Work—Negligence—Evidence—Nonsuit—Trials—Invitation.*—Among other machinery in its woodworking plant, the defendant had an edging machine of standard kind in good order, with the cogwheels moving the carriage covered by metallic

EMPLOYER AND EMPLOYEE—*Continued.*

hoods in the usual manner, protecting the employees working thereat in the manner therein required of them, under the rules of the company, children were forbidden to come into the mill, with notices placed in the mill to give sufficient notice thereof; that plaintiff, a bright lad of eleven years of age, was sent to the mill by his father to get some of the edging placed on the outside of the mill, forbidding the son to enter the mill, which had also been forbidden him by the supervising officers of the mill; that upon the invitation of a worker at the edging machine, a lad of about sixteen years of age, and in the absence of other employee, the plaintiff entered the mill to get his edging from around the machine, and his clothes caught in the cogs, causing the injury alleged, while he was in a dangerous position not required by the operation of the machine: *Held*, in the absence of evidence sufficiently definite to show an abrogation of the rule, the invitation and direction of the employee, having a definite work to perform as a laborer at the edger, was not within his authority to bind his principal, the defendant, and the evidence is insufficient to show negligence on the part of the defendant; and a motion as of nonsuit thereon should have been granted. *Butner v. Lumber Co.*, 612.

13. *Same—Duty of Employer.*—The duty of an employer to furnish his employee a safe place to work at a power-driven machine, in this case an edger in a woodworking plant, does not extend to an outsider who has entered the shop, forbidden, whose clothing has caught in the cogs of the machine, causing the injury for which he seeks damages in his action. *Ibid.*

14. *Employer and Employee—Master and Servant—Duty of Master—Safe Place to Work—Negligence — Contributory Negligence — Evidence—Questions for Jury—Trials.*—The master's duty is to furnish his employee a reasonably safe place to work, which the latter may assume he has done, and where the omission of this duty by the former causes an injury to the latter, without negligence on his part, he may recover in his action such damages as he may thereby have sustained, which under conflicting evidence is a question for the jury, upon both the issues as to negligence and contributory negligence, and a motion for judgment as of nonsuit upon the evidence will be denied. *McMahon v. Spruce Co.*, 636.

15. *Same—Simple Tools.*—Evidence that a minor employee, without instructions from his employer, in the course of his employment, was required to help put a hand-car upon the rails of defendant laid upon a platform or dock, which had been derailed by the rotten condition of the planks upon which the rails were laid, causing them to spread; that insufficient help was furnished to do this, in the usual manner, by lifting the car upon the rails, and required the plaintiff to go around a pile of lumber to get planks with which to again place the car upon the rails in furtherance of his work, and that the injury complained of was caused, while he was in the exercise of due care, by his stepping upon planks piled by the defendant improperly and out of their place, on the platform or dock, the principle as to "ordinary tools" has no application, and such evidence is sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *Ibid.*

16. *Employer and Employee—Master and Servant—Physicians and Surgeons—Negligence.*—Evidence that the employer selected a physician

EMPLOYER AND EMPLOYEE—*Continued.*

to attend employees injured while engaged in the course of their duties, and paid for such services by assessment among the employees, is sufficient to sustain a verdict for damages caused by the malpractice of the physician, so selected and paid, to an employee so injured, when the employer has been negligent in not properly selecting the attending physician. *Ibid.*

17. *Same—Notice—Evidence.*—Evidence that a physician, selected by the employer to attend an employee injured in the course of his employment, failed to place the broken bones of the arm of the employee in proper alignment, but left them overlapping each other, without a union between them, thus shortening the arm, leaving it two inches shorter than it should have been, and very crooked and ugly in appearance, and practically useless, is sufficient, upon the question as to the malpractice of the attending physician, to take the case to the jury, with other evidence that the employer had previous notice of his incompetency as a physician or surgeon. *Ibid.*

18. *Same—Substantive Evidence.*—Evidence that at the trial of another action, to which he was a party, the employer acquired knowledge of the incompetency of a physician or surgeon whom he thereafter retained to attend an employee who received an injury in the course of his employment, is sufficient as to the defendant's notice of such incompetency, upon the question of his negligent selection of him, though not substantive evidence as to whether he was, in the present case, chargeable with malpractice. *Ibid.*

19. *Employer and Employee—Master and Servant—Physicians and Surgeons—Malpractice—Evidence—Res Gestae.*—It was competent for the plaintiff to testify in his own behalf as to what the physician said at the time he treated his arm, as to its condition and appearance, and and as to what a knot near the elbow signified, which turned out afterwards to be a wrong diagnosis, this being in the nature of declarations accompanying the acts of the physician in treating the arm, and therefore a part of the thing done (*pars rei gestae.*) *Ibid.*

ENDORSEMENT. See Bills and Notes, 2, 4; Husband and Wife, 1.

ENTIRETIES. See Estates, 1.

ENTRY. See Clerks of Court, 1.

EQUITY. See Judgments, 6; Bills and Notes, 3, 5; Wills, 11, 30; Contracts, 10, 12; Controversy Without Action, 2; Mortgages, 1, 4, 6, 9; Pleadings, 4; Principal and Surety, 3; Statute of Frauds, 3; Estates, 10, 11; Deeds and Conveyances, 10.

1. *Equity—Subrogation—Mortgages.*—The attorney of a mortgagee had charge of an arrangement whereby a private sale was effected under agreement that the proceeds, sufficient for the purpose, were to discharge the mortgage debt, and the mortgagee gave a third person authority to collect the money and pay it accordingly. The attorney voluntarily guaranteed the payment of the money, and, *Held*, the equitable right of subrogation to the mortgagee's right, if any, was not available to him, he not having an interest to protect, or being in any manner liable for the debt. *Kennedy v. Trust Co.*, 225.

ESTATES. See Actions, 2; Trespass, 1; Wills, 8, 21, 23, 24, 27, 32, 35; Deeds and Conveyances, 8; Judgments, 12.

1. *Estates—Husband and Wife—Life Estates—Entireties—Wills.*—A life estate held by the testator's son and his wife under a devise made to them jointly, holds the estate in entirety. *Jernigan v. Evans*, 87.

2. *Estates—Estates Tail—Statutes — Fee—Limitations — Contingencies — Heirs at Law.*—An estate to testator's wife for life, then to their named daughter and her children, if any, but should the latter die leaving no children, then to the heirs at law of testator's wife. The wife being dead, and the daughter being her only heir, and there never having been children born of the daughter, the latter takes an estate tail converted by the statute into a fee-simple title, and should she never have chiildren she would take as the heir at law of her mother; and, in either event, her deed would be a valid conveyance of an absolute fee-simple title. *Cole v. Thornton*, 90.

3. *Estates—Contingent Remainders.*—An estate for life, with remainder over to designated persons in being, A. B. C., one-third each, living at the death of the first taker, or to their children then living, and if no living children at that time, to the survivors of A. B., and C., before the termination of the life estate: *Held*, A., B., and C., take an estate in one-third of the land contingent upon their being alive at the death of the first taker, and each one a further estate contingent upon the event of the death of the others, or one of them, before the death of the life tenant without leaving children. *Bourne v. Farrar*, 135.

4. *Estates—Contingent Interests—Sales—Statutes—Private Sales—Courts —Contingencies.*—Lands affected with a contingent interest may be sold under the provisions of Rev., 1590, when it is made to appear that the income from it is a little more than sufficient to pay taxes and keep the premises in repair; that it is not well located, and not likely to rise in value; and a judgment of the Superior Court that they be privately sold to a designated person, at a price ascertained to be a fair and reasonable one, will be sustained on appeal. *Ex parte Rees*, 192.

5. *Estates—Contingent Interests—Sales—Statutes—Proceeds, How Held— Life Tenant—Payment—Contingencies.*—When lands affected with contingent interests are sold for reinvestment under the provisions of Rev., 1590, the life tenant is only entitled to receive the net income from the proceeds of the sale pending reinvestment in lands, or from the lands thereafter reinvested in, during her life; and there is no authority of law to arrive at the value of the life estate and pay the *corpus* of it to the life tenant, in money. *Ibid.*

6. *Estates—Contingent Interests—Sales—Proceeds—Reinvestment—Statutes—Liberty Bonds—Contingencies.*—The proceeds of the sale of lands affected with contingent interests under Rev., 1590, should be paid into the clerk's office, to be loaned on real estate security on approval of the judge, or, under ch. 17, Laws 1919, temporarily invested in Liberty Bonds, until such time as it can be reinvested in the purchase of other real estate, to be held upon the same contingencies and in like manner as was the property ordered to be sold. *Ibid.*

7. *Estates—Remainders—Contingencies — Children — Possibility of Issue Extinct—Fee Simple—Deeds and Conveyances.*—An estate for life, and also upon contingency in fee should the tenant for life die with-

ESTATES—*Continued.*

out children, vests the estate immediately upon the death of the testator in the first taker upon the contingency stated: and where she has only one child the possibility of her bearing others being waived, a deed made by both will convey the fee-simple title to the purchaser. The effect of a general power of disposition given by will to the first taker, and the difference between the expressions "devise" and "bestow," discussed by WALKER, J. *Tillett v. Nixon*, 195.

8. *Estates—Conditions—Precedent—Timber Deeds—Deeds and Conveyances.*—The law does not favor the construction of a lease as creating a condition, the nonperformance of which will avoid the entire contract, and the language employed will not be strictly construed, but the court will hold it to be merely a covenant unless the intention of the parties clearly appears to be otherwise from the written instrument, taken in connection with the situation of the parties, their relation to the subject of the transaction and the object in view. And the omission of a clause providing for reëntry of the grantor for condition broken, or declaring the deed void, or some equivalent words, will be considered by the court as the usual indication of an intent to create a covenant. *Hinton v. Vinson*, 393.

9. *Same—Covenants.*—An agreement in a deed limiting the use of the premises is a covenant, and not a condition, and its violation of it will not work a forfeiture of the estate granted. *Ibid.*

10. *Same—Damages—Equity—Specific Performance.*—Where the language of a conveyance permits it, under a proper interpretation, the expression of a condition therein will be construed as a covenant, for a breach of which an action for damages will lie, and in proper instances an order of court may be obtained to compel its performance. *Ibid.*

11. *Estates—Deeds and Conveyances—Conditions Precedent—Contract—Breach—Avoidance—Equity.*—Where, in accordance with the expression of a conveyance of standing timber, the party of the second part accepts it "with condition that he, his heirs and assigns, will erect no mill on the streams leading into the fish pond on said land which, with thirty acres adjoining the same, has been leased to L. and others for fishing," etc., and there is no language used therein evidencing the intent that the word "condition" should be construed to be other than a covenant, it will be so interpreted, especially when to declare a forfeiture would cause a loss to the defendant of a sum altogether inequitable, and greatly disproportionate to the benefits he would otherwise receive. *Ibid.*

12. *Estates—Rule in Shelley's Case.*—The ancient rule of law in relation to the title to lands laid down in the rule in *Shelley's case* obtains in North Carolina, there being no statutory change therein. The history of this rule, and the reason for it, discussed by WALKER, J. *Blackledge v. Simmons*, 535.

13. *Same—Wills—"Heirs of the Body"—Children—Purchasers.*—An estate devised to the testator's daughter for life, and at her death unto the "heirs of her body lawfully begotten," and in the event she should die without "heirs of her body," then to the testator's heirs at law: *Held*, the intent of the testator, which controls the interpretation, will be gathered from the terms employed in the will considered as

ESTATES—*Continued.*

a whole; and the words "heirs of her body" will not be taken in their technical sense, as denoting an entire class of heirs to take as such, in indefinite succession, but as *descriptio personae*, and therefore be construed as the children of the testator's designated child, who take in fee simple as purchasers, and prevents the limitation over to the "heirs" general of the testator. *Ibid.*

14. *Estates—Wills—Deeds and Conveyances—Judicial Sales—Estoppel—Purchasers—Sales.*—A., B., and C., took by will a remainder in lands contingent upon their being alive at the time of the death of the first taker, and a further contingent estate depending upon the others being dead at the designated time without leaving issue. A. and B. conveyed, for a sufficient consideration, their right, title, and interest to the land, and the purchaser acquired at a sale under decree of court by deed without warranty from the commissioner, all the right, title, and interest of C. to the identical land, referring to the devise to C.: *Held*, the conveyances of A. and B. were of their whole estate in the land, including both of their contingent interests, and the commissioner's deed was of the entire estate of C., and that A., B., and C., were estopped by their deeds to claim any interest whatsoever in the land, and the purchaser could convey a fee-simple title. *Bourne v. Farrar*, 135.

ESTOPPEL. See Estates, 14; Mortgages, 6, 9; Judgments, 16; Limitation of Actions, 2; Contracts, 12.

EVIDENCE. See Appeal and Error, 2, 11, 12, 14, 17, 20, 25, 27, 28, 32, 33, 35, 37, 38, 40; Arbitration, 1, 3; Limitation of Actions 3; Attachment, 1; Bills and Notes, 6, 8; Subornation of Perjury, 1; Contracts, 1, 6, 7, 8, 10, 11, 12, 18, 20; Deeds and Conveyances, 4; Employer and Employee, 3, 5, 7, 12, 14, 17, 18, 19; Instructions, 2, 3, 8, 10, 11, 15, 17, 18; Municipal Corporations, 5, 11, 18, 20; Negligence, 1, 2, 4, 5, 6, 7, 10, 13, 14; New Trials, 1; Principal and Surety, 1, 2; Railroads, 1, 7, 8, 10, 15; Officers, 2, 3; Trespass, 1, 2; Issues, 1; Wills, 4, 15, 16; Courts, 9; Landlord and Tenant, 1; Corporation Commission, 2; Explosives, 1, 2; Judgments, 14; Arbitration and Award, 2; Intoxicating Liquors, 1, 2, 3, 4; Homicide, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14; Criminal Law, 2, 3, 6, 18.

1. *Evidence—Declarations—Hearsay—Res Inter Alios Acta—Vendor and Purchaser—Contracts—Breach.*—In seller's action to recover damages for the purchaser's breach of contract to accept potatoes, wherein the defendant relies upon the ground that the potatoes did not come up to grade and were therefore refused by him, accounts made to the seller by another and subsequent purchaser of the potatoes refused by the defendant, showing they were of the required grade, are incompetent upon the question as hearsay and *res inter alias acta*. *Cherry v. Upton*, 1.

2. *Evidence—Contracts—Parol Agreements—Subsequent Writings—Timber—Lumber—Sawmills—Slabs.*—The plaintiff, by a parol contract, sold the timber on his land, to be cut, removed, and sawed by the purchaser, and paid for at a certain price per thousand feet, who had the same sawed at defendant's mill; and a controversy having arisen between the plaintiff and defendant as to the ownership of the slabs, the plaintiff thereafter procured from the purchaser a written statement that he only bought the lumber to be sawed from the trees, etc.:

EVIDENCE—*Continued.*

Held, the parol agreement of purchaser as established controlled the question as to whether, under an established custom, the slabs belonged to the defendant, the owner of the mill where the trees were sawed. *Cohoon v. Harrell*, 40.

3. *Evidence—Declarations—Hearsay—Corroboration.*—Where evidence of the value of lands is competent, upon the question of the measure of damages for defendant's failure to take up the plaintiff's option thereon, testimony that one who had previously held an option on the same land that he would not take a certain price therefor, are incompetent as unsworn declarations, and cannot be considered in rebuttal, when the declarant had been on the stand himself and had not testified on the subject. *Newby v. Realty Co.*, 51.

4. *Evidence—Contracts—Admissions.*—Where the breach by defendant of his contract is the subject of the action, the plaintiff may not testify to the breach of a prior contract, when relevant, to show the inducement, the relation of the parties, and the measures for entering into the contract sued on, after he has testified that the prior contract had been abrogated. *Ibid.*

5. *Evidence—Questions for Jury—Trials.—Held*, in this case, the evidence was sufficient to be submitted to the jury on the issues raised by the pleadings. *Coats v. Norris*, 77.

6. *Evidence—Declarations—Evidence—Fires—Hearsay.*—Testimony of a statement made by a witness who has since died, relative and material to the inquiry in a fire damage case, is incompetent as hearsay. *Matthis v. Johnson*, 131.

7. *Evidence—Hearsay—Fires—Damages.*—A map made by a surveyor showing the number of acres as "claimed" by the plaintiff to have been burnt over and damaged by fire from defendant railroad company's locomotive in an action to recover damages for the negligence of the defendant therein, is hearsay and incompetent as substantive evidence, and a judgment based thereon and calculated by the judge on a verdict of so much damage per acre, the acreage not being found by the verdict, is reversible error. *McRae v. R. R.*, 223.

8. *Evidence—Motions—Inspection Before Trial—Writings—Corporations—Public-service Corporations—Statutes—Constitutional Law.*—Where the issue in an action involves the question as to whether a public-service corporation, furnishing electric power to other such companies for distribution and resale, discriminates in its charges against the plaintiff, a motion in this cause, under the provisions of Pell's Revisal, 1656, with affidavits, etc., asking that the defendant furnish plaintiff copies of certain specified contracts which the defendant has made with other consumers under the same or substantially similar conditions, is the proper remedy, and the allegations are not objectionable upon the ground that the matters alleged are insufficient to warrant the order, for that the contracts are immaterial to the proper determination of the issues involved. *R. R. v. Power Co.*, 422.

9. *Same—Court's Discretion—Appeal and Error.*—A motion under Pell's Revisal, 1656, that defendant, a public-service corporation, furnish plaintiff copies of certain contracts in order to show an alleged discrimination against the plaintiff, in rates charged other consumers or distributors of electricity, etc., is addressed to the sound legal dis-

EVIDENCE—*Continued.*

cretion of the trial judge, and in the absence of evidence of his abuse of such powers, not reviewable on appeal. *Ibid.*

10. *Evidence—Statutes—Dying Declarations.*—Ch. 29, Laws of 1919, allowing as evidence dying declarations in actions brought to recover damages for the wrongful or negligent acts of another, Rev., 59, is a constitutional and valid change of the rules of evidence, and permits in evidence such declarations of the act of killing and circumstances immediately attendant on the act, which constitutes a part of the *res gestae*, and uttered when the declarant was in actual danger of death, and full apprehension thereof, and when the death accordingly ensued. *Tatham v. Mfg. Co.*, 628.

11. *Evidence—Deceased Person—Statutes.*—The intent and meaning of Rev., 1631, is to prevent a party to a suit from testifying as to a transaction against the estate or interest of the other party, when the latter is dead and unable to testify in his own behalf. *Reece v. Woods*, 631.

12. *Same—Deeds and Conveyances—Delivery—Husband and Wife.*—Where the title to lands in dispute depends upon whether the deed to a party had been surreptitiously taken from the grantor and wife, under whom he claims, and to be delivered only when a certain part of its consideration had been performed, and had had the same wrongfully registered, it is competent for the wife, after the death of her husband, to testify to the facts of its nondelivery, the defendant, the grantee in the deed being alive and present, and capable of testifying in his own behalf, and such not being within the intent and meaning of our statute on the subject, Rev., 1631. *Ibid.*

13. *Same—Probate Officers—Corroborative — Substantive — Res Gestae.*—Where there is evidence that a grantee in a deed from husband and wife, surreptitiously took it from the *feme* grantor, when it was being held by her pending the performer of condition made a part of the consideration, in an action involving the validity of this deed upon the ground stated, it is competent for the wife, after the death of her husband, to give evidence as to the facts; and also for the probate officer to testify as to declaration of the alleged grantors made at the time the deed was acknowledged before him as to their intent and purpose in making such acknowledgement, such declaration being competent as accompanying an essential fact in the *res gestae*. *Ibid.*

14. *Evidence—Questions for Jury—Instructions.*—In this action to recover damages for the alleged negligence of his employer in causing an employee a personal injury, it is held that the case was properly submitted to the jury, under correct instructions, and defendants' exceptions to the evidence were without merit. *Oliver v. Wilts*, 655.

15. *Evidence—Nonsuit. Moore v. Hines*, 664.

16. *Evidence—Questions for Jury—Compromise.*—Where the defendant resists recovery on a promissory note given in part payment of an exchange of personal property, for fraud in the transaction, transferred to plaintiff for value after maturity, evidence that the original parties had afterwards agreed to exchange with each other the property each had received is evidence of ratification, which, with the other evidence in this case, presents a question of fact for the jury to determine. *Fowler v. Apperson*, 669.

EVIDENCE—*Continued.*

17. *Evidence—Witnesses—Experts—Speed of Automobiles—Negligence.*—Witnesses qualified as experts therein may testify, when relevant to the inquiry, as to the distance within which an auto truck of the kind causing the injury in the action can stop when going at a given speed an hour. *S. v. Gray*, 698.

18. *Evidence—Exclusion—Appeal and Error — Questions and Answers.*—The exclusion of the answer to a question which the witness afterwards substantially answered and when, at the time, it did not appear what the answer would have been, if erroneous, is harmless error. *S. v. Chambers*, 705.

EXAMINATION OF PARTIES. See Pleadings, 5.

EXCEPTIONS. See Appeal and Error, 3, 26; Statutes, 2.

EXCUSABLE NEGLECT. See Judgments, 18.

EXECUTION. See Corporations, 2.

EXECUTORS AND ADMINISTRATORS. See Waiver, 3; Wills, 34.

Executors and Administrators—Actions—Venue—Removal of Causes.—Where the personal representative is sued and it does not appear from the complaint whether the action was brought against him as executor or trustee under the will of the deceased, the presumption is that he was sued in his capacity as executor, and the estate is in some way sought to be charged; and when the action is brought outside of the county wherein the defendant had qualified, it is in proper proceedings aptly brought, removable to the county wherein he has duly qualified, provided either he or the surety on his bond lives therein. *Lumber Co. v. Currie*, 391.

EXECUTORY DEVISE. See Wills, 23.

EXEMPTIONS. See Elections, 5.

EXONERATION. See Mortgages, 1; Principal and Surety, 3.

EXPERTS. See Homicide, 4; Evidence, 17; Appeal and Error, 39.

EXPLOSIVES. See Negligence, 7, 9, 10.

1. *Explosives—Negligence—Defense—Unrelated Evidence—Wires.*—When there is evidence that the defendant was negligent in keeping large quantities of gasoline at its distributing plant, requiring a watchman, which it did not have; that a stream of gasoline was seen flowing from the defendant's warehouse under such surroundings as would make an explosion probable, and that the plaintiff's injury was proximately caused by an explosion in the defendant's warehouse, unconnected evidence that a piece of wire had been found near the defendant's warhouse is too remote or conjectural to be admitted on the theory that the warehouse had been dynamited by others for whose acts the defendant was not responsible. *Fox v. Texas Co.*, 543.

2. *Explosives—Gasoline—Negligence— Evidence— Municipal Corporations —Cities and Towns—Ordinances.*—Where the defendant negligently permitted the conditions at its storage warehouse for gasoline to remain, and without a watchman, so as to menace adjoining or adjacent lands and houses from ignition of the gasoline vapor, and there

EXPLOSIVES—*Continued.*

is evidence that the plaintiff's house was set afire in consequence, testimony offered by the defendant that after the explosion it had received an anonymous postcard, whereon were the words "New Year's Eve, then the explosion," is heresay and incompetent, and not a part of the *res gestae*. *Newton v. Texas Co.*, 561.

EXPRESS COMPANIES. See Carriers of Goods, 1.

FALSE PRETENSE. See Criminal Law, 17.

FEDERAL CONTROL. See Railroads, 13.

FEDERAL GOVERNMENT. See War, 3.

FEDERAL STATUTES. See Removal of Causes, 5, 7; Statutes.

FEE. See Estates, 2; Wills, 21, 23, 24.

FELLOW SERVANTS. See Employer and Employee, 1, 2.

FERTILIZERS. See Principal and Agent, 1, 2, 3.

FINANCIAL PAPER. See Municipal Corporations, 12, 15.

FINDINGS. See Appeal and Error, 1, 22, 24, 25, 28, 35, 39; Summons, 2; Costs, 1, 3; Verdict, 2.

FIRES. See Appeal and Error, 12; Evidence, 6, 7; Negligence, 1, 2; Railroads, 11; Municipal Corporations, 17.

1. *Fires—Tramroads—Railroads—Negligence — Defective Locomotives — Burden of Proof.*—When it is shown that defendant's tramroad locomotive set out sparks from its smokestack or fire box which caused an injury to the plaintiff's land, the burden of proof is on the defendant, having better means of knowing the facts, to show that its smokestack was reasonably well equipped with a proper spark arrester, and that the fire box to the engine was also reasonably safe; and it is competent to show, in this connection, that the locomotive in question had a short time previously been seen throwing out sparks. *Matthis v. Johnson*, 130.

2. *Same—Foul Right of Way.*—Evidence that the defendant's tramroad locomotive dropped sparks on a foul place of its right of way, causing a fire which was communicated to plaintiff's land and damaged it, is sufficient as proof of the defendant's negligence in permitting this condition to exist on its right of way, without showing that its spark arrester was defective. *Ibid.*

FISHING. See Navigation, 1.

FLOODS. See Negligence, 13.

FORECLOSURE. See Sales, 1.

FRAUD. See Judgments, 9, 10; Trusts, 1; Mortgages, 11; Corporations, 2; Arbitration and Award, 1; Deeds and Conveyances, 10; Contracts, 18; Appeal and Error, 2; Attachment, 1; Wills, 17, 20; Bills and Notes, 3; Constitutional Law, 4; Pleadings, 4; Sales, 2.

FRAUD—*Continued.*

Fraud—Pleadings — Results — Ratification.—When fraud is the subject-matter of a cause of action, it should be pleaded with sufficient fullness and detail to apprize the defendant of the matters he is called upon to answer; and where, in an action to set aside a deed made by a corporation to a purchaser at a sale at public auction of practically all of its property, the facts upon which the allegations of the principal fraud rests are sufficiently pleaded, and the suit has been properly instituted by the minority stockholders of the corporation, added allegations of the complaint showing the results of the principal fraud, and to repel a possible claim of ratification by the corporation, etc., are not required to be set forth in the same detail of averment. *Nash v. Hospital Co.*, 60.

FUNDS. See Attachment, 4.

GASOLINE. See Negligence, 7, 9, 10; Explosives, 2; Municipal Corporations, 17.

GATES. See Railroads, 1.

GIFTS.

Gifts—Causa Mortis.—A death-bed statement by a dying person that he wanted his wife to have his store or stock of merchandise, with something vague said about her having the income; that when his wife told him to tell a bystander what he wanted and he would fix it, he replied, "I have waited too long," is insufficient to evidence the intent of the person dying to transfer the possession by delivery, so as to make a gift to the wife *causa mortis*. *Askew v. Matthews*, 175 N. C., 187, cited and applied. *In re Tart*, 105.

GOVERNMENT. See War, 1, 3.

GOVERNMENT CONTROL. See Carrier of Passengers, 2.

GOVERNMENTAL POWERS. See Railroads, 4.

GRAND JURY. See Indictment, 1.

GUARANTEE. See Landlord and Tenant, 1.

HEALTH.

Health—Cattle—Eradication of Ticks—Constitutional Law—Quarantine—Statutes.—A regulation of a quarantine district laid off and enforced in pursuance of C. S., 4688 (3) and 4873, for the eradication of ticks on cattle under the authority of the commissioners of the county affected, and the State and Federal Departments of Agriculture, and also under the State and Federal inspections therein provided for, requiring those in the district to have their cattle dipped in a solution, and by methods furnished them, to get rid of the ticks on the cattle and prevent infection, is a reasonable and valid regulation. *S. v. Hodges*, 751.

HEIRS. See Descent and Distribution, 1; Estates, 2, 13.

HEIRS OF THE BODY. See Deeds and Conveyances, 8.

HOLOGRAPH. See Wills, 1, 3.

HOMICIDE. See Trials, 2, 3; Criminal Law, 6.

1. *Homicide—Criminal Law—Instructions—Murder—Manslaughter—Appeal and Error.*—Where there are facts in evidence tending to reduce the crime to manslaughter, and the prisoner is tried under an indictment for murder, it is the duty of the trial judge to submit this view of the case to the jury under a correct charge, and his failure to do so will constitute reversible error, though the defendant may have been convicted of the higher offense. *S. v. Bryant*, 690.

2. *Same—Prayers for Instructions.*—Where, upon the trial for murder, there are facts in evidence permitting the inference that the homicide was not intentional, but was unintentionally caused by the defendant's careless use of his pistol, in a culpably negligent manner, a charge of the court to the jury which makes no reference to the offense of manslaughter, and ignores a special request presenting these principles, is reversible error. *Ibid.*

3. *Homicide—Criminal Law — Instructions — Statutes — Murder — Manslaughter.*—Where the defendant is being tried under an indictment for murder, and there is evidence, in his behalf, tending to show that the crime was of the less offense of manslaughter, a charge of the court to the jury which gives no instructions pertinent to these respective positions, or otherwise as to what may constitute either murder or manslaughter, is erroneous in not sufficiently complying with our statute, Rev., 535, requiring that the court shall declare and explain to the jury the law pertaining to the facts in evidence. *Ibid.*

4. *Homicide—Murder—Evidence.*—Evidence that the prisoner shot at the deceased four times, two of the shots taking effect after the deceased had fallen, with malice and without provocation or legal excuse, is sufficient for conviction of murder in the first degree. *S. v. Ward*, 693.

5. *Homicide—Murder — Insanity — Drunkenness — Evidence — Experts—Witnesses—Hypothetical Questions.* When the defense of insanity is interposed on a trial for murder and there is evidence that the prisoner had been drinking at the time of the crime, a question asked a medical expert, on cross-examination, whether, in his opinion, the prisoner was under the influence of whiskey or was crazy, if he could walk straight and carry on a rational conversation, is a proper one, when based on facts the counsel contended he had proved. *Ibid.*

6. *Homicide—Murder—Premeditation—Evidence — Questions for Jury—Motions—Nonsuit—Trials.*—The evidence of the element of deliberation and premeditation, which are essential to a conviction of murder in the first degree, is sufficient, if shown to exist for however short a time preceding the homicide; and where the evidence tends to show that some one had given previous warning, with answering call, as the sheriff approached an illicit still in operation, and the sheriff was shot and killed by the defendant while being taken into custody, who watched the approach of the sheriff across a clearing, and stood with pistol in hand, ready to shoot, together with the defendant's declaration made some time previous, in a joking manner, that if he were blockading and an officer interferred "he would shoot his way out," is sufficient for a conviction of murder in the first degree, and defendant's motion of nonsuit should be denied. *S. v. Baity*, 722.

HOMICIDE—*Continued.*

7. *Homicide—Murder—Motive—Evidence.*—Evidence that the deceased had been living in an illicit manner for years with a woman with whom the defendant was infatuated, and to his knowledge, is sufficient to show the defendant's motive in taking his life, upon his trial for murder. *S. v. Holdsclaw*, 731.

8. *Homicide—Murder—Evidence—Res Gestae—Res Inter Alios Acta.*—Upon evidence tending to show that the defendant premeditatively and deliberately shot and killed the deceased for illicitly living with the woman with whom he was infatuated, testimony that others had remonstrated with the deceased for so doing, and the conduct of the woman over the body of the deceased immediately after the killing, etc., is not a part of the *res gestae*, but *res inter alios acta*. *Ibid.*

9. *Homicide—Murder—Premeditation.*—The length of time between the premeditation and killing is immaterial in order to convict the defendant of murder in the first degree, and if he had preconceived the purpose to kill in all events, for however short a time, it is sufficient. *Ibid.*

10. *Homicide—Murder—Premeditation — Method of Killing — Evidence—Manslaughter—Instructions.*—A deliberate and premeditated purpose to kill may be evidenced by the manner employed in the taking of the life, as where there is evidence that the prisoner, living in adultery in another State, away from his home, returns thereto by rail, avoiding recognition, discovers another man with his wife, waits until he has left her, and then chokes her to death, etc., and upon this, and other conflicting evidence, a motion, based upon a lack of premeditation and motive, as of nonsuit thereon, will be denied; and, *Held further*, under the evidence in this case, an exception that the judge failed to charge upon the aspect of manslaughter cannot be sustained. *S. v. Henderson*, 735.

11. *Homicide—Murder—Evidence—Threats—Character.*—Upon a trial for a homicide where there is no evidence that the prisoner acted in self-defense, or was reasonably apprehensive that his life was in danger, or of receiving great bodily harm, but that he had shot the deceased in the back, and the transaction is not in doubt, evidence of the character of the deceased, or of threats made by him but not previously communicated to the prisoner, are properly excluded. *S. v. Canup*, 739.

12. *Homicide—Murder—Intoxication—Evidence.*—Upon a trial for a homicide where the evidence shows that the prisoner shot the deceased when the latter was drunk, profane and boisterous, testimony under the facts of this case was not improperly excluded that the deceased was in the habit of drinking. *Ibid.*

13. *Homicide—Murder—Evidence—Declarations.*—Where the prisoner is a policeman, and on his trial for the homicide of one whom he was assisting to arrest, by shooting him in the back with a pistol, his declarations, made some time before the homicide, as to his promptitude and readiness to shoot under such circumstances are properly admitted, with other evidence tending to show his guilt. *Ibid.*

14. *Homicide—Murder—Character — Evidence — Cross-examination — Impeaching Evidence.*—The deceased was killed when being arrested by the prisoner, a policeman: *Held*, upon a trial for murder, the defense

HOMICIDE—*Continued.*

may cross-examine a witness who has testified to the good character of the deceased, upon matters tending to impeach his general character, but not as to specific instances, or as to how many men it had taken to arrest him on a former occasion, this being collateral to the issue being tried. *Ibid.*

HUSBAND AND WIFE. See Elections, 1; Estates, 1; Principal and Surety, 1; Judgments, 8, 17; Evidence, 12; Divorce, 4.

1. *Husband and Wife—Bills and Notes—Notes—Negotiable Instruments—Endorsement of Married Women—Common Law—Statutes.*—An endorsement of a married woman of her husband's note in a State where the common law prevails, unaffected by statute, is void; and payment thereon made by her after her husband's death and her naked promise to pay the balance is without consideration, and not enforceable as her ratification of the transaction after discoverture. *Elliott v. McMillan*, 232.

2. *Husband and Wife—Married Women—Wife's Torts—Husband's Liability—Statutes.*—The rule of the common law that made the husband liable for the torts of his wife, though living separate at the time, has been modified by statute so as to make him liable when they are living together. Rev., 2105. *Young v. Newsome*, 315.

3. *Same.*—Rev., 2105, giving a right of action against the husband for the tort of the wife, while they are living together, modifying the common law, is not affected by the courtesy act of 1848, the constitutional provision vesting in the wife her separate estate; the marriage act of 1871-72 and other statutes giving her many of the rights of a *feme sole;* the Martin Act of 1911, ch. 109, allowing her to contract in certain cases as if unmarried, and the act of 1913, ch. 13, giving to a married woman her personal earnings, with right to sue alone for personal injuries, etc.; for the rights thus given are additional ones, without changing the common-law principles as modified by the statute. Rev., 2105. *Ibid.*

4. *Husband and Wife—Actions—Assault—Venereal Disease—Statutes—Damages—Punitive Damages.*—While at common law a wife could not maintain an action without joining her husband, or against him personally, this was changed by statute, Rev., 408, with relation to her separate property, and by the Legislature of 1913, including the right as to personal injuries and torts; and now she may maintain her action against her husband as in assault, for coercing her and willfully and maliciously giving her a venereal disease, in which case, punitive as well as compensatory damages may be awarded. *Crowell v. Crowell*, 516.

HYPOTHETICAL QUESTIONS. See Homicide, 5.

IDEM SONAMS. See Criminal Law, 12.

IMPROVEMENTS. See Judgments, 2.

INDEMNITY. See Principal and Surety, 7.

INDICTMENT. See Arrest of Judgment, 1; Judgments, 20; Criminal Law, 13, 14, 16.

1. *Indictment—Criminal Law—Motion to Quash—State's Witness—Grand Jury.*—A motion to quash an indictment made after the plea of not

INDICTMENT—*Continued.*

guilty, will not be granted on the ground that a witness for the State, in a criminal action, was a member of the grand jury, that found the true bill, especially when it appears that he took no part therein. *S. v. Brewer*, 716.

2. *Same—Courts—Discretion.*—The denial of a motion to quash an indictment, made upon the ground that a State's witness in the action was a member of the grand jury that found the true bill, and after the plea of not guilty will not be disturbed on appeal, the matter being one exclusively addressed to the discretionary power of the trial judge. *Ibid.*

INFANTS. See Employer and Employee, 12.

INFERENCE. See Verdict, 2.

INJUNCTION. See Municipal Corporations, 1; Removal of Causes, 4.

Injunction—Malice—Probable Cause — Damages — Independent Action—Statutes.—Rev., 817 (C. S., 854), requiring bond in injunction to cover defendant's damages, and Rev., 818 (C. S., 855), providing for the recovery of plaintiff in the same action, does not limit the remedy of plaintiff to that action, in the event the injunction was sought with malice and without probable cause; and he has the right therein to elect between this remedy and that by independent action, without limiting his recovery to action on the bond when the damages sought are in excess of that amount. *Shute v. Shute*, 386.

INSANITY. See Homicide, 5; Trials, 3.

INSOLVENCY. See Attachment, 1.

INSPECTION. See Appeal and Error, 1; Evidence, 8; Employer and Employee, 11.

INSTRUCTIONS. See Appeal and Error, 5, 7, 13, 15, 16, 23, 29, 33, 34, 41; Bills and Notes, 2; Carriers of Goods, 3; Homicide, 1, 2, 3, 10; Contracts, 4; Municipal Corporations, 9; Navigation, 1; Railroads, 6, 11; Intoxicating Liquors, 8; Wills, 15, 17; Criminal Law, 1, 15, 18; Negligence, 3, 16; Subornation of Perjury, 4; Arbitration and Award, 2; Issues, 2; Evidence, 14.

1. *Instructions—Contract—Breach—Vendor and Purchaser — Damages.*—Where the purchaser of goods, in this case potatoes, has breached his contract to receive and pay for them, so that the seller is forced to sell them upon the market, it is required of the trial judge, in charging the jury upon the question of the measure of damages, to give them some guidance to aid them in their determination, and an instruction to allow such sum as they find the damage to be, subject to the vendor's duty to minimize the loss, is erroneous. *Cherry v. Upton*, 1.

2. *Instructions—Verdict Directing—Evidence—Appeal and Error.*—Where a verdict may be directed by the court on the issue of a carrier's negligence, it is reversible error to do so on the issue of damages upon the testimony of the plaintiff as to the value of a lost trunk, the subject of the injury. *Midgett v. Transportation Co.*, 71.

3. *Instructions—Employer and Employee—Master and Servant—Evidence—Appeal and Error.*—It is reversible error for the trial judge to

INSTRUCTIONS—*Continued.*

charge the jury that the plaintiff was an employee of the defendant to whom the latter owed the duty to furnish a safe place to work, when there was evidence that the plaintiff was at work as an independent contractor. *Hobbs v. R. R.*, 129.

4. *Instructions—Prayers for Instruction—Substantial Compliance.*—It is sufficient if an instruction to the jury substantially covers the prayers therefor tendered, as the court is not required to use the language of the prayers. *In re Hinton*, 207.

5. *Instructions—Appeal and Error—Harmless Error.*—The charge of the court to the jury should be construed as a whole in the same connected way as it was given, with the presumption that the jury has not overlooked any portion of it, and when, so construed, it presents the law fairly and clearly, the judgment will not be reversed because some portion might be regarded as erroneous. *Haggard v. Mitchell*, 255.

6. *Instructions—Conflicting Charge—Appeal and Error—Reversible Error.*—When the trial judge erroneously instructs the jury on the issue of contributory negligence, under conflicting evidence, as to the duty of one driving upon a railroad track, at a street crossing in a town, to stop, as well as to look and listen for an approaching train, the error is not cured by a correct but conflicting instruction thereon, in another part of the charge, as the jury will not be presumed to know which of these conflicting instructions is the correct principle of law applicable to the evidence. *Kimbrough v. Hines*, 274.

7. *Instructions—Negligence—Contributory Negligence.*—Only in rare and exceptional instances does the negligence or contributory negligence, in an action for damages, depend on a single fact, but it is usually determined from all the relevant and surrounding circumstances; and the practice of making single instances the basis of instructions thereon, to the jury, is disapproved, although sometimes permissible. *Lee v. R. R.*, 413.

8. *Instructions—Evidence — Opinion—Courts — Contentions.*—A requested instruction which attempts to pass upon the evidence, or withdraws a material portion of the relevant evidence from the jury, is properly refused. *Newton v. Texas Co.*, 501.

9. *Same—Admissions.*—Where there is evidence that plaintiff's house was negligently injured by an explosion of gasoline stored in the defendant's warehouse, and caused by the defendant's negligence, it is not error for the trial judge to speak of the explosion as an admitted fact, when it has been admitted. *Ibid.*

10. *Instructions—Issues—Correlating Evidence.*—It is not an expression of opinion by the trial judge to narrate the related evidence in stating the contentions of the parties in his instructions to the jury, and to explain to the jury the relevancy of the evidence to the issues submitted. Rev., 535. *Ibid.*

11. *Instructions—Evidence—Appeal and Error—Objections and Exceptions.*—An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the

INSTRUCTIONS—*Continued.*

evidence, as required by Rev., 535, and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. *Tatham v. Mfg. Co.*, 628.

12. *Instructions—Verdict Directing—Appeal and Error—Verdict.—Held*, in this case, a verdict directed upon the evidence, if found to be true, was a correct instruction. *Roten v. Parker*, 658.

13. *Instructions—Verbal Requests—Substance.*—The consideration of whether the appellant had the right to have an instruction, orally requested, submitted to the jury, under the circumstances of this case on appeal, becomes immaterial when it appears from the instructions given, he had received the full benefit of this request. *Fowler v. Apperson*, 669.

14. *Instructions—Admissions—Issues — Statutes—Criminal Law.* — Where the only fact at issue is whether the defendant was the one who had broken into and robbed a store, objection that the charge did not "state in a plain and correct manner the evidence given in the case, and explain the law arising thereon." Rev., 535, is untenable, as the whole controversy is reduced to the determination of one fact. *S. v. Willoughby*, 676.

15. *Instructions—Admissions—Circumstantial Evidence—Criminal Law.*— The instructions in this case, where the breaking into and robbing a store is admitted, and the identity of the defendant is the only question, are held unobjectionable as charging an admission of defendant's guilt, and upon the law of circumstantial evidence. *Ibid.*

16. *Instructions—Appeal and Error.*—Where the charge of the court, in a criminal action for subornation of perjury, construed as a whole, correctly states the law in relation to the evidence, a "slip of the tongue" at a certain part will not be held as reversible error; nor will any detached expression of the court be so held, when the charge is correct in its entirety, and so construed, the presumption being that the jury did not overlook any part of it. *S. v. Chambers*, 705.

17. *Instructions—Explaining Evidence—Appeal and Error.*—Where the evidence is plain and uncomplicated, upon a trial for an assault with a deadly weapon with intent to kill, a charge of the court which is otherwise without error, is not objectionable solely because the judge did not explain the evidence to the jury. *S. v. Shemwell*, 718.

18. *Instructions—Recapitulating Evidence—Special Requests—Appeal and Error.*—The failure of the judge to recapitulate the evidence in his charge to the jury, without a special request made in apt time to do so, is not properly assignable for error on appeal. *Ibid.*

INSULATION. See Negligence, 12.

INSURANCE. See Employer and Employee, 7.

INSURANCE, LIFE.

1. *Insurance, Life—Policies—Noncontestable Clause—Actions.*—Under a clause in a life insurance policy making it incontestable after a year from its date, except for nonpayment of premiums, the insured has a

INSURANCE, LIFE—*Continued.*

right of action against the designated beneficiary after the death of the insured within that period, and living, to declare the policy void for fraud or material representations as to the health of the insured in his application, and being concluded by the express terms of the policy, the company may not thereafter maintain his action, except for the nonpayment of premiums due it thereunder. *Trust Co. v. Ins. Co.*, 173 N. C., 558, cited and applied. *Hardy v. Ins. Co.*, 180.

2. *Insurance, Life—Noncontestable Clause—Conditions—Pleadings.*—The provisions of a life insurance policy that it is incontestable after a stated time, etc., are conditions upon which the contracts are made, and not a waiver, and not being in strictness "a short period statute of limitation," it is sufficiently pleaded when the policy sued on containing them is set out in the complaint as a part thereof. *Ibid.*

3. *Insurance, Life—Policies—Noncontestable Clause—Contracts — Interpretation—Ambiguity.*—A clause in a life insurance policy making it incontestable after one year from its date, except for the nonpayment of premiums, is for the benefit of the insured in the acquisition of business, and being unambiguous, the courts will not interpolate additional words to the effect that it was necessary for the policy to have been in force for a year before the death of the insured. *Ibid.*

4. *Insurance, Life—Policies—Noncontestable Clause—Actions—Limitations of Actions—Statutes.*—Where, under a clause in a policy of life insurance, it is uncontestable after a year from its date, with certain exceptions, and the insured has died within the period, leaving the designated beneficiary alive, the insured is not relieved of his obligations to bring its action to declare the policy void for matters falling without the exceptions, within the year from the date of the policy, either against the insured in his lifetime, or the beneficiary thereafter; and there having always been a party against whom the insurer could have brought its action, the provisions of Rev., 367, extending the time in certain instances, have no application. *Ibid.*

INTENT. See Wills, 2, 30, 31, 35; Officers, 1; Intoxicating Liquors, 8.

INTEREST. See Actions, 1, 2.

INTERROGATORIES. See Controversy Without Action, 1.

INTERVENING ACT. See Negligence, 8.

INTERVENORS. See Attachment, 4; Courts, 18.

INTIMATION OF OPINION. See Wills, 36.

INTOXICATING LIQUOR.

1. *Intoxicating Liquor—Spirituous Liquor—Unlawful Sale — Evidence.*—Evidence that crowds frequenting defendant's place of business were drinking is competent as corroborative of direct testimony to the sale by defendant of intoxicating liquor there, on the trial under an indictment for the unlawful sale of intoxicating liquors. *S. v. Ingram*, 672.

2. *Intoxicating Liquor—Spirituous Liquor—Criminal Law—Manufacture—Evidence—Questions for Jury—Trials.*—Testimony that the defendant, charged with the unlawful manufacture of intoxicating liquor,

INTOXICATING LIQUOR—*Continued.*

was arrested at an obscure place suited to the purpose, with the meal reduced to the state of beer, proper to be made into whiskey, the still complete, except the cap and worm, which would not be needed in a week, with declarations of the defendant that he was manufacturing the liquor for his own use but had been caught before he could do so, with further evidence that the still gave indication that it had been used before, goes beyond being evidence of preparations to commit the offense, and is sufficient to sustain a verdict of guilty. *S. v. Blackwell*, 733.

3. *Intoxicating Liquor—Spirituous Liquor—Manufacture—Common Benefit—Circumstantial Evidence.*—A conviction of several defendants upon wholly circumstantial evidence tending to show that they had a common purpose in illicit distilling spirituous liquor in a close neighborhood to each other, upon adjoining premises, and receiving a common benefit, may be had, as in this case, where there was evidence that they had moved stills from one place to the other on their lands, to conceal their operations, used the still slops for the feeding of their hogs, with other circumstantial evidence tending to show the joint and unlawful manufacture of the liquor, and identifying them therewith. *S. v. McMillan*, 741.

4. *Intoxicating Liquor—Spirituous Liquor—Possession—Presumptions—Evidence.*—Evidence that the defendant occupied a room in a city ten miles from his home, fitted up for receiving intoxicating liquor and keeping it for sale, and therein, at the time of his arrest, there was found in his possession more than a quart of whiskey, in several small bottles, and also a whiskey glass, a funnel, empty bottles and fruit jars, is, in the absence of explanation, sufficient to sustain a conviction of the offense of receiving liquor illegally and for an illegal purpose. *S. v. Fore*, 744.

5. *Same—Statutes—Congress—Volstead Act—Constitutional Law—Concurrent Powers—Courts.*—The purpose of the Eighteenth Amendment to the Federal Constitution was to prevent the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and the territories subject to the jurisdiction thereof for beverage purposes, and to give Congress and the several States "concurrent power" to enforce these provisions "by appropriate legislation": *Held*, by giving Congress and the Legislatures of the different States "concurrent" powers, the latter may enact such laws for the accomplishment of the main purpose of the Eighteenth Federal Amendment as are not in conflict with the congressional legislation on the same subject-matter, but in addition thereto and coming within the police regulations of the State, and in the enforcement thereof; and our State statutes on the subject of the presumption that the possession of spirituous liquors, in certain quantities, is for the purpose of unlawful sale, is not in conflict with the Volstead Act of Congress, 41 U. S. Sts. at Large, and is a valid and enforcible enactment. *Ibid.*

6. *Same.*—As to whether our statute upon the subject of receiving more than one quart of intoxicating liquor in fifteen days is in conflict with the Volstead Act, *Quaere. Ibid.*

7. *Spirituous Liquors—Statutes—Amendments—Statutory Rewards—Avery County—Intoxicating Liquors.*—From the title and otherwise,

INTOXICATING LIQUOR—*Continued.*

ch. 188, Public-Local Laws of 1919, relating to Avery County, and giving certain officers of the county specified rewards for the conviction of or furnishing evidence against those unlawfully manufacturing spirituous liquors, is construed as an amendment to ch. 807, Laws of 1909, upon the same subject-matter, and to further encourage the enforcement of the law; and the rewards offered in the later act are in addition to those offered in the former one. *Braswell v. Comrs.*, 572.

8. *Spirituous Liquor—Intoxicating Liquor—Manufacture—Intent to Purchase—Instructions—Verdict Directing—Appeal and Error.*—Evidence that the defendant, clad in his overalls, was found at a whiskey still, in operation, with another, is sufficient to convict of the unlawful act of distilling; but when his evidence in explanation is that he only asked where he could get a drink, knew nothing of the still, and was carried to the place and had not gotten it when the officers arrived: *Held*, an instruction that upon his own testimony he would be guilty of aiding and abetting the unlawful act of distilling is reversible error. *S. v. Sykes*, 679.

INTOXICATION. See Homicide, 12.

INVITATION. See Employer and Employee, 12.

ISSUES. See Estates, 7; Negligence, 1; Wills, 19, 20, 36; Instructions, 10, 14; Courts, 18; Bills and Notes, 8; Courts, 2; Railroads, 11; Trials, 1.

1. *Issues—Processioning—Title—Appeal and Error—Evidence.*—Objection that an issue as to title had not been submitted to the jury, an appeal in a proceeding to procession land cannot be sustained when the party so objecting has tendered no issue or offered any evidence as to title. *Exum v. Chase*, 95.

2. *Issues — Trials — Negligence — Contributory Negligence — Last Clear Chance—Instructions—Appeal and Error.*—In an action against a street car company for its negligence in injuring the plaintiff's vehicle by a collision while crossing the track, and the evidence is conflicting upon the issues of negligence, contributory negligence, and the last clear chance, it is not reversible error for the trial judge to refuse to submit an issue upon the last clear chance, when he properly charges the law thereon under the issue of negligence. The charge in this case is adjudged sufficient, but the submission of the issue as to the last clear chance is commended. *Semble*, the evidence in this case may present the principle of concurring negligence. *Buffaloe v. Power Co.*, 216.

3. *Issues—Material Facts—Separate Issues.*—There is no reversible error in submitting essential part of a transaction, involved in the controversy, on a separate issue to the jury, when the trial is otherwise free from error. *Fowler v. Apperson*, 669.

ISSUES SET ASIDE. See Appeal and Error, 10.

JAIL. See Municipal Corporations, 1.

JUDGMENTS. See Appeal and Error, 1, 8, 10, 12, 21, 24, 25, 27; Bills and Notes, 1, 8; Pleadings, 2; Railroads, 3; Wills, 6; Parties, 1, 2; Constitutional Law, 7, 16; Negligence, 11; Courts, 15, 21; Limitation of Actions,

JUDGMENTS—*Continued.*

2; Surveys, 1; Corporations, 2; Principal and Sureties, 4; Costs, 3; Verdict, 2; Arrest of Judgment, 1.

1. *Judgments—Default—Motions—Irregular Judgments — Laches — Reasonable Time—Statutes.*—A judgment by default taken after answer has actually been filed in time, though, by mistake in the date thereof, appearing not to have been, is irregularly entered and the remedy is by motion in the cause to set it aside, made within a reasonable time under existing conditions. Rev., 274, relates to judgments taken in the course and practice of the courts, and has no application to judgments irregularly entered. *Gough v. Bell*, 269.

2. *Same — Mortgages — Sales — Purchaser for Value — Improvements.* — Where an irregular judgment by default final has been taken against a mortgagor of lands and he has been ousted from the possession thereof by proceedings for the purpose, without protest, or motion in the cause to set aside the judgment for more than 5 years, and after improvements have been made thereon by the purchaser or his vendee, a purchaser for full value without notice, the delay is *Held* to be an unreasonable one, and the motion will be denied. *Ibid.*

3. *Judgments—Irregular Judgments — Motions — Laches—Merits.*— Upon motion to set aside an irregular judgment, the right of the movant is not absolute and without limit as to time, and in order to obtain relief in case of judgment voidable for irregularity, it is required of him that he should move within a reasonable time and make a reasonable show of merits, which, under the facts in this case, he has not done. *Ibid.*

4. *Judgments—Irregular Judgments — Motions — Judgments Set Aside—Rights of Third Persons—Purchasers for Value Without Notice.*—The power of the court in setting aside a judgment by default final, for the want of an answer, extends to modifying the judgment and imposing conditions pertinent to the scope of the inquiry, as the right and justice of the case may require; and, in proper instances, it may set aside the judgment as between the original parties, and protect the rights of an innocent purchaser of lands for full value, without notice, which have arisen to him under the judgment vacated. *Ibid.*

5. *Judgments—Motion to Set Aside—Divorce—Federal Statutes—Soldiers and Sailors Civil Relief Act.*—A judgment in favor of the wife, in an action for divorce against her husband on the ground of his adultery, summons served by publication, will not be set aside as in violation of the Federal Soldiers and Sailors Civil Rights Act, when it appears that the husband had separated himself from his wife, and joined the army without her knowledge thereof or as to where he was, and he has made his motion more than ninety days after his termination of service in the army, and does not make it to appear to the court, by specific averment, that he has a meritorious or legal defense. *Combs v. Combs*, 381.

6. *Judgments—Motions to Set Aside Judgments—Independent Action—Process—Summons—Service—Equity—Cloud on Title to Lands.*—The remedy to set aside a judgment for lack of service on the defendant, which is regular on its face and rendered on process showing service, is by motion in the cause and not by an independent action, whether

JUDGMENTS—*Continued.*

the action is called one to remove a cloud upon the title to land or to invoke the equity jurisdiction of the court to prevent an injustice. *Caviness v. Hunt*, 384.

7. *Judgments—Consent — Contracts — Courts.*—A consent judgment is a contract of record between the parties entered with the approval of the court. *Morris v. Patterson*, 484.

8. *Same — Husband and Wife — Divorce — Statutes.*—In an action for divorce brought by the wife for a divorce *a mensa*, C. S., 2529, a consent judgment that the wife have a life estate in certain of her husband's lands, remainder to their children, would have otherwise been valid as a voluntary conveyance, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. *C. S.*, 1668, and a writ of possession may be issued. C. S., 1664. *Ibid.*

9. *Same—Fraud—Mistake.*—As in other instances of contract, a consent judgment entered in the wife's action for divorce *a mensa*, affecting the husband's lands and the disposition of the children among the parties, but not decreeing a divorce, estops the parties thereto actually consenting, in the absence of fraud or mutual mistake. *Ibid.*

10. *Judgments—Consent—Fraud—Mistake— Action — Collateral Attack—Burden of Proof.*—To attack, in an independent action, a judgment by consent entered by a court of competent jurisdiction of the parties and subject-matter, the burden of proof is upon the plaintiff to show that the judgment was obtained by fraud or mutual mistake, or that consent was not, in fact, given. *Ibid.*

11. *Judgments—Consent—Amendments—Courts.*—A consent judgment can be amended only by consent, and is an exception to the rule that the judgments may be modified by the judge during the term at which they are rendered. *Ibid.*

12. *Judgment—Consent—Lands—Estates—Deeds and Conveyances—Title —Third Persons.*—A consent decree for the recovery of lands in fee has the effect of conveying the legal estate in fee "as between the parties," and is good as against third persons in the absence of fraud or collusion. C. S., 608. *Ibid.*

13. *Judgments—Motions—Excusable Neglect.*—It is inexcusable and gross neglect for a plaintiff to take out claim and delivery in his action, fail to file his complaint, and permit a judgment by default to be taken against him according to the course and practice of the courts; and his motion to set aside the judgment for excusable neglect therein will be denied. *Shepherd v. Shepherd*, 494.

14. *Judgments — Assignment — Parol Evidence — Trusts — Beneficiaries—Ratification.*—It may be shown by parol that an assignment of a judgment, absolute in form, was, in fact, to be held as a security for a debt; and this applies to one acquiring an interest under the assignment, who was not aware of it at the time, but afterwards ratified it by claiming its benefits. *Chatham v. Realty Co.*, 500.

15. *Same—Actions—Parties.*—Where a judgment has been assigned to one for the benefit of himself and others, the one to whom the judgment has been assigned holds as trustee for the others, and he and the

JUDGMENTS—*Continued.*

others holding an interest therein may maintain an action against the judgment debtor; and while such assignee is not a necessary party, when he holds merely as a trustee, he is a proper party. *Ibid.*

16. *Judgments — Assignment—Estoppel — Trusts.*—A judgment assigned either absolutely or in trust operates as an estoppel between the judgment debtor and the parties, and privies, or others having an interest therein as *cestui que trustent.* C. S., 449. *Ibid.*

17. *Judgments—Appeal and Error — Reformation of Judgment — Supplies Furnished—Mortgages, Chattel — Collateral Security—Husband and Wife.*—When a man and his wife have executed a chattel mortgage as collateral security for supplies furnished the husband for the year 1915, she is liable only for the supplies furnished for that year, and not the preceding one; and where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly.—*Stores Co. v. Bullock*, 656.

18. *Judgments Set Aside—Defense—Default of Answer—Motions—Excusable Neglect—Laches.*—To set aside a judgment for excusable neglect, the movement must show a meritorious defense and a legal excuse for his laches, which he has not done when it appears that he was informed by the plaintiff that prior negotiations to compromise were ended; that complaint must be filed, by a certain time under the statute, a rejected offer by plaintiff of compliance with the compromise which had been declared off, and the final judgment for the want of an answer taken in the course and practice of the courts. *Gray v. King*, 667.

19. *Judgment—Criminal Law—Suspension of Judgment—Violation of Conditions—Trial Judge—Discretion—Trial by Jury—Appeal and Error.* The proceedings of the trial judge in a criminal action to ascertain whether the terms of a suspended judgment have been complied with, are addressed to his reasonable discretion, and do not fall within the province of the jury; and his action thereon is not reviewable on appeal when supported by evidence, unless this discretion has been manifestly abused by him. *S. v. Hoggard*, 678.

20. *Judgments—Motions in Arrest—Indictments—Courts—Concurrent Jurisdiction—Pleas—Abatement.*—A motion in arrest of judgment can be made only for a defect appearing. Where a recorder's court and the Superior Courts have concurrent jurisdiction has the case before it it is only to be taken upon plea in abatement. *S. v. Shemwell*, 718.

21. *Same—Recorder's Court—Committing Magistrate.*—Where a recorder's court and the Superior Court have concurrent jurisdiction of a criminal offense and the judge of the former court acts within his powers of committing magistrate, and binds the prisoner over to the Superior Court, objection that the recorder's court had thereby taken jurisdiction of the offense is untenable, and neither will a motion to quash the indictment, nor a plea in abatement be sustained. *Ibid.*

JUDICIAL NOTICE. See Courts, 16.

JUDICIAL SALES. See Estates, 14.

JURISDICTION. See Courts, 2, 4, 6, 8, 10, 12, 15, 17, 20; Removal of Causes, 1, 6, 7; Costs, 3; Judgments, 19.

JUSTICE'S COURTS. See Appeal and Error, 6; Courts, 10, 11, 14, 22; Costs, 1; Criminal Law, 5.

LABORERS. See Principal and Surety, 8.

LACHES. See Appeal and Error, 6; Judgments, 1, 3, 18.

LANDLORD AND TENANT. See Lessor and Lessee, 1; Courts, 10, 11; Contracts, 20.

Landlord and Tenant—Title—Tenant's Possession—Deeds and Conveyances—Guarantee of Landlord—Wills—Evidence—Appeal and Error. —A tenant is estopped to deny the title of the one under whom he holds possession, without first having surrendered the possession; but this doctrine does not apply when the title of the landlord has terminated, or claimed by descent, or to prevent the tenant from assailing, for fraud, the validity of an alleged transfer from his landlord, in order to protect his possession; as where the niece of the testator, his tenant, in possession, claims title under his will, duly admitted to probate, and attacks for fraud the deed of her landlord under which the plaintiff claims; and the exclusion of the defendant's evidence to this effect is reversible error. *Hargrove v. Cox*, 360.

LANDS. See Contracts, 14.

LAPPAGE. See Deeds and Conveyances, 6.

LEASES. See Contracts, 20.

LEGISLATIVE OPINION. See Constitutional Law, 12.

LEGISLATIVE POWERS. See Statutes, 1.

LESSOR AND LESSEE. See Railroads, 3.

Lessor and Lessee—Landlord and Tenant—Contracts—Damages—Crops—Caveat Emptor. It is incumbent upon the lessee of lands to observe the lands beforehand with regard to fences and other like or apparent matters, and protect himself in his lease as to their repair, etc., and when he has not done so the doctrine of *caveat emptor* applies and he may not recover of his lessor damages to his crops caused by the condition of the fence during the period of the lease for farming purposes. *Duffy v. Hartsfield*, 151.

LETTERS. See Appeal and Error, 4; Wills, 1.

LIBEL AND SLANDER. See Attachment, 2.

1. *Libel and Slander—Privilege—Communications—Slander.*—An absolute privileged communication rests in public policy, and is one which, under ordinary circumstances, would be defamatory, made to another in pursuit of a duty, political, judicial, social, or personal, and an action for libel or slander will not lie, though the statement was false, unless actuated by actual malice. *Alexander v. Vann*, 187.

2. *Libel and Slander—Qualified Communications.*—A qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating, acting without malice, has an interest, or in reference to which he has a moral or a legal duty to

LIBEL AND SLANDER—*Continued.*

perform; and the inference of malice may be rebutted by the occasion of the communication, or such occasion may tend to prove it, or tend to prove that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. *Ibid.*

3. *Libel and Slander—Privilege—Actionable Per Se—Actions.*—The sheriff of a county in returning a prisoner charged with wife murder, to another county, put the prisoner in charge of his deputy sheriff, and deputized a negro ex-convict, who had, single-handed, made the arrest, to assist his deputy. The subdeputy rode in the car for colored people, but at the request of a third person, with the acquiescence of the deputy, went into the white people's car and rode with them for a while, to give some personal information as to the arrest: *Held*, a letter written to the deputy by a defeated candidate for sheriff, of the county to which the prisoner was being carried, in effect, that the writer was surprised and disgusted that the deputy permitted the negro subdeputy to ride on equality in the coach with himself, and that the negro subdeputy, a wife murderer, except in incident of birth, was a better man, lacks the elements of a privileged communication, in that it was addressed personally to an official of an adjoining county, and not to any one who could have remedied the wrong, if any had been committed; and considered with the further facts of the case, showed personal spite and malice, and was actionable *per se*. *Ibid.*

LICENSES. See Statutes, 4; Taxation, 1.

LIENS. See Principal and Surety, 4.

LIMITATION. See Estates, 2; Wills, 23, 27.

LIMITATION OF ACTIONS. See Insurance, Life, 4; Municipal Corporations, 6, 8, 10; Pleadings, 3; Corporations, 2.

LIMITATION OF ACTIONS.

1. *Limitation of Actions—Wills—Caveat—Coverture—Married Women—Statutes.*—Our statute, Rev., 3135, in express terms, repels the bar of the statute of limitations when the caveators to the will are *feme coverts*, for the duration of their coverture; and where the jury have found that the caveat had been filed more than seven years after the will had been probated, but during the full time the caveators were and still are under coverture, the statute may not be successfully pleaded.—*In re Hinton*, 207.

2. *Limitation of Actions—Judgments—Estoppel—Adverse Possession.*—A judgment in an action involving the disputed title of land will not estop the losing party from showing his title by twenty years adverse possession since the rendition of the judgment, under known and visible metes and bounds. *Shuler v. Lumber Co.*, 648.

3. *Same—Evidence—Questions for Jury—Trials.*—Evidence that the *locus in quo* had been in the possession of a party, claiming title by adverse possession, and that he had used the lands for the purposes to which they were adapted, for more than twenty years, under known and visible metes and bounds, and, in this case, that he had cleared and cultivated some of it every year, and had continuously for the re-

LIMITATIONS OF ACTION—*Continued.*

quired period, taken from the tract rail timber, board timber, locust pins, and tan bark, is sufficient to take the case to the jury; and a motion for a judgment as of nonsuit upon the evidence will not be sustained. *Ibid.*

LOCAL AND PRIVATE ACTS. See Constitutional Law, 11.

LUMBER. See Contracts, 1; Evidence, 2.

MAGNETIC NEEDLE. See Surveys, 1.

MALICE. See Injunction, 1.

MALPRACTICE. See Contracts, 19; Employer and Employee, 19.

MANDAMUS. See Removal of Causes, 2, 3, 4.

1. *Mandamus—Corporations—Public-Service Corporations.*—Mandamus is the proper remedy to compel a public-service corporation to perform the duties it owes for the public benefit. *Public Service Co. v. Power Co.*, 336.

2. *Mandamus—Public-Service Corporations—Corporations—Statutes.*—A petition in proceedings under the provisions of Revisal (Pell's), secs. 822-824, to force a public-service corporation to supply electricity to the plaintiff, and other users, alike, is to compel the performance of a continuous duty, and the remedy is by *mandamus*. *Ibid.*

3. *Same—Moot Questions.*—Where a public-service corporation owes the plaintiff, in *mandamus* proceedings, the duty to supply it with electricity, the declaration of the defendant that it will, as an accommodation only supply the plaintiff with electricity until a stated time, after which it will be discontinued, is a present denial of plaintiff's right to the service, and the proceedings may be maintained without waiting until the service has been discontinued; and a moot question is not therein presented to the court. *Ibid.*

MANDATORY INJUNCTION. See Removal of Causes, 4.

MANSLAUGHTER. See Homicide, 1, 3, 10; Criminal Law, 4.

MANUFACTURE. See Intoxicating Liquors, 2, 3.

MAPS. See Deeds and Conveyances, 4; Municipal Corporations, 4, 7.

MARRIAGE. See Divorce, 2, 3, 4, 5; Deeds and Conveyances, 10; Courts, 21.

MARRIED WOMEN. See Husband and Wife, 1, 2; Limitation of Actions, 1.

MASTER AND SERVANT. See Employer and Employee; Instructions, 3; Railroads, 15; Contracts, 18; Negligence, 15.

MATERIALMEN. See Principal and Surety, 8.

MECHANICS' LIENS. See Principal and Surety, 8.

MERGER. See Contracts, 15.

MINORS. See Employer and Employee, 12.

MISJOINDER. See Parties, 1.

MISNOMER. See Criminal Law, 12.

MISTAKE. See Pleadings, 4; Judgments, 9, 10; Deeds and Conveyances, 10.

MOOT QUESTIONS. See Mandamus, 3.

MORTGAGEE. See Mortgages, 11.

MORTGAGES. See Equity, 1; Judgments, 2, 7; Novation, 1; Principal and Surety, 1; Contracts, 16; Official Bonds, 1.

1. *Mortgages—Deeds and Conveyances—Warranty—Powers of Sale—Equity—Exoneration—Courts.*—The owner of lands conveyed it, taking at the time a mortgage to secure the purchase money, which has never been paid, and the grantee, H., sold the land to plaintiff by deed with full covenant and warranty of title, and the plaintiff reconveyed a portion of the land to H. by deed with warranty. The administrator of the original owner advertised the land for sale under the power of sale contained in the mortgage, and at the time thereof the administrator acceded to plaintiff's request to first sell the land not covered by his deed to H., which was done, and it brought a sufficient sum to pay off the mortgage debt. The defendants are the heirs at law of H. in the action of trespass involving the title to the lands: *Held*, the equity of exoneration applies to a sale under the power contained in the mortgage, without the necessity of the intervention of court, and the plaintiff's warranty in his deed reconveying a portion of the lands did not deprive him of his equitable right. *Berry v. Boomer*, 67.

2. *Mortgages—Sales—Powers—Presumptions—Deeds and Conveyances.*—The presumption of law is in favor of the regularity of a sale made under the power contained in a mortgage, and, there being no evidence to the contrary, the sale will not be declared void. *Ibid.*

3. *Mortgages—Sales—Powers—Subdivisions of Lands—Trustee.*—It is not necessary that a mortgage of lands provides that the sale shall be as a whole or in parcels for the same to be done, as such is within the sound discretion of the one authorized to sell upon default, and it is his duty to reasonably see that the sum to be realized shall be sufficient to pay the mortgage debt, and that other interested parties are injured as little as possible. *Ibid.*

4. *Mortgages—Deeds and Conveyances—Sales—Void—Voidable—Equity.*—Where interested persons are injured by a sale made under a power contained in a mortgage by a division of the lands into lots or parcels by the one exercising the power in an arbitrary or unfriendly manner, the sale is voidable, and not void, entitling the one so injured to the equity of setting aside the sale. *Ibid.*

5. *Mortgages—Trusts—Powers of Sale—Wrongful Sale—Damages.*—Where a mortgagor or trustee in a deed of trust of lands given to secure borrowed money executes a power of sale in the instrument after the money has been repaid, the instrument is void and the attempted sale thereunder is invalid, and the mortgagor may ratify the sale and accept the proceeds thereof in settlement; or maintain an action to set the sale aside when the purchaser is one with notice, or acting in repudiation of the sale, or sue the mortgagee or trustee for the wrong done him therein, and recover the true worth of the property. *Burnett v. Supply Co.*, 117.

MORTGAGES—*Continued.*

6. *Same—Equity—Estoppel.*—When the mortgagee or trustee in a deed of trust to secure borrowed money has wrongfully executed the power of sale of the mortgaged land, under the protest of the mortgagor that the money has been repaid, and thereafter the mortgagor seeks, in his action, to recover the true value of the land, his merely attending the sale wtihout protesting it is not alone sufficient to estop him in equity from successfully maintaining his action. *Ibid.*

7. *Mortgages—Extension of Time of Payment—Contracts—Consideration.* Promise of the mortgagee to extend time to the mortgagor for the payment of the mortgage note, without money, has no legal consideration, and is unenforceable. *Lewis v. Nunn*, 159.

8. *Mortgages—Serial Notes—Default—Tender.*—Where several notes secured by mortgage are in series, and due at different dates, with provision that upon default in payment of one, all shall become due and payable with interest, after such default in the payment of the note first becoming due, a tender of payment of the note thus due, and interest on all of them in the series, is an insufficient tender. *Ibid.*

9. *Mortgages—Sales—Silence of Mortgagor—Equity—Estoppel.*—When the mortgagor attends the sale of the land under the mortgage, and while claiming the sale to be unlawful by reason of tender of payment of the mortgage debts, stands by and says and does nothing to put bidders upon notice thereof, he will be estopped in equity, and not afterwards heard to impugn the title of the one purchasing for value and without notice of his claim. *Ibid.*

10. *Mortgages—Written Contracts—Contemporaneous Agreements—Options—Election of Rights.*—A mortgagor and mortgagee, contemporaneously with the execution of the mortgage, executed a collateral written contract, called an option by the parties, and signed only by the mortgagee, giving the mortgagee the right to purchase the lands described at a certain price, in the event of the mortgagor's default in the payment of any note in a series that the mortgage secured, with further provision allowing the mortgagor to pay this sum within a prescribed time. The mortgage was to enable the mortgagor to take up a prior mortgage, and to obtain an additional sum of money: *Held*, the mortgagee and collateral written contract should be construed together, and thus interpreted, the written contract was merely an option which the optionee might elect to exercise under its provisions, or sell the lands under the terms of his mortgage. *Ibid.*

11. *Mortgages—Deeds and Conveyances—Conveyance to Mortgagee—Fraud—Presumptions—Burden of Proof.*—The principle establishing a *prima facie* case of undue influence, and placing the burden of proof on the mortgagee to disprove it when the mortgagor has conveyed the mortgaged lands to him in fee simple in payment of the debt, does not apply when the mortgagee, the plaintiff in his action to recover possession, happens to be the president of a bank which holds a number of the defendant's notes secured by mortgage on his land, with the plaintiff as endorser, in the absence of any control or coercion on his part, and defendant has placed his defense upon a separate and distinct ground. *Chilton v. Smith*, 472.

MOTIONS. See Judgments, 1, 3, 4, 5, 6, 13, 18, 20; Removal of Causes, 1; Parties, 1; Pleadings, 5; Courts, 9, 17, 22; Corporation Commission, 2; Verdict, 1; Evidence, 8; Wills, 34; Appeal and Error, 18, 24, 25, 30, 33; Homicide, 6; Criminal Law, 13, 14; Indictment, 1.

Motions—Special Appearance—Merits.—A defendant entering a special appearance for the purpose of dismissing the action must confine himself to jurisdictional grounds, and to obtain the protection of his special appearance he must not plead to the merits of the cause or waive the court's jurisdiction by asking any favor, such as a continuance, or the like. *Barnhardt v. Drug Co.*, 436.

MOTIVE. See Homicide, 7.

MUNICIPAL ASSENT. See Railroads, 1.

MUNICIPAL BOND. See Statutes, 3.

MUNICIPAL CORPORATIONS. See Railroads, 4; Constitutional Law, 6, 8, 15; Usury, 1; Negligence, 4; Explosives, 2.

1. *Municipal Corporations—Sale of Public Building—Jail—Notice—Approval of Voters—Injunction—Elections.*—In the absence of a special statute, the mayor and councilmen of a town are unauthorized to sell the only building of the town in which the jail and municipal offices, etc., are located, without having given the thirty days notice required by Rev., 2978, or the approval of the qualified voters of the town, Rev., 2916 (6), and in such instances a permanent injunction is proper. *Carstarphen v. Plymouth*, 26.

2. *Municipal Corporations—Cities and Towns—Condemnation—Damages—Removal of Houses—Special Agreement.*—In the absence of statutory provision in this State authorizing it, a municipal corporation may not condemn the owner's land for a city street, and require him to move a dwelling therefrom onto his adjoining land; and it is necessary for the city to acquire and to compensate the owner for the house as well as for the land, in the absence of a special agreement. *Goldsboro v. Holmes*, 99.

3. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Dedication—Burden of Proof.*—Where the defendant is in possession of a strip of land, claimed by plaintiff to be a public street of the town, for the use of lots he owns therein, the burden of proof is on him to show his title to the *locus in quo*, otherwise he must fail in his action. *Lumberton v. Branch*, 249.

4. *Municipal Corporations—Cities and Towns—Maps—Plats—Statutes—Dedication.*—Where the original owner of lands plats them into streets and lots and conveys them to another to be sold by lottery, and lots are accordingly sold with reference to the plat, and under a private act of the Legislature a town was incorporated of the lands so sold, it is a dedication of the streets and public ways, appearing on the plat, to the use of the public. *Ibid.*

5. *Same—Evidence.*—Where the plaintiff claims that the defendant is occupying lands in an incorporated town dedicated and accepted for the use of a public street, an old plat found by a clerk of the Superior Court of the county, among the records of his office, etc., is not sufficient evidence of title when it appears that the defendant had been

MUNICIPAL CORPORATIONS—*Continued.*

from the first in adverse peaceful possession of the *locus in quo*, and that the street in question was only indicated as running in the direction of the plaintiff's land, and the plat was torn out so that it did not show thereon that it reached it, etc. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Streets—Adverse Possession—Limitation of Actions.*—Prior to the act of 1891 (Rev., 389), sufficient adverse possession would ripen the title to a street by its citizen against a municipal corporation. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Streets—Maps—Easements—Actions.*—The purchaser of a lot abutting on an open space shown on a plat, laying off the lands of the owner into streets, etc., may maintain an action in protection of his proprietary rights in the open space, by showing that he had purchased with reference to the map under assurance by the owner that such space should be left open for the use and benefit of his own lot, and of those similarly situated, and the remedy, on pertinent findings, by injunction, mandatory or otherwise, is open to him. *Haggard v. Mitchell*, 255.

8. *Same—Dedications—Limitations of Actions—Adverse Possession.*—Where an action involves the issues as to whether the plaintiff had the right to the use of an open space abutting his property by dedication of the original owner, in dividing his lands into streets, parks, etc., and selling the lots with reference to the plat, etc., or by adverse user by the public for twenty years, on a verdict of both of these issues in the affirmative, the result of the trial will not be disturbed unless the defendant can show error both on the finding of a dedication and of adverse user for twenty years on the part of the public. *Ibid.*

9. *Municipal Corporations—Cities and Towns—Dedication—Streets—Easements—Acceptance—Instructions.*—Where there is evidence to support the charge of the court to the jury, in effect, that the original owner of lands platted it into streets, open spaces, etc., and sold the lots with reference to the map and under assurance that these streets and spaces were to be left open for the use of the purchasers, with the intent to so dedicate them, and a purchaser of a lot abutting on one of these open spaces bought upon such assurances and with reference to the map: *Held*, on a verdict of the jury in the affirmative, and under a correct charge to the jury, when construed as a whole, an irrevocable dedication of the disputed open space is established so far as the seller is concerned, whether the general public has accepted and acted upon it or otherwise. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Streets—Public User—Limitations of Actions—Adverse Possession.*—An easement in an open space on a street may be acquired through open, uninterrupted, or continuous occupation and enjoyment adversely to the original owner by the public for twenty years, when the occupation is so general and of such a kind as to permit the inference, and apprize the owner, that the public has assumed control of his property and is exercising it as a matter of right. *Kennedy v. Williams*, 87 N. C., 6, cited, distinguished, and applied. *Ibid.*

11. *Same—Evidence—Nonsuit—Trials.*—Evidence, in this case that the plaintiff bought a lot of defendant shown by him, or his agent, on a

MUNICIPAL CORPORATIONS—*Continued.*

map made for the purpose of sale and with reference to the plat, and upon assurance that a space left open thereon should be kept open for the public use; that for twenty years or more the public had continuously used it, with evidence of ownership by the municipal authorities, etc., is *Held* sufficient upon the issue as to whether the *locus in quo* had been in public use, occupation and enjoyment as a matter of right, for more than twenty years, and to sustain a judgment in plaintiff's favor upon an affirmative finding on that issue. *Ibid.*

12. *Municipal Corporations — Bonds — Sales — Notice — Advertisement — "Financial Paper."*—A newspaper of general circulation regularly publishing news relating to financial matters, and notices of proposed sales of municipal bonds, is within the intent and meaning of a statute requiring that a certain notice of the sales of such bonds be published "in a financial paper or trade journal." *Kornegay v. Goldsboro*, 443.

13. *Municipal Corporations—Bonds—Private Sale—Public Sale—Sales.*—Where an issuance of municipal bonds has met the constitutional and statutory requirements, a sale thereof is not void for the reason they were sold at a higher price at a private sale than was obtained at previous offers to sell at public sales. *Ibid.*

14. *Municipal Corporations—Cities and Towns—Bonds—Sale—Notice—Publication—Statutes.*—Ch. 3, sec. 4, Public Laws of North Carolina, Special Session of 1920, amending sec. 2956, Consolidated Statutes, as to the advertisement or notice of the sale of municipal bonds, requiring, in addition, that such notice be published in "a financial or trade journal, published within the State of North Carolina, which regularly publishes the sale of municipal bonds," does not require that the newspaper designated be exclusively devoted to finance and trade, if the publication will likely give notice to the buyers of this class of securities, and it is sufficient if the newspaper in which the publication is made is one of general circulation in the State and carries advertisements relating to these matters as a customary and established feature of the issue. *Comrs. v. Prudden*, 496.

15. *Municipal Corporations—Bonds—Sales—Notice—Publication—Statutes —Financial Newspapers.*—Where the notice of sale of municipal bonds has been published in this State in a newspaper of local circulation only, and not in a newspaper of general circulation, carrying advertisements relating to these matters as a customary and established feature of the issue, the bonds so issued are void as between the contracting parties. *Ibid.*

16. *Municipal Corporations — Bonds—Notice — Publication — Purchaser — Parties—Matters in Fieri.*—The proposed purchaser of municipal bonds may refuse to take the bonds for which he is the successful bidder, on the ground that the statute has not been followed which requires advertisement in "a financial paper or trade journal," etc., the objection being between the original parties when the matter is *in fieri*. *Ibid.*

17. *Municipal Corporations—Gasoline—Ordinances—Cities and Towns—Fires—Corporations.*—A dealer in a city for the sale of gasoline, contained in tanks and in large quantities, in a warehouse at the corner

MUNICIPAL CORPORATIONS—*Continued.*

of two streets near the tracks of a railroad company, where locomotives are frequently passing, and with a spur track leading up to a warehouse, are amenable to the provisions of an ordinance of the city requiring that such business must be conducted under a license to be issued when the applicant has submitted to the proper city authorities its plans and specifications to be approved by its board; and this requirement is a valid one. *Stone v. Texas Co.*, 546.

18. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Defects in Sidewalks—Negligence—Subsequent Repairs—Identification—Evidence.*—In an action to recover damages of a city for a personal injury, caused to the plaintiff by the defendant's negligently having its meter box in a dangerous condition, with its top several inches below the level of the sidewalk, covered up or concealed by weeds or straw, so that the plaintiff did not see its imperfect condition and stepped therein to her injury, evidence is competent, when wholly confined to the location of the water meter box in question, a relevant matter in dispute, that the defendant made changes in the condition of this box after the occurrence of the injury complained of in the suit, but not as evidence of negligence. *Bailey v. Asheville*, 645.

19. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Defects—Negligence—Notice.*—Municipal corporations are required to keep their streets and sidewalks free from dangerous defects therein for the safety of those entitled to use them, and are responsible in damages to those who may be injured, when such damages are the proximate cause, and the municipalities have had sufficient previous notice thereof, either actual or implied from its neglect of its duty of supervision, for such length of time as should have put them upon sufficient notice to repair in time or to guard against the injury, or to be reasonably inferred by the jury from the facts in evidence. *Ibid.*

20. *Same—Evidence—Questions for Jury—Trials.*—Where there is evidence that a municipal corporation for several months had permitted its water meter box to become dangerous to pedestrians on its sidewalk, had had the meter read by its employee once each month, the last time being about five days before the injury for which damages are demanded in the action; that the top of the box was several inches below the grade of the sidewalk, and not discernible for the grass and leaves: *Held*, sufficient upon the issue of the defendant's actionable negligence; and as to whether it had, or should have had by proper supervision, notice sufficient for it to have remedied the defect and avoided the injury. *Ibid.*

MUNICIPAL ORDINANCES. See Negligence, 9.

MURDER. See Homicide, 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14; Trials, 2, 3; Criminal Law, 4.

NAVIGABLE WATERS. See Navigation, 1.

NAVIGATION.

Navigation—Navigable Waters—Fishing—Nets—Negligence—Instructions—Appeal and Error.—While vessels operating in pursuance of their

NAVIGATION—*Continued.*

trade have paramount right over fish nets set in the lane of navigation where the rights conflict, yet where both can be freely and fairly enjoyed, the right of navigation does not permit a trespass upon and injury to the fishing, and where the evidence is conflicting, the question of negligence depends upon whether, by the exercise of ordinary care, the vessel ought to have seen the nets of the plaintiff in time to have avoided striking them and causing the damages complained of in the action; and a refusal of a prayer for instruction to this effect is reversible error. *Mfg. Co. v. Mfg. Co.*, 69.

NEGLECT. See Judgments, 13.

NEGLIGENCE. See Appeal and Error, 23, 38; Evidence, 17; Damages, 1; Explosives, 1, 2; Contracts, 18; Municipal Corporations, 18, 19; Issues, 2; Criminal Law, 6, 7, 9, 10, 11; Carriers of Goods, 2; Instructions, 7; Employer and Employee, 1, 2, 4, 6, 8, 9, 10, 11, 12, 14, 16; Fires, 1; Navigation, 1; Railroads, 1, 2, 6, 7, 8, 10, 11, 14, 15.

1. *Negligence— Issues— Pleadings— Evidence— Fires—Damages.*—An answer to an issue, was "the plaintiff's land burned over by the negligence of the defendant, as alleged in the complaint?" refers to the negligence alleged and not to the number of acres of the plaintiff that were damaged. *McRae v. R. R.*, 223.

2. *Negligence— Evidence— Railroads— Fires—Sparks from Locomotive— Nonsuit—Trials.*—In an action against a railroad company to recover damages for setting fire to plaintiff's house by sparks from its locomotive, in bright daylight, evidence tending to show that eight or nine minutes after the passing of defendant's locomotive fire caught on the roof of plaintiff's house nearest the defendant's track, midway between the kitchen chimney and flue, the wind carrying large quantities of smoke from the locomotive drawing a heavy train, which was exhausting heavily, towards the plaintiff's house, and that the fires in plaintiff's chimney and stoves had died down early in the day, is sufficient upon the defendant's actionable negligence to take the case to the jury, and to deny defendant's motion to nonsuit; and testimony of witness that he had seen the smoke, but no sparks coming from the locomotive, at the time, does not exclude the inference by the jury that the locomotive was throwing them out with the exhaust. *Deppe v. R. R.*, 152 N. S., 79, cited and applied. *Reid v. R. R.*, 511.

3. *Same—Instructions.—Held*, the evidence in this action to recover of defendant railroad company damages caused the plaintiff for negligently setting fire to his house by sparks from its passing locomotive, did not justify the giving of defendant's requested instructions, that if "all the evidence were believed, the spark arrester was such as was approved at the time, and the engine was being handled by competent and skillful operatives, in a skillful and competent manner." *Ibid.*

4. *Negligence—Negligence Per Se—Municipal Corporations—Cities and Towns—Ordinances—Evidence.*—When a seller of gasoline, etc., has not complied with the requirements of a valid ordinance regulating such matters, in failing to get a license for the conduct of such business, and damages are directly caused thereby, without contributory fault, in setting fire to property of an adjacent owner, the

NEGLIGENCE—*Continued.*

violation of the ordinance is negligence *per se*, and whether it was the proximate cause of the injury resulting therefrom is a question of fact for the jury. As to whether the maintenance of such conditions is either a public or a private nuisance, *Quaere? Stone v. Texas Co.*, 546.

5. *Same—Evidence—Questions for Jury—Courts—Res Ipsa Loquitur.*—Where the defendant has stored in its warehouse tanks containing large quantities of gasoline for sale or distribution among its customers in a city, and maintains, without a watchman, its equipment in violation of a city ordinance, and there is evidence tending to show that a stream of gasoline, enveloped by a highly explosive vapor, flowed from the warehouse wherein the gasoline was stored towards and under a railroad track adjoining its property, where trains were constantly passing, it is sufficient evidence as to the negligence of the defendant to be submitted to the jury, in an action for the destruction by fire of a house of an adjacent owner of lands, upon the inference, which the jury could have drawn from the testimony, that the damage to plaintiff's property was proximately caused by contact of live sparks thrown out by the passing locomotives with the said stream of gasoline, or the carelessness in the use of matches or lighted cigars or cigarettes by pedestrians and others; and that there was evidence from which the jury could find that the defendant's negligence, in allowing the gasoline to escape from its premises, was the proximate cause of the explosion and the injury. The doctrine of *res ipsa loquitur* is explained and applied. *Ibid.*

6. *Same—Nonsuit—Rebuttal Evidence.*—Where the plaintiff's evidence tends to show that the defendant maintained, in violation of a city ordinance, a large supply station for the sale and distribution of gasoline in such manner as to be a menace to adjacent lands, and likely to be ignited by locomotives frequently passing on tracks near thereto, or by the careless use of fire by passersby, and that he has been damaged by the fire, and the defendant offers no evidence in rebuttal, the refusal of the defendant to explain, is a relevant and competent circumstance against it; and, upon the whole evidence, the refusal of a motion to nonsuit was proper. *Ibid.*

7. *Negligence—Explosives—Gasoline—Evidence—Nonsuit.*—Evidence that the defendant maintained a distributing plant containing large quanties of gasoline in tanks for its customers in a city at a street corner, without a watchman, and in violation of an ordinance, and that railroad tracks were located on one of these streets on which locomotives or trains passed frequently, and that a stream of gasoline was seen flowing from the defendant's warehouse under the railroad track shortly before the passing of one of these trains, is sufficient as furnishing a reasonable inference that either the explosion, causing damage to the plaintiff's adjacent or adjoining house, was at that time caused by fire from the locomotives, or the carelessness of passersby in the use of matches in lighting cigars or cigarettes, or otherwise; and a motion for judgment of nonsuit thereon is properly denied. *Newton v. Texas Co.*, 561.

8. *Same—Proximate Cause—Intervening Acts.*—Where the defendant has been negligent in maintaining a plant for the storage of gasoline for

NEGLIGENCE—*Continued.*

its customers in a city, under such circumstances as to sustain a verdict in the plaintiff's favor, the reasonable inference therein that the ignition of the gasoline was caused either by fire from passing locomotives, or by the carelessness of passersby in the use of fire, does not affect the continuing negligence of the defendant which produces the result, nor is the negligence of such persons attributable to the plaintiff, nor does it relieve the defendant of liability as an independent or intervening cause. If defendant's negligence concurred with that of another in causing the injury, defendant is liable. *Ibid.*

9. *Negligence—Municipal Ordinances—Explosives—Gasoline.*—While the municipal authorities may pass a valid ordinance for the protection of its property owners from fire, it does not protect a defendant in a civil action for damages from the effect of its violation in building and operating its plant, and the granting of a license, under the ordinance, for the maintenance of a large storage and distributing plant for the sale of gasoline, will not avoid liability on the part of the defendant violating the ordinance itself. *Ibid.*

10. *Negligence—Explosives—Evidence—Res Ipsa Loquitur—Gasoline.*—The doctrine of *res ipsa loquitur* applies where the evidence tends to show that the defendant's storage plant for gasoline, in large quantities, was under the care and control of the defendant, and that under circumstances tending to show its negligence, an explosion occurred therein to the damage of the plaintiff's property, which, under ordinary circumstances, would not have happened. *Ibid.*

11. *Negligence—Joint Torts—Actions—Judgments—Concurrent Negligence—Third Person—Damages.*—Where the joint and concurring negligence of two parties cause an injury to a third, and a recovery has been had of one of them in an action brought against both, the one paying the judgment has no right of action over, and may not recover of the other a proportionate part of the damages. *Power Co. v. Mfg. Co.* 597.

12. *Same—Electricity—Wires—Insulation—Contributory Cause.*—Where a company generating electricity has supplied its customers therewith over high voltage and deadly wires, transformed at the customer's plant, to wires of harmless voltage, except for the furnisher's negligence in not insulating its wires; and the user had made the place of danger accessible by elevating a railroad track for its use at its plant with the knowledge of the furnisher, the latter may not recover of the former its proportionate part of the damages paid under a judgment in an action against it alone, formerly brought by the administrator of a deceased eleven-year-old boy whose death it has caused; and a motion as of nonsuit upon evidence of this character should be granted. *Ibid.*

13. *Negligence—Actus Dei—Floods—Evidence—Trials.*—In the building of a dam and power house to generate electrical power on its own land and premises, the defendant is not responsible for damages caused to the plaintiff's land on the stream below, by a rainstorm or cloudburst of magnitude theretofore unknown at the place, especially when it appears that the dam remained intact after the storm, and there was no negligence in its construction or in other acts of the defend-

NEGLIGENCE—*Continued.*

ant relating thereto; and evidence of the extraordinary character of the storm was competent. *Rector v. Power Co.*, 622.

14. *Negligence— Railroads — Wrongful Death — Evidence — Questions for Jury—Trials.*—In an action to recover for the wrongful death of the plaintiff's intestate, an employee of a lumber manufacturing company, against his employer, and also against a railroad company, there was evidence tending to show that the plaintiff, with others, was engaged in "pinching" a carload of lumber along the railroad track to a point where lumber was piled so near the track as likely to be torn down by contact with a passing train, and that without signal or warning, and under circumstances that should have made the employees on the defendant's railroad train aware of the intestate's danger, they backed upon the car upon which the plaintiff's intestate was at work, to carry it away, in such manner as to cause the pinch bar being used by the plaintiff to be driven against his throat, causing injury and death: *Held*, sufficient upon the issue of defendant railroad's actionable negligence to take the case to the jury. *Tatham v. Mfg. Co.*, 627.

15. *Same—Employer and Employee—Master and Servant—Joint Torts—Nonsuit.*—In an action for the wrongful death caused by the alleged negligence of the intestate's employer and a railroad company, there was evidence tending to show that the foreman or boss of the employer had full opportunity to be aware of the danger of the co-defendant's train as it approached to connect with and take away a car of lumber, on which the intestate was engaged, in "pinching" or moving it upon the track to place it in position for the purpose, and, when the intestate heard the train approaching he started to desist, but was told by his foreman in charge of this work to keep at work, for the car "won't come on you," and in consequence the injury and resulting death was cause: *Held*, sufficient upon the issue of actionable negligence of the defendant employer; and there also being such evidence as to its codefendant, the railroad company, it was sufficient to be submitted to the jury upon the question of their joint tort, and a motion as of nonsuit was properly denied. *Ibid.*

16. *Negligence—Instructions. Jordan v. Power Co.*, 664.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 3, 4, 6, 8; Husband and Wife, 1.

NETS. See Navigation, 1.

NEWSPAPERS. See Statutes, 3; Courts, 16.

NEW TRIALS. See Courts, 1.

1. *New Trials—Appeal and Error—Nonsuit—Opinion of Supreme Court—Verdict Directing—Evidence—Trials.*—Where, on a former appeal from a judgment of nonsuit on the question of whether an employer had negligently failed to furnish his employee a safe place to work, the Supreme Court following its uniform ruling in considering only the evidence in plaintiff's favor, interpreted in the light most favorable to him, said the place in question could not, as a matter of law, be held a safe place, this expression does not justify a directed verdict on the appropriated issue on the new trial granted, where the further

NEW TRIALS—*Continued.*

evidence is conflicting as to whether the place was in fact a safe one under the principles of law applicable. *Hassell v. Daniels*, 37.

2. *New Trials—Appeal and Error—Substantial Injustice.*—Mere errors on the trial that have not worked substantial injustice to the appellant will not entitle him to a new trial. *Kennedy v. Trust Co.*, 225.

NONRESIDENTS. See Actions, 1; Summons, 1; Courts, 18; Removal of Causes, 5; Attachment, 5.

NONSUIT. See Employer and Employee, 12; Evidence, 15; Appeal and Error, 33.

NOTES. See Bills and Notes, 1, 2, 6; Husband and Wife, 1; Mortgages, 8; Novation, 1; Principal and Surety, 1, 2.

NOTICE. See Arbitration, 1; Bills and Notes, 2, 7; Statutes, 3; Carriers of Goods, 1; Judgments, 4; Municipal Corporations, 1, 12, 14, 15, 16, 19; Courts, 16; Employer and Employee, 17.

NOTICE TO SHOW CAUSE. See Courts, 5.

NOVATION.

Novation—Principal and Surety—Mortgages—Notes—Extension of Time—Contracts—Discharge.—The owner gave a chattel mortgage upon his property to E., and afterwards sold the property to plaintiff, who agreed to assume the mortgage without the consent of the mortgagee, and afterwards the plaintiff sold the property to one M., with whom the mortgagee E. entered into a written contract extending the time of payment of the mortgage debt, and to foreclose the mortgage then past due, upon certain conditions of payment, resulting in foreclosure: *Held*, the mortgagor and the plaintiff were discharged from their obligations under the mortgage by the agreement of the mortgagee with M., whether regarded as a novation or substitution of M. as a new paymaster, or whether they be considered as sureties. *Hamilton v. Benton*, 79.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 4, 7, 14, 15, 16, 18, 19, 21, 23, 25, 29, 33, 34, 37, 42; Pleadings, 2; Trials, 1; Instructions, 11.

OBSTRUCTIONS. See Courts, 5; Railroads, 14.

OFFICERS. See Appeal and Error, 35.

OFFICIAL BONDS.

Official Bonds—Deeds and Conveyances—Mortgages—Registration—Statutes—Purchasers—Bonds.—The mortgage or deed in trust permitted by Rev., 265, to be given in lieu of an official bond, is, as to proper registration, to be regarded as a mortgage, or deed in trust, and accordingly registered as the law requires, construing the statute strictly, as required; and its entry upon the records in the clerk's office as a bond, alone, without recording it in its proper place as a mortgage, is insufficient to give notice to, or priority of lien, over a deed of a subsequent purchaser of the land. *Hooper v. Power Co.*, 651.

OFFICERS.

1. *Officers—Public Officers—Prosecuting Attorney—Removal from Office—Criminal Law—Intent—Statutes.*—The proceedings before the judge of the Superior Court to remove a prosecuting attorney, sheriff, police officer, or constable from office, C. S., 3208, is of a civil nature for the protection of the public, and is not a criminal proceeding against the officer. *S. v. Hamme*, 684.

2. *Same—Property—Constitutional Law—Evidence—Admissions—Trial by Jury.*—The proceedings before the judge to remove a prosecuting attorney from office "for willful misconduct or maladministration in office," or on the other grounds stated in C. S., 3208, do not require an issue to be submitted to the jury. Upon the defendant's own admissions in this case, and evidence, he is guilty of the offense charged, which is sufficient to remove him from office; such office is not a property right under the provisions of the Constitution of North Carolina, Art. I, sec. 19. *Ibid.*

3. *Officers—Public Officers—Removal from Office—Statutes—Evidence.*—The evidence of a prosecuting attorney in proceedings before the judge to remove him from office, C. S., 3208, for misconduct, etc., is sufficient to sustain an order removing him when it admits that he attempted to induce, and did induce, a person to violate the statutes of our State in participating in acts made an offense for immorality, etc., whatever his intent may have been therein. *Ibid.*

4. *Same—Admissions—Petition to Remove from Office—Conviction.*—When a prosecuting attorney has been removed upon his own testimony from his office in proceedings before the judge, C. S., 3208, he may not complain that it was not in accordance with the specifications alleged against him in the petition, but upon the specifications in his own evidence, as he could not have been taken by surprise, or well have asked for an amendment to the petition, permitted by this statute in proper instances. *Ibid.*

OPINION. See Appeal and Error, 13; Instructions, 8.

OPTIONS. See Contracts, 3, 5, 9, 10; Mortgages, 10.

ORDER. See Clerks of Court, 1; Courts, S. 21; Appeal and Error, 1; Employer and Employee, 6, 27; Costs, 3.

ORDER NOTIFY. See Vendor and Purchaser, 2.

ORDINANCES. See Negligence, 4; Explosives, 2; Municipal Corporations, 17.

OUTLET. See Appeal and Error, 11.

OWNERSHIP. See Courts, 18; Attachment, 4.

PAROL. See Contracts, 6, 8, 12, 20; Trusts, 1; Evidence, 2; Waiver, 2.

PARTIES. See Actions, 1; Removal of Causes, 1, 5; Railroads, 13; Courts, 14, 19; Municipal Corporations, 16; Judgments, 15; Corporations, 3; Contracts, 16.

1. *Parties—Misjoinder—Pleadings—Motions—Arrest of Judgments.*—Objection to a defect or misjoinder of parties to the action must be made by demurrer when such appears on the face of the pleadings,

PARTIES—*Continued.*

or they will be deemed as waived; and when such defect does not so appear, by petition or answer, and a motion in arrest of judgment on these grounds will be overruled. *Lanier v. Pullman Co.*, 406.

2. *Parties—Judgments—Consent—Vendor and Purchaser.*—Where, under a valid consent judgment, the wife and children of the plaintiff have an estate in a part of the husband's lands, they are not parties necessary to the determination of his action to compel his vendee to accept his deeds to lands, including those affected by the consent judgment. *Morris v. Patterson*, 485.

3. *Parties—Railroads—Government Control—Director General of Railroads.*—Under the Federal Control Act the Director General of Railroads is, in effect, a receiver, and an action will therefore lie against him as such for damages for the actionable negligence of an employee of a railroad under Government control, and the railroad company is also properly joined as a party defendant. *Vann v. R. R.*, 659.

PARTNERSHIP. See Appeal and Error, 1; Removal of Causes, 5, 7.

PAYMENT. See Bills and Notes, 8; Estates, 5; Principal and Surety, 1, 4.

PEDESTRIANS. See Railroads, 2.

PER CAPITA. See Wills, 12, 35.

PERFORMANCE. See Statute of Frauds, 3.

PERJURY. See Subornation of Witnesses, 1, 2, 3, 4.

PERSONALTY. See Wills, 11.

PETITION. See Removal of Causes, 3.

PHYSICIANS. See Wills 10; Contracts, 19; Employer and Employee, 16, 19.

PLATS. See Deeds and Conveyances, 4, 9.

PLEADINGS. See Contracts, 15; Trials, 1; Wills, 34.

1. *Pleadings—Counterclaims—Torts—Contracts—Statutes.*—In an action by the principal against his agent for conversion or embezzlement the defendant may not set up as a counterclaim a breach by the plaintiff of his contract to assume an indebtedness of the defendant, the action arising in tort and the counterclaim on contract. Rev., 481. *Hamilton v. Benton*, 79.

2. *Pleadings—Nonsuit—Appeal and Error—Objections and Exceptions—Final Judgment.*—Exception to the refusal of the trial judge to grant a motion for judgment of nonsuit upon the pleadings should be noted, and appeal taken from the final judgment. *Duffy v. Hartsfield*, 151.

3. *Pleadings—Amendments—Courts—Wills—Caveat—Devisavit Vel Non—Limitation of Actions.*—It is within the sound discretion of the trial judge to permit amendments to the pleadings so as to set up the plea of the statute of limitations to the caveat of a will. *In re Hinton*, 207.

4. *Pleadings—Contracts to Convey Lands—Mistake—Fraud—Equity.*—The defense to an action to enforce specific performance of a contract to

PLEADINGS—*Continued.*

convey land, that there was a mistake made therein, or that the plaintiff had fraudulently and materially changed it, is an equitable one, and it is necessary to be pleaded in order to be shown by the evidence. *Goodman v. Robbins*, 239.

5. *Pleadings—Examination of Party—Statutes—Motions.*—In order to examine the opposite party to an action to obtain evidence upon which to prepare a pleading, it must be properly made to apear that the evidence sought is necessary to be thus obtained; and where the grounds of action are fully set out in the complaint, the order to examine should not be granted; the remedy, in proper instances, being by motion to make the allegations more specific, or for a bill of particulars, especially when the defendant seeks no affirmative relief. Rev., 866; C. S., 901, 902. *Jones v. Guano Co.*, 319.

PLEAS. See Judgments, 20; Criminal Law, 13; Subornation of Perjury, 4.

POLICIES. See Insurance, Life, 1, 3, 4; Employer and Employee, 7.

PONDS. See Deeds and Conveyances, 7.

POWERS. See Mortgages, 2, 3, 5; Wills, 13, 23; War, 1, 2, 3.

POWERS OF SALE. See Wills, 8, 21, 29, 34.

PRESUMPTIONS. See Appeal and Error, 1; Intoxicating Liquors, 4; Contracts, 1; Deeds and Conveyances, 5; Mortgages, 2; Wills, 7, 25; Mortgages, 11.

PRINCIPAL AND AGENT. See Contracts, 8; Carriers of Passengers, 1; Employer and Employee, 11; Summons, 1; Waiver, 1; Taxation, 1.

1. *Principal and Agent—Vendor and Purchaser—Fertilizer—Commissions—Estimates—Sales.*—A sale of fertilizer upon commission, whereunder the agent was to obtain estimated amounts from the purchasers, sales to be approved by the principal, shipped out direct to the purchasers when they sent in their orders, and the commissions *were due* only *when* the fertilizers had been paid for, does not entitle the agent to commissions on fertilizers on the estimates furnished, but only on such for which the orders were given and paid for by the purchasers. *Swift v. Produce Co.*, 27.

2. *Principal and Agent—Commissions—Vendor and Purchaser—Fertilizer—Wastage—Damages.*—When fertilizers are consigned to the selling agent, to be sold upon commission, title retained by the vendor, and the agent to render a statement to him at designated time, and return the unsold part of the consignment, the agent cannot recover for wastage by reason of the sacks not having been properly sewed, when it established that the agent had been paid his commissions in full. *Ibid.*

3. *Principal and Agent—Vendor and Purchaser—Contracts—Wastage—Fertilizer.*—A selling agent of fertilizer, upon commission, may not recover for wastage by reason of insecurely sewed sacks, when he has not complied with a stipulation in his contract providing that "all claims of whatsoever nature must be made within ten days of the receipt of the fertilizer, or they will not be recognized," and had not paid the vendees for any shortage by reason of such waste. *Ibid.*

PRINCIPAL AND SURETY. See Novation, 1; Actions, 3.

1. *Principal and Surety—Payment—Bills and Notes—Notes—Mortgages—Evidence—Husband and Wife.*—When money is loaned to the husband for the prosecution of his business, secured by a chattel mortgage on his own property, and the wife appears on the note as a joint maker, and the note is further secured by a mortgage on their lands held in entireties: *Held*, a payment of the note by the proceeds of an agreed sale of the personal property of the husband, also discharges the mortgage on the realty, and the liability of the wife as surety on the note; and as between the original parties it may be shown that the wife signed as surety and not as a joint maker thereof. *Kennedy v. Trust Co.*, 225.

2. *Principal and Surety—Bills and Notes—Notes—Evidence.*—A wife signing a note with her husband for a loan made to him personally by a bank may show, as between the original parties, that she signed as surety, and this principle applies to an attorney or agent of the payee, who, fully aware of the transaction, voluntarily paid the note and claims the equity of subrogation to the rights of the payee. *Ibid.*

3. *Principal and Surety—Equity—Exoneration—Bills and Notes.*—Where the wife is surety on her husband's note, secured by a chattel mortgage on his property, and also by mortgage on lands held by them both in entireties, evidence of the value of the chattels covered by the mortgage, privately sold, under an agreement with the mortgagee, that the proceeds should satisfy his debt, is admissible upon the question of exoneration of the surety, and the mortgagee having received the proceeds of the sale or the benefit thereof. *Ibid.*

4. *Principal and Surety—Judgments—Payment—Assignment—Trusts—Trustees—Liens.*—A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of statute, in order to preserve the judgment lien and enforce it for his reimbursement, is required to have it assigned to some third person for his benefit, and, in case of collateral security, he is in such instances also entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he is himself bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. *Davie v. Sprinkle*, 580.

5. *Same—Statutes.*—The Laws of 1919, ch. 194, gives the right or a surety against whom, with the principal debtor, a judgment has been obtained, the right, upon paying the judgment, to demand of the judgment creditor that the judgment be transferred to a trustee for his benefit, providing that the lien shall be kept alive for his benefit, and that the judgment debtor so refusing shall not thereafter be entitled to execution. *Ibid.*

6. *Same—Status Quo.*—Under a proper interpretation of the relevant parts of ch. 194, Laws of 1919, it is *Held*, that the refusal of the judgment creditor to transfer the judgment to some third person to preserve the lien thereof for the benefit of surety, tendering payment of the same, means from his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers to, and stands willing to, assign the judgment, as the statute requires. *Ibid.*

PRINCIPAL AND SURETY—*Continued.*

7. *Principal and Surety—Indemnity—Bonds—Beneficiaries—Actions.*—It is not required that the beneficiaries of indemnity contract should be named therein to recover thereon, when such is provided for in the bond by express stipulation, or by fair and reasonable intendment, construing together the bond and the contract it is intended to secure. *Dixon v. Horne*, 585.

8. *Same—Mechanic's Liens—Materialmen—Laborers—Contracts.*—A bond against liability on a contract given for the erection of a house given to the owner, is for the faithful performance of the contractor's contract, and that he will satisfy and save the owner harmless against costs and damage by reason of his failure so to do; and the contract, among other things, stipulates that the contractor shall furnish labor, material, etc., at a named price, and give bond for the faithful performance of the contract: *Held*, it included the laborers on and furnishers of material used in the house, and they, though not parties to the contract, may recover against the surety on the bond to the extent of their lawful claims. *Ibid.*

PRIVILEGE. See Libel and Slander, 3.

PROBATE. See Wills, 6.

PROBATE OFFICER. See Evidence, 13.

PROCESS. See Judgments, 6; Summons, 1, 2.

PROCESSIONING. See Courts, 2, 4; Issues, 1; Clerks of Courts, 1.

PROFITS. See Contracts, 5; Waiver, 1.

PROPERTY. See Officers, 2.

PROSECUTION. See Costs, 1.

PROXIMATE CAUSE. See Railroads, 9; Negligence, 8.

PUBLICATION. See Municipal Corporations, 14, 15, 16; Courts, 16.

PUBLIC OFFICE. See Appeal and Error, 35.

PUBLIC OFFICERS. See Officers, 1, 3.

PULLMAN COMPANIES. See Carriers of Passengers, 1.

PUNCTUATION. See Wills, 26.

PURCHASERS. See Judgments, 2, 4; Wills, 9; Municipal Corporations, 16; Estates, 13, 14; Deeds and Conveyances, 9; Contracts, 14, 16; Official Bonds, 1.

QUARANTINE. See Health, 1.

QUESTIONS FOR JURY. See Evidence, 5, 14, 16; Railroads, 7, 9, 15; Negligence, 5, 14; Employer and Employee, 14; Intoxicating Liquors, 2; Homicide, 6; Municipal Corporations, 20; Limitation of Actions, 3.

RAILROADS. See Carriers of Goods: Carriers of Passengers; Courts, 8; Fires, 1; War, 1, 3; Negligence, 2; Parties, 3.

1. *Railroads— Evidence— Negligence— Crossings — Gates — Watchman — Municipal Assent.*—It is incumbent upon a railroad company to take such reasonable precautions as are necessary to the safety of travelers at a public crossing, and, upon the issue of negligence, it is competent to show that there were no automatic alarms or gates at the crossing in plaintiff's action to recover damages, caused by a collision of plaintiff's automobile with defendant's train, it being for the jury to determine the question of whether the plaintiff's or the defendant's negligence was the proximate cause; and the assent of the municipal authorities that a watchman should be stationed at the crossing, who should give warning, is not conclusive upon the question. *Dudley v. R. R.*, 34.

2. *Railroads—Crossings—Collisions—Automobiles—Negligence—Proximate Cause—Superior Rights—Pedestrians.*—The liability of the defendant, whose train had a collision with the plaintiff's automobile at a public crossing depends upon whether the plaintiff's or defendant's negligence was the proximate cause of the injury; and a prayer for instruction, tendered by the defendant, which eliminates this principle, makes it the plaintiff's duty to recognize the prior right of the defendant to its roadway, is properly refused. The principle applying to a trespasser who was negligent after the defendant's engineer should have discovered his condition, *distinguished*. *Ibid.*

3. *Railroads—Judgments—Director General—Lessor and Lessee—Federal Statutes.*—When the Government, represented by the Director General, is a party defendant with a railroad company, under the Federal Control Act, a judgment against the Director General alone is not objectionable, the Government being the lessee operating the railroad, and the railroad company the lessor, permitting adjustments of balances due under the Federal statute, and a judgment could be taken against either or both. *Ibid.*

4. *Railroads—Street Railways—Charters—Municipal Corporations—Cities and Towns—Enlarged Limits—Governmental Powers—Streets and Sidewalks.*—The provisions of a charter granted by a municipality to a street railway company that it pave along and between its rails and turnouts, etc., in the same manner and materials, etc., as the municipality should use when improving its streets where the tracks run, applies to improvements of streets in added territory by an extension of the city limits, not alone under the conditions imposed by the charter, but also under the general exercise of the governmental powers of the municipality. *R. R. v. Power Co.*, 234.

5. *Same—Moving Track.*—Under a provision of a franchise given for a street railway by a municipal corporation that its tracks shall be located, wherever practicable, in the center of the street, and also under the general police or governmental powers generally exercised by the municipality, a city or incorporated town may lawfully require the railway company to remove a track it is operating on the side of a street near the sidewalk, to the center of the street. *Ibid.*

6. *Railroads—Crossings—Collisions—Negligence—Contributory Negligence —Instructions—Appeal and Error—Reversible Error.*—Where, upon the trial of an action against a railroad company to recover damages

RAILROADS—*Continued.*

for a personal injury sustained by one driving upon a railroad track at a street crossing in a town, there is evidence tending to show that the view of the plaintiff was obstructed by box cars the defendant had permitted to remain on spur or lateral tracks at the crossing; that the plaintiff knew of the frequent passing of trains at this place, and the train causing the injury approached without sounding its whistle or ringing its bell, and the plaintiff was prevented from seeing the train approach by the intervening box cars, or hearing it by reason of the noise of the running engine of his automobile, and that he did not come to a full stop before going on the track, but, not hearing or seeing the train, he increased the speed of his automobile, and was immediately struck upon passing the end of a box car, which would not have happened had he stopped his machine to investigate: *Held*, an instruction to answer the issue as to contributory negligence in the negative, if the plaintiff looked and listened before entering upon the track, under the circumstances, without reference to the law relating to his not stopping to ascertain the danger, is reversible error. *Kimbrough v. Hines*, 274.

7. *Railroads—Collisions—Negligence—Contributory Negligence—Crossings —"Stop, Look, Listen"—Evidence—Questions for Jury.*—While it is evidence of contributory negligence for the plaintiff to drive his automobile upon the defendant's track at a public crossing without stopping, it may not be so held, as a matter of law, when he slowly and cautiously had approached the track, had looked and listened, and was prevented from seeing the coming train by growth that the defendant had permitted to remain on its right of way, or from knowing that the train was approaching because of the failure of defendant's employees to sound the whistle or ring the bell of the locomotive. *Perry v. R. R.*, 290.

8. *Railroads—Collisions—Signals—Negligence—Evidence.*—It is the duty of the employees of a railroad company to give reasonable and timely notice of the approach of its train to a public crossing, by ringing the bell or blowing the whistle of the locomotive, or doing both, when the circumstances demand it, and its negligence in the failure to perform this duty may be shown upon the testimony of nearby witnesses to the effect that they did not hear the whistle or the bell at the time of the injury. *Ibid.*

9. *Same—"Stop, Look, Listen"—Proximate Cause—Questions for Jury.*— Upon evidence that the plaintiff did not stop on a public highway before entering on the defendant railroad company's right of way while driving an automobile, resulting in a collision with defendant's train, and that the plaintiff was prevented from seeing or hearing the approach of the train by the negligence of the defendant in failing to give warning by ringing its bell or blowing its whistle, and permitting growth to remain upon its right of way, and that the plaintiff was carefully observant and slowly driving at the time of the collision: *Held*, the question of proximate cause is presented upon the issue of contributory negligence. *Ibid.*

10. *Railroads— Negligence— Contributory Negligence — Crossings — "Stop, Look, Listen"—Signs.*—A sign maintained by a railroad company at its crossing with a public highway, for travelers thereon to "Stop,

RAILROADS—*Continued.*

look, and listen," has no other legal effect than to call to their attention the duty imposed upon them by law to exercise ordinary care for their own safety. *Ibid.*

11. *Railroads— Fires— Negligence— Evidence—Issues—Burden of Proof— Res Ipsa Loquitur—Instructions.*—Where, in an action to recover damages of a railroad for the negligence of the defendant in burning over plaintiff's lands, there is evidence that the injury was caused by sparks from the defendant's passing locomotive which started the conflagration, a *prima facie* case is established under the doctrine of *res ipsa loquitur*, and the burden of the issue remains with the plaintiff, the *prima facie* case being only sufficient evidence to carry the case to the jury and to sustain a verdict in the plaintiff's favor. An instruction to the jury which places upon the defendant the burden of satisfying the jury by a preponderance of the evidence that it was not negligent is error. *Page v. Mfg. Co.*, 330.

12. *Same—Appeal and Error—Reversible Error.*—It is reversible error for the trial judge to instruct the jury, in effect, that the burden of the issue did not remain with the plaintiff, in his action against a railroad company for negligently setting out fire from its passing locomotive to the injury of his land, where applying the doctrine of *res ipsa loquitur*. *Ibid.*

13. *Railroads—Federal Control—Director General—Parties.*—The Federal act for the Government control of the railroads during the war specifically gives a right of action against the carrier without joining the Director General of Railroads (sec. 10); and objection that an action sounding in tort against a railroad company is fatally defective in not making the Director General a necessary party, is untenable. *Semble*, the question as to whether he should be made a formal party is not a practical one in this case. *Lanier v. Pullman Co.*, 407.

14. *Railroads— Negligence— Contributory Negligence— Obstructed View— Smoke—Matters of Law—Courts—Trials—Obstruction.*—Upon the evidence of plaintiff, a boy 15 or 16 years of age, in his action against a railroad company, that after waiting at the end of a string of box cars on a lateral spur track to two main-line tracks of the defendant, for the passage of a freight train on one of the main lines, which threw out great quantities of smoke and cinders in passing, and while enveloped in smoke so he could not see, he attempted to cross the tracks and was immediately struck and injured by another train going in an opposite direction from the train throwing out the smoke, on the other main-line track, when he knew that defendant's trains were constantly running there: *Held*, the plaintiff, in going, as if blindfolded, upon the track, under the circumstances, was guilty of contributory negligence, the proximate cause of the injury, irrespective of whether the defendant's engineer, on the train which caused the injury, rang the bell or sounded the whistle as his train approached. *Lee v. R. R.*, 413.

15. *Railroads— Evidence— Negligence— Contributory Negligence—Trials— Questions for Jury—Master and Servant—Employer and Employee.*— Evidence that an employee of a railroad company, in the performance of his duties, and obeying the order of its foreman, left a place of safety on its train, provided for his return from work, boarded the

RAILROADS—*Continued.*

train as it was leaving, and was prevented from entering a car on the train because of its narrow door and crowded condition; and while thus being compelled to ride on its running board was struck and injured after going about three hundred yards, by a switch post placed about eighteen inches therefrom, and when the speed of the train had reached twenty miles an hour, and that in starting no whistle was blown or bell rung, is sufficient evidence of the defendant's actionable negligence, and also of the plaintiff's contributory negligence in not doing what was required of him to reach a place of safety or avoid striking the switch post, within the stated space, to take the case to the jury on both of these issues. *Hill v. R. R.*, 490.

RATES. See Corporation Commission, 1.

RATIFICATION. See Fraud, 1; Judgments, 14.

REBUTTAL. See Contracts, 12.

RECEIVERS. See Corporations, 3.

RECORDARI. See Courts, 22.

RECORDERS' COURTS. See Judgments, 21.

RECORDS. See Appeal and Error, 4, 7, 24, 41.

REFERENCE. See Appeal and Error, 19, 20, 21, 22.

REFORMATION. See Deeds and Conveyances, 10; Judgments, 7.

REGISTRATION. See Elections, 4; Official Bonds, 1.

RELEASE. See Contracts, 18.

REMAINDER. See Estates, 7; Wills, 8, 21.

REMEDY. See Constitutional Law, 17.

REMOVAL OF CAUSES. See Executors and Administrators, 1.

1. *Removal of Causes—Transfer of Causes—Courts—Jurisdiction—Motions—New Parties.*—Where a cause is removable, for improper venue, from the county in which it has been brought, and new parties defendant are made at their own request, such new parties are not prejudiced by the delay of the original defendant to take timely steps to remove the cause to the proper county, when they act promptly and within the time allowed by law. *Lumber Co. v. Lumber Co.*, 13.

2. *Removal of Causes—Mandamus.*—Proceedings for the issuance of the writ of mandamus in a State court is not a suit of a civil nature at law or in equity such as can be removed from the State to the Federal Court under the Federal Removal Acts. *Public Service Co. v. Power Co.*, 335.

3. *Removal of Causes—Mandamus—Petition.*—Where proceedings upon petition for a *mandamus* are sought to be removed to the Federal Courts under the Federal statute, the allegations of the petition for the writ must be taken as true. *Ibid.*

REMOVAL OF CAUSES—*Continued.*

4. *Removal of Causes—Mandamus—Public-Service Corporations—Corporations—Statutes—Injunction—Mandatory Injunctions.*—Where a public-service corporation denies its customer the present right to its services of a continuous nature, and declares it will only do so for a specified time as an accommodation, upon a petition to remove the cause to the Federal Courts, under the Federal statutes: *Held*, the remedy is by *mandamus*, Pell's Revisal, secs. 822-824, and, when sought, the cause is not removable upon the theory that in fact it was a proceeding for a mandatory injunction. *Ibid.*

5. *Removal of Causes—Federal Statutes—Partnership—Corporations—Parties—Nonresidents—Diversity of Citizenship—Torts—Contracts—Breach.*—Where one of the plaintiffs to a suit is a nonresident, as also the defendants, it may not be removed to the Federal Court by the defendants on the ground of diversity of citizenship; and this applies when the action is for damages for breach of contract, brought by several members of a partnership, who form an incorporated company after the occurrence of the breach of contract sued on. *Motors Co. v. Motors Co.*, 619.

6. *Same—Courts—Jurisdiction.*—Upon a motion to remove a cause from the State to the Federal Court, on the ground of diversity of citizenship, where it appears that the defendants were nonresidents, and the plaintiffs were a partnership, with one of its members a nonresident, and the action is for breach of contract, the mere fact that one of the plaintiffs signed the contract as "president" does not preclude the State court from inquiring into the fact of incorporation, and retaining the cause for a determination of this question. *Ibid.*

7. *Removal of Causes—Federal Statutes—Partnership—Corporations—Diversity of Citizenship—Courts—Jurisdiction.*—A partnership, by holding itself out as a corporation, does not thereby convert itself into one, and on petition to remove the cause to the Federal Court, for diversity of citizenship, wherein this question arises, the question of the plaintiff's fraud in making a misjoinder of parties to retain the jurisdiction of the State court, is one for the determination of the State court, and the cause is not at once removable to the Federal Court as a matter of the defendant's right under the Federal law. *Ibid.*

RENTS AND PROFITS. See Statute of Frauds, 3.

RES GESTAE. See Evidence, 13; Employer and Employee, 19; Homicide, 8.

RES IPSA LOQUITUR. See Railroads, 11; Negligence, 5, 10.

RESTRAINT ON ALIENATION. See Wills, 23.

REVISAL. (See Consolidated Statutes.)

59. (Laws 1919.) The change of the rule of evidence permitting dying declarations in evidence in actions for the wrongful or negligent death is valid. *Tatham v. Mfg. Co.*, 627.

265. Mortgage or deed in trust given in lieu of official bond must be registered as other like instruments, to be good as to purchasers, etc., who have registered them. *Hooper v. Power Co.*, 651.

REVISAL—*Continued.*

274. Has no application to judgments irregularly entered. *Gough v. Bell*, 268.

367. This section extending the time for commencing action in certain instances does not apply to the period in which the insurer is required to bring action to invalidate a noncontestable policy of life insurance after the death of insured and beneficiary is alive. *Hardy v. Ins. Co.*, 180.

389. Prior to 1891, title to a street would ripen by sufficient adverse possession in favor of a citizen against a municipal corporation. *Lumberton v. Branch*, 249.

408. Amended by statute, 1913. Wife may maintain action as for assault against her husband for forcing her and giving her venereal disease. *Crowell v. Crowell*, 516.

419. Suit to set aside deed in trust or to establish prior lien should be brought in the county in which the land is situated. *Lumber Co. v. Lumber Co.*, 12.

423-424. Suit to set aside deed of trust not brought where land is situated may be transferred there. *Ibid.*

423-424. These sections do not apply to the courts taking jurisdiction of transitory causes of action. *McGovern v. R. R.*, 219.

424. The Federal statute relating to suits by and against carriers under Government control as a war measure does not interfere with our State statute as to venue. *Hill v. R. R.*, 428.

481. The principal's action for conversion or embezzlement against his agent sounds in tort, and the latter may not set up in defense a counterclaim for damages for breach of contract. *Hamilton v. Benton*, 79.

507. Courts have full power within the statute to allow amendments to process and pleadings, correct misnomers, and insert other relevant matters. *Barnard v. Drug Co.*, 436.

531. Where the controversy is reduced to one unmistakable fact, objection to the charge that the judge did not state in a plain and concise manner the evidence and explain the law is untenable. *S. v. Willoughby*, 676.

535. Upon trial for murder, when there is evidence of the less offense, a charge which does not give the respective positions or instruct as to what constitutes each of them is erroneous. *S. v. Bryant*, 690.

535. Narrating related evidence in stating the contentions of the parties and explaining to the jury their relevancy to the issues is not the expression of opinion by the trial judge. *Newton v. Texas Co.*, 561.

535. In this case the charge was clear and comprehensive, stated the position of the respective parties, and is not objectionable in not explaining or declaring the law arising from the evidence. *Tatham v. Mfg. Co.*, 628.

590, 591, 554. Errors in the charge and the refusal to give special instructions, when properly raised and appearing of record, are deemed excepted to without appellant's filing formal objections. *Paul v. Burton*, 45.

REVISAL—*Continued.*

607. Appeal from order of justice of peace taxing prosecuting witness with costs, does not again put in jeopardy the defendant in a criminal action, and is allowable. *S. v. Cole,* 682.

614. Upon the clerk's transferring a processioning proceeding to the Superior Court for trial, without objection, a motion to remand for failure of defendant to raise an issue of title will be refused. *Exum v. Chase,* 95.

728. Slander is an injury to a person, and will sustain proceedings in attachment. *Tisdale v. Eubanks,* 153.

803. Controversy submitted without action does not confer on the parties the right to propound interrogatories to the court. *Herring v. Herring,* 165.

817, 818. Injunction bond does not limit recovery to amount of bond when injunction is sought with malice and without probable cause, and when damages in excess of amount of bond is sought, the plaintiff may elect to sue in independent action. *Shute v. Shute,* 386.

822, 824. The remedy to force a *quasi*-public corporation to perform its duty to supply plaintiff, and other users, without discrimination is by mandamus, and not removable to Federal Court on the theory it is a mandatory injunction. *Public Service Co. v. Power Co.,* 366.

866. Order allowing examination of opposite party to prepare pleading should not be made if the pleading filed is sufficiently explicit; the remedy, in proper instances, is by motion to make it more specific, or for bill of particulars. *Jones v. Guano Co.,* 319.

952. A void deed to the wife and a devise to her of her husband's lands does not put her to her election under the terms of her husband's will. *Elmore v. Byrd,* 120.

1297. On appeal from justice's court taxing prosecutor with costs, the Superior Court may inquire as to whether the prosecution was frivolous or malicious, or make such further findings, orders, and decrees as the justice of the case may require. *S. v. Cole,* 682.

1297. To tax prosecuting witness with cost requires a finding that prosecution was frivolous and malicious. *Ibid.*

1419. The jurisdiction of justice's court in actions to recover unliquidated damages not exceeding $200, claimed by contract, is not disturbed by elements of false warranty and deceit being involved, or upon the theory that the jurisdiction does not exceed $50 in actions sounding in tort. *Newell v. Barley,* 432.

1467. (Rule 2.) See reference to Revisal, sec. 507.

1492. A writ of *recordari* to a justice's court is improvidently granted defendant when he has failed to perfect his appeal within the statutory time, and this is imputable to the party and not his attorney. *Bargain House v. Jefferson,* 32.

1500. A nonresident plaintiff may maintain an action here against an initial and nonresident connecting carrier, the cause being transitory. *McGovern v. R. R.,* 219.

REVISAL—*Continued.*

1565. In actions for absolute divorce, it is only required that residence be alleged in affidavit. *Williams v. Williams*, 273.

1566. Under this section, before amendment, in wife's action for divorce *a mensa*, the judge may leave open counter allegations and award alimony, including attorney's fees. *Hennis v. Hennis*, 606.

1567. Amended by laws of 1919, gives right to wife for subsistence *pendente lite*, but not for attorney's fees. *Allen v. Allen*, 465.

1581. *Held*, under the facts of this case the testator's grandchildren took an estate directly from him. *Goode v. Hearne*, 475.

1590. Lands affected with a contingent interest and sold, the courts in that county will afford complete relief against the purchaser, and the court *ex mero motu* will dismiss an independent action brought in a different county. *Crawford v. Allen*, 245.

1590. Lands affected with contingent interests may be sold under conditions existing in this case; life tenant entitled to net income during her life; proceeds should be paid into clerk's office and reinvested in lands. *Ex parte Rees*, 192.

1631. The wife, who had executed a deed to land with her deceased husband, may testify, the grantee being alive, that he had taken from her the deed, awaiting his performance of a condition before delivery, and had had it recorded; and that in fact the deed had not been delivered to him. *Reece v. Woods*, 631.

1655-1657. It will be assumed on appeal that trial judge found sufficient facts to support his order allowing inspection and production of papers, nothing else appearing; and in this case, *Held*, the affidavit was sufficient, under the circumstances, to support the order. *Leroy v. Saliba*, 15.

1656. Motion to compel a public-service corporation to furnish plaintiff with certain contracts to show unlawful discrimination is to discretion of trial judge, and not reviewable on appeal when not abused. *R. R. v. Power Co.*, 422.

1656. Where public-service corporations hold themselves out to, and did sell electricity to other such corporations for resale, a motion for it to furnish contracts with others to show discrimination is for material matters relating to the issues involved. *R. R. v. Power Co.*, 422.

2105. The common-law principles that make husband liable for his wife's tort still obtain unless modified by statute; and he is now liable therefor when they are living together. *Young v. Newsome*, 315.

2107. A wife is not put to his election under the terms of her husband's will when the land conveyed to her by his deed is void. *Elmore v. Byrd*, 120.

2153. An instrument conforming to the negotiable instrument law does not affect a purchaser in due course for value with equities between the original parties, by a statement thereon of an executory contract, or of a warranty. *Critcher v. Ballard*, 111.

REVISAL—*Continued.*

2178, 2198, 2206, 2212. A negotiable instrument, payable to order, must be properly endorsed to shut out equities and defenses existing between the original parties. *Critcher v. Ballard*, 111.

2646. The negligence of the employer's vice principal causing damages without contributory fault of injured employee, falls without the rule of the fellow-servant act. *Midgett v. Mfg. Co.*, 24.

2916 (6), 2978. City authorities may not sell jail or municipal office building without giving thirty days notice or approval of qualified voters. *Carstarphen v. Plymouth*, 26.

2956 (amended by-laws 1920). Advertisement of sale of municipal bonds is sufficient if made in newspaper of general circulation carrying financial matters as a customary or established feature. *Comrs. v. Prudden*, 496.

3127 (2), 3113 (2). Statutes must be strictly followed to make valid holograph will, with the intention of writer that it be deposited for safekeeping. *In re Bennett*, 5.

3128, 3129. Judgment upon a will admitted to probate in common form, is conclusive evidence of its validity, until vacated on appeal or declared void by competent tribunal, unless some inherent defect appears upon the face of the proceedings. *Edwards v. White*, 55.

3135. Repels the bar of the statute of limitations when caveator to will remains under coverture. *In re Hinton*, 206.

3145. After the death of both husband and wife, lands devised to the husband and by him conveyed, are subject to the claim of after-born children of the marriage. *Howe v. Hand*, 103.

3271. Verdicts should be in the precise form required by statute, and specify in terms the degree of the crime of which the prisoner is convicted. *S. v. Bryant*, 690.

3274. Section provides for trial *de novo* on appeal from justice's court in both criminal and civil actions. *S. v. Cox*, 682.

3615, 3616. Subornation of perjury is a distinct offense from perjury, and triable independently. *S. v. Chambers*, 705.

RULES. See Wills, 26; Carriers of Passengers, 2.

RULES OF COURT. See Appeal and Error, 3, 30, 31, 36.

RULE IN SHELLEY'S CASE. See Deeds and Conveyances, 8; Estates, 12.

SAFE PLACE TO WORK. See Employer and Employee, 3, 8, 10, 11, 12, 14.

SALES. See Actions, 2; Mortgages, 1, 2, 3, 4, 5, 9; Contracts, 9, 14; Estates, 4, 5, 6, 14; Judgments, 2; Municipal Corporations, 1, 12, 13, 14, 15; Principal and Agent, 1; Wills, 11, 12; Usury, 1; Statutes, 3; Courts, 16.

1. *Sales—Mortgages—Void Foreclosure—Resale—Title.*—Where, under the power of sale contained in a mortgage or deed in trust, the purchaser is judicially ascertained to have acted for and as the agent of the mortgagee, he and the mortgagee may again sell the land under the continuing power contained in the mortgage, without the order

SALES—*Continued.*

of court to sell, and convey the title to the purchaser at the second sale. *Harrison v. Daw*, 21.

2. *Sales—Auction—Suppressing Bids—Deeds and Conveyances—Fraud.*—The purpose and policy of a sale at public auction is to obtain the worth of the property by free and fair competition among the bidders, and where one, in violation of his principle and by agreement or words and conduct reasonably designed and calculated to effect the result, has succeeded in stifling competition and procuring the property at a lower price, he will not be allowed to hold his bargain, and the sale and deed predicated upon it will be set aside. *Nash v. Hospital Co.*, 59.

3. *Same—Corporations—Pleadings—Demurrer.*—The minority stockholders of a corporation, after demand on and refusal by the corporation to do so, brought action in behalf of themselves and other shareholders, etc., to set aside a deed made to a purchaser of the lands sold at public auction under allegation that the purchaser had joined with others in a movement to purchase the property for the use of a hospital for the benefit of the public, and had secured a person of high standing and integrity in the community to bid for them up to a certain price; that after reaching that price the defendant privately instructed the designated bidder to bid to a higher price, and thinking he was doing so for the defendant and his associates, he did so, and the property was accordingly sold to him; that the defendant's associates, and those attending the sale, understood that the bidder was acting under the agreement until after the sale; that the property brought a grossly inadequate price, to the loss of the shareholders of the corporation: *Held*, sufficient to set aside the purchaser's deed, and a demurrer to the complaint was had. *Ibid.*

SAWDUST. See Deeds and Conveyances, 7.

SAWMILLS. See Contracts, 1; Evidence, 2.

SCHOOLS. See Elections, 1.

1. *Schools—School Districts—Taxation—Statutes—Elections—Approval of Voters—Constitutional Law.*—Under the provisions of Consolidated Statutes, sec. 5626, the board of commissioners of a county may form special school-tax districts without regard to township lines, and provide for a levy of a tax, when submitted to and approved by a majority of the voters in accordance with the statute. *Riddle v. Cumberland*, 321.

2. *Same—Ballots.*—Under a statute which sets out a form of ballot to be used at an election, the use of such form is directory and not mandatory, unless the statute so declares, this matter being within the discretionary power of the Legislature; and the forms prescribed by Consolidated Statutes, sec. 5626, "for special tax" and "against special tax" in an election for the formation of a special school-tax district, will not render the election invalid when a free and fair opportunity has been afforded the voters therein to express their will at the poles, and from the order calling the election and the notice thereof, and from the special facts and circumstances, it appears that the result of the election was in favor of the tax, though voted

SCHOOLS—*Continued.*

for upon forms of ballots reading "for" or "against consolidated schools" of a certain territory within the township. *Ibid.*

SERVICE. See Judgments, 6; Summons, 1, 2.

SLANDER. See Attachment, 2; Courts, 6; Libel and Slander, 1.

SOLDIERS. See Elections, 5.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT. See Judgments, 5.

SPECIAL APPEARANCE. See Courts, 6, 20.

SPECIAL PRIVILEGES. See Constitutional Law, 13.

SPECIFIC PERFORMANCE. See Contracts, 10; Statute of Frauds, 3; Estates, 10.

SPIRITUOUS LIQUORS. See Intoxicating Liquors.

STATUTES. See Courts, 2, 8; Actions, 2; Costs, 1; Appeal and Error, 1, 6, 7, 35; Criminal Law, 6; Attachment, 2; Instructions, 14; Bills and Notes, 3; Constitutional Law, 1, 2, 5, 9, 12, 13, 16, 17; Controversy Without Action, 1; Divorce, 1, 2, 3; Election, 1; Employer and Employee, 1; Husband and Wife, 1, 2, 4; Estates, 2, 4, 5, 6; Officers, 1, 3; Insurance, Life, 4; Judgments, 1, 5, 8; Limitation of Actions 1; Municipal Corporations, 4, 14, 15; Subornation of Perjury, 2; Pleadings, 1, 5; Criminal Law, 4; Railroads, 3; Mandamus, 2; Wills, 1, 9, 33; Schools, 1; Removal of Causes, 4; Corporation Commission, 2; Homicide, 3; War, 3; Evidence, 8, 10, 11; Official Bonds, 1; Injunction, 1; Intoxicating Liquors, 7; Courts, 16; Principal and Surety, 5; Taxation, 1; Health, 1.

1. *Statutes — Subsequent Statutes — Legislative Powers — Constitutional Law.*—A legislative enactment cannot control subsequent Legislatures upon the same subject when within the powers conferred by the Constitution. *Korncgay v. Goldsboro*, 442.

2. *Statutes —Related Statutes— General Statutes— Repugnancy— Exceptions.*—Legislative acts on the same subject are construed so as to be reconcilable when this can be done by fair and reasonable intendment, and a special act will control in its intent a general law, and held to be an exception when necessarily repugnant thereto. *Ibid.*

3. *Statutes—Interpretation—Municipal Bond—Sales—Notice—Newspapers —Impossibilities.*—A statutory requirement, in this case providing that the notice of the sale of municipal bonds shall be made by publication in "financial paper or trade journal, published within" this State, will not be so construed as to require an impossibility. *Comrs. v. Prudden*, 496.

4. *Statutes—Doubtful Meaning—Courts—Validity—Licenses—Automobiles —Taxation.*—It is a rule of statutory construction that the courts are inclined against an interpretation that will render a law of doubtful validity, and *quaere*, as to the validity of a statute giving to a manufacturer, or others, the exclusive privilege of selling any special make of automobiles after the same has been acquired and used by independent purchasers. *S. v. Barber*, 711.

STATUTES—*Continued.*

5. *Same—Amendments—Criminal Law.*—Construing ch. 90, sec. 72, Public Laws 1919, with the act subsequently passed at the Special Session of the same year, adding a provision for licensing second-hand dealers in automobiles when the manufacturer's tax of five hundred dollars has been paid and fixing the fee at fifty dollars, evidences the intent of the former law that taxing second-hand automobiles was not included in its provisions, though not applicable to the indictment in the present case, the alleged offense of selling a second-hand automobile without the license having been committed before the passage of the amendment. *Ibid.*

6. *Statutes—Amendments—Taxation—License—Automobiles.*—Section 85, ch. 90, Public Laws 1919, making it a misdemeanor for any one engaging in any business or practicing any profession for which a license is required by the act, by its express terms and accepted interpretation applies only where a license is provided for in other portions of the law, and not to the sale of second-hand automobiles, not included within the intent and meaning of sec. 72 of the same chapter. *Ibid.*

STATUTE OF FRAUDS. See Trusts, 1.

1. *Statute of Frauds—Contracts—Specific Performance—Sufficient Writings—Accepted Checks—Deeds and Conveyances—Equity—Fraud.*—Under a parol contract to sell a certain house and lot in a city, a check made to the seller in part payment of the purchase price thereof, with sufficient designation, and endorsed and collected by him, is a sufficient writing to enforce the performance of the contract within the intent and meaning of the statute of frauds, as is also a formal deed to the land made and executed by the seller and placed by him in the hands of his attorney or agent, to be delivered to the purchaser upon his performing the conditions imposed upon him by his contract of purchase. *Harper v. Battle*, 375.

2. *Same—Collateral Controversies.*—Where the writing is sufficient to enforce a contract to convey lands within the intent and meaning of the statute of frauds, a controversy between the parties as to which one should pay the taxes for the preceding or current year, relates to the meaning of the contract, and not to its existence or validity. *Ibid.*

3. *Statute of Frauds—Contracts—Specific Performance—Equity—Time of Performance—Rents and Profits—Court's Discretion.*—Where the jury has decided with the plaintiff in his suit to enforce specific performance of a contract to convey lands, and as to the time agreed it should be effective, it is not within the discretion of the trial court to disallow the rents and profits to the plaintiff from that date merely on account of some delay in demanding the deed, for he is entitled thereto as a matter of right. *Ibid.*

STENOGRAPHER'S NOTES. See Appeal and Error, 41.

STREAMS. See Deeds and Conveyances, 7.

STREETS AND SIDEWALKS. See Municipal Corporations, 3, 6, 7, 9, 10, 18, 19; Railroads, 4; Deeds and Conveyances, 9.

STREET RAILWAYS. See Railroads, 4.

SUBORNATION OF PERJURY.

1. *Subornation of Perjury—Perjury—Evidence.*—Upon a trial for subornation of perjury of a witness who had testified falsely in behalf of the defendant's son in a criminal action, it is competent for the State to show the commission of the act of perjury on the trial of the criminal action against the defendant's son and the defendant's threats and coercion resulting in the perjury of the witness, and such facts and circumstances in evidence on the son's trial that will tend to show defendant's motive therein and to corroborate the State's witness in the present trial for subornation of perjury. *S. v. Chambers*, 705.

2. *Subornation of Perjury—Perjury—Trials—Statutes.*—While subornation of perjury is accessional in its nature, it has been made an offense separate and distinct from perjury, triable independently (Rev., 3615), and punishable as if the person committing the offense had himself committed the perjury. (Rev., 3616.) *Ibid.*

3. *Subornation of Perjury—Definition—Perjury*—Subornation of perjury is where the accused has instigated or procured a person to testify knowingly, willfully, falsely, and corruptly, under oath administered by one lawfully qualified for the purpose, with the foreknowledge or belief that the testimony would be thus falsely given. *Ibid.*

4. *Subornation of Perjury—Perjury—Admissions—Burden of Proof—Instructions—Pleas—Confession and Avoidance.*—Upon the trial of an action for subornation of a witness on a general denial of guilt by the accused, an admission by him that the witness had been convicted of perjury by a court of competent jurisdiction, is not an admission by the accused that he had corruptly subserved him, and a charge by the court to the jury that the admission was in the nature of a plea of confession and avoidance places upon the accused the burden of showing he was not guilty of corruptly procuring the testimony, when the burden remains with the State throughout to show it beyond a reasonable doubt, and the instruction is reversible error. *Ibid.*

SUBSTITUTION. See Contracts, 7.

SUMMONS. See Judgments, 6; Courts, 13.

1. *Summons—Process—Service—Nonresidents—Principal and Agent—Corporations.*—Under the principle that valid service of summons can be made upon a nonresident, by service upon his agent here having charge or management of a branch of his principal's business requiring the exercise of his own judgment or discretion; it is held that service in this State, upon the agent of a nonresident furniture corporation, who had discretionary power or judgment in purchasing furniture, is valid in plaintiff's action to recover on a contract of sale of furniture made with the same person. *Furniture Co. v. Furniture Co.*, 531.

2. *Summons—Service—Process—Clerks of Court—Courts—Findings—Appeal and Error—Actions.*—Where the clerk of the court has refused defendant's motion to dismiss plaintiff's action for divorce, made on the ground that the summons had been issued less than ten days from the time set for its return, finding the fact to the contrary, which

SUMMONS—*Continued.*

was affirmed by the trial judge on appeal, such findings are not reviewable in the Supreme Court on appeal thereto, and the action of the lower court will be affirmed. *Hennis v. Hennis*, 606.

SUPERIOR COURTS. See Courts, 10, 14; Appeal and Error, 17; Costs, 2; Criminal Law, 5.

SURVEYS. See Trespass, 2.

Surveys — Magnetic Needle — Variation — Judgments — Boundaries.— To ascertain a dividing line between adjoining owners of land determined by judgment in 1885, as running from a certain point west, it is necessary to take into consideration the variation of the magnetic needle, which, by common knowledge, is different in various parts of the world; and when the only evidence by expert surveyors is that this variation in this locality is one degree for every twenty years, or the difference between due west then and now is north 88¼, an instruction that if the fact is so found by the jury upon the evidence to answer the issue accordingly, is a correct one. *McCourry v. McCourry*, 508.

SYNONYMOUS TERMS. See Wills, 22.

TAXATION. See Elections, 2, 3; Schools, 1; Constitutional Law, 6; Statutes, 4, 6.

Taxation—Automobiles—License—Principal and Agent—Statutes.—Chapter 90, sec. 72, Public Laws of 1919, requiring a license tax of five hundred dollars from manufacturers, or from corporations or persons offering for sale, etc., auto-vehicles in this State, authorizing such as have paid the tax to employ an unlimited number of agents to sell the machine designated in the license, upon a duplicate license issued with the agent's name therein on the payment of a fee of five dollars for each agent, was not intended to, and does not include a dealer in second-hand automobiles, but only contemplates the payment of the tax and the taking out of a license by the manufacturer, or in default thereof, by the dealer in new automobiles, with the right of the latter, in so doing, to appoint agents in the same manner and to the same extent as the manufacturer was authorized upon the payment of the five hundred dollar tax as provided by the statute. *S. v. Barber*, 711.

TAXES. See Elections, 5.

TENANTS IN COMMON. See Wills, 27.

TENDER. See Mortgages, 8; Elections, 5.

THREATS. See Homicide, 11.

TIMBER. See Contracts, 1; Deeds and Conveyances, 1; Evidence, 2; Estates, 8.

TITLE. See Deeds and Conveyances, 12; Issues, 1.

TOOLS AND APPLIANCES. See Employer and Employee, 11.

TORTS. See Pleadings, 1; Husband and Wife, 2; Carriers of Passengers, 1; Courts, 12; Removal of Causes, 5; Negligence, 11, 15.

TRAMROADS. See Fires, 1.

TRANSFER OF CAUSES. See Removal of Causes, 1.

TRANSFER TO TERM. See Clerks of Court, 1.

TRESPASS. See Deeds and Conveyances, 6.

1. *Trespass—Estates—Life Estates—Evidence—Nonsuit.*—A tenant for life in possession of the lands may recover nominal damages for trespass thereon, and a motion for judgment as of nonsuit upon the evidence is properly disallowed. *Lee v. Lee*, 86.

2. *Trespass—Evidence—Admissions—Survey—Court's Supervision.—Held*, under the admissions in this action of trespass, a certain portion of the land awarded to the defendant should be marked under the supervision of the court to avoid future litigation. *Ibid.*

TRIALS. See Courts, 7; Railroads, 14, 15; Evidence, 5; Negligence, 2, 13, 14; Municipal Corporations, 11, 20; New Trials, 1; Wills, 18; Employer and Employee, 12, 14; Intoxicating Liquor, 2; Homicide, 6; Issues, 2; Subornation of Perjury, 2; Limitation of Actions, 3.

1. *Trials—Issues—Pleadings—Appeal and Error—Objections and Exceptions.*—It is reversible error for the trial judge to submit an issue to the jury not raised by the pleadings, over the objection of a party, when both parties insist upon the submission only of the issue they have raised; as where the issue is as to whether the defendant had breached a condition subsequent in a conveyance of lumber growing upon the plaintiff's land by cutting or sawing timber near his fish pond, and thereby destroying the fish by the sawdust therefrom, and the issue submitted relates to a different cause created by statute applicable to the county alone, and not stated in the pleadings. *Hinton v. Vinson*, 393.

2. *Trials—Remarks of Counsel—Homicide—Murder.*—A remark by the solicitor when selecting a jury for trial for murder, that he understood the defendant did not deny the killing, is not objectionable as an improper one, when the sole defense was insanity. *S. v. Ward*, 693.

3. *Trials—Homicide—Murder—Insanity—Drunkenness—Questions and Answers—Appeal and Error.*—A question asked by the solicitor, on cross-examination on the trial for murder, defended on the plea of insanity, as to whether the defendant did not get into a high temper when drunk, is competent under evidence that he was drunk at the time of the homicide, and if otherwise, is not prejudicial when the witness has stated that he had never appeared to be dangerous when drinking. *Ibid.*

TRIAL BY JURY. See Arbitration, 2; Officers, 2; Judgments, 19; Criminal Law, 5.

TRUSTEE. See Mortgages, 3; Constitutional Law, 6; Principal and Surety, 4.

TRUSTS. See Mortgages, 5; Judgments, 14, 16; Principal and Surety, 4; Wills, 34.

Trusts—Parol—Deeds and Conveyances—Statute of Frauds—Frauds.—A parol trust cannot be established between the parties in favor of

TRUSTS—*Continued.*

the grantor in a deed conveying an absolute fee-simple title to lands, nor can such deed be converted into a mortgage without allegation and proof that a clause of defeasance or redemption was omitted therefrom by reason of ignorance, mistake, fraud, or undue influence. C. S., 938. *Chilton v. Smith*, 472.

TRUSTS AND TRUSTEES. See Bills and Notes, 1.

UNDUE INFLUENCE. See Wills, 10, 16.

USURY.

Usury—Municipal Corporations—Bonds—Sales—Chattels.—Usury laws may be changed at the will of the Legislature, and an act authorizing municipalities in a certain county to sell bonds for less than par is not objectionable as being in conflict with a general law applicable to the State; and especially so when the bonds in question have been sold to the best advantage to a purchaser, thus being dealt with as a sale of a chattel. *Kornegay v. Goldsboro*, 442.

VARIATION MAGNETIC NEEDLE. See Surveys, 1.

VENDOR AND PURCHASER. See Contracts, 8, 9; Evidence, 1; Instructions, 1; Principal and Agent, 1, 2, 3; Parties, 2.

1. *Vendor and Purchaser—Contracts—Breach—Measure of Damages—Nominal Damages.*—Where the purchaser of goods of a market value, wrongfully refuses to accept them according to his contract, under claim that they were not up to grade, and the vendor could have reasonably sold them at the place and time of delivery for the contract price, or more, the vendor can only recover nominal damages in his action, the measure of damages being the difference between the contract price and the market value at the time and place of delivery. *Cherry v. Upton*, 1.

2. *Vendor and Purchaser—"Order Notify"—Title—Goods Destroyed—Contract—Breach—Recovery.*—Title to goods shipped "order notify," bill of lading attached to draft, remains in the shipper until the draft is paid, and when the shipment is lost in transit the seller cannot recover of the purchaser the purchase price thereof. *Penniman v. Winder*, 73.

VENEREAL DISEASE. See Husband and Wife, 4.

VENUE. See Actions, 1, 2; War, 3; Executors and Administrators, 1.

VERDICT. See Appeal and Error, 8; Criminal Law, 1, 4; Bills and Notes, 8; Wills, 20; Courts, 9; Instructions, 12.

1. *Verdict—Motions—Verdict Set Aside—Court's Discretion.*—Motions to set aside a verdict as being against the weight of the evidence are addressed to the discretion of the trial judge, and not reviewable on appeal unless it is grossly abused. *Lanier v. Pullman Co.*, 406.

2. *Verdicts—Special Verdicts—Findings—Inferences—Criminal Law—Judgments.*—A special verdict on the trial of an action charging the defendant with violating the provisions of ch. 90, sec. 72, by engaging in the business of selling automobiles without a license, is defective when it does not find that the defendant was engaged "in the business

VERDICT—*Continued.*

of selling the same in the State," and a conviction cannot be sustained thereon, under the principle that such verdict must find sufficient facts to permit of the conclusion of law upon which the judgment rests, and that the trial judge is not permitted to find any fact, or inference of fact, necessary to the determination of the issue of guilt or innocence. *S. v. Allen*, 166 N. C., 267, cited and applied. *S. v. Barber*, 711.

VERDICT DIRECTING. See Employer and Employee, 5; Instructions, 2, 12; New Trials, 1; Spirituous Liquors, 2.

VERDICT SET ASIDE. See Wills, 5; Verdict, 1.

VICE PRINCIPAL. See Employer and Employee, 1, 6, 11.

VOLSTEAD ACT. See Intoxicating Liquors, 5.

VOTERS. See Elections, 2; Schools, 1.

VOTES. See Constitutional Law, 5.

WAIVER. See Bills and Notes, 2; Courts, 4, 20; Wills, 14, 19.

1. *Waiver — Contracts — Writing — Expenditures for Improvements on Lands—Principal and Agent—Division of Profits.*—Under a contract for the sale of lands for a present consideration paid by the sellers to the owner, with provision for an expenditure of a certain sum for improvement, to be increased on mutual agreement between the parties, in writing, the question of the waiver of the writer is one of personal privilege to be exercised by the owner, and to be shown as a matter of fact by the evidence, that he intended to relinquish this right by words or by acts calculated to induce the seller to believe that the owner had abandoned his right to require a written agreement as to such increased expenditure. *Allen v. Bank*, 608.

2. *Same — Parol Agreements — Acts and Conduct— Consideration— Contracts.*—A contract for the sale of land, after expressing a present consideration to be paid the owner, provided for an expenditure of $20,000 for improvements before a distribution of profits between the owner and his selling agents, and such further sum for development of the lands if agreed upon in writing. A parol agreement was made as to a further and much larger expenditure for such improvements, to the total amount of $204,000, with the knowledge and acquiescence of the owner: *Held*, a waiver by the owner of the requirement of a writing for the further expenditure, which must be paid before the distribution of the contemplated profits, allowing the owner to retain as a priority the sum of money paid him as the consideration for making the original contract of sale. *Ibid.*

3. *Same—Executors and Administrators—Personal Representatives.*—The waiver by the owner of lands, requiring a consent in writing, for improvements on the land by his selling agents, beyond a certain sum specified in the contract, is binding upon his executor, or personal representatives, after his death. *Ibid.*

WAR.

1. *War—Railroads—Powers—State Government—National Government.*—The authority, where war exists, to exercise all those extreme sovereign powers under the rule of war, recognized by the civilized

WAR—*Continued.*

world, is vested in Congress by the Constitution of the United States, with all means, not prohibited, that are appropriate to that end; and where it, legally exercised, comes in conflict with a State regulation, the power of the National Government is paramount. *Hill v. R. R.*, 428.

2. *Same—Courts—Conflict of Powers.*—It is within the peculiar province of the courts to see that the Federal and State Governments, in their original dual form, each exercise the powers and duties solely apportioned to it, so that the one will not interfere with the other where it is supreme, and the courts, wherever possible, will adopt a rule of construction which will prevent conflict between National and State authority. *Ibid.*

3. *War—Railroads—Powers—Federal Government—State Government—Statutes—Venue—Orders of Director General.*—The act of Congress placing common carriers under the control of the United States Government as a war measure, by providing that "actions at law or suits in equity may be brought by and against such carrier and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government," does not conflict with our State statute as to venue in a civil action against the carrier, Rev., 424; and if the orders of the Director General, Nos. 18 and 18a, requiring all suits or actions against carriers to be brought in the county or district of the plaintiff's residence are not authorized by the act of Congress, they are void as in contravention of the State law. *Ibid.*

WARRANTIES. See Deeds and Conveyances, 3; Descent and Distribution, 1; Mortgages, 1.

WASTAGE. See Principal and Agent, 2, 3.

WATCHMAN. See Railroads, 1.

WIDOW'S DISSENT. See Controversy Without Action, 2.

WILLS. See Appeal and Error, 5; Controversy Without Action, 2; Landlord and Tenant, 1; Estates, 1, 13, 14; Limitations of Actions, 1; Pleadings, 3.

1. *Wills — Holograph Wills — Letters— Statutes.*— For a letter wholly written and signed by a deceased person to be construed as his holograph will, the provisions of our statutes, Rev., 3113 (2) and 3127 (2), must be scrupulously observed and followed in all essential respects and with substantial precision. *In re Bennett*, 5.

2. *Same—Intent to Make a Will.*—A letter wholly written and signed by a deceased person, to operate as his holograph will, must show his present intention to will his estate, or his purpose to dispose of it after his death, and this intention must exist at the time of the writing; and an expression in the letter that the writer wanted the addressee thereof to have everything he had in the world, "and I will have it fixed if I can have the chance," etc., only indicates the purpose of the writer to make a will in the future, in favor of the addressee, to the effect stated, and the writing is upon its face invalid as a holograph will. *Ibid.*

WILLS—*Continued.*

3. *Wills—Holograph Wills—Deposited for Safekeeping.*—A letter written wholly by the testator, and signed by him, stating that he wanted the addressee to have all of his property, and that he "would have it fixed if he had the chance," bears no evidence upon its face that the writer intended that it should be deposited with any one for safekeeping, as required by our statutes, Rev., 3127 (2), and without further evidence of a request that it be kept, or preserved, or that it was other than any ordinary casual letter, it is insufficient in this respect as a holograph will were it otherwise sufficient. *Ibid.*

4. *Wills—Devisavit Vel Non—Evidence—Declarations—Rebuttal.*—Declarations of testator, who signed by crossmark to his alleged will, that the paper-writing was a forgery, and that he had not signed it, are competent in rebuttal of the evidence introduced in support of its genuineness. *In re Bailey*, 30.

5. *Wills—Devisavit Vel Non—Verdict Set Aside—Consent.*—The court will not set aside a verdict in an action *devisavit vel non* at the request of all the parties, for this would present a moot question, which the courts will not consider. *Ibid.*

6. *Wills—Probate—Common Form—Courts—Judgments—Collateral Attack.*—Where a will has been admitted to probate in common form before the clerk of the Superior Court, and no inherent or fatal defects appear upon the face of the proceedings, the judgment may not be collaterally attacked, but only in the court where the judgment was rendered, and in accordance with the statutory provisions enacted for such purpose; and the record and probate of the will is conclusive evidence of its validity until it is vacated on appeal or declared void by a competent tribunal. Rev., 3128, 3129. *Edwards v. White*, 55.

7. *Same—Presumptions.*—Jurisdiction of the court in admitting a will to probate is presumed, and acts or omissions affecting the validity of the proceedings and judgment must be affirmatively shown, and unless the want of jurisdiction, either as to the subject-matter or the parties, appears in some proper form, the jurisdiction and regularity of the proceedings leading up to the judgment will be supported by every intendment. *Ibid.*

8. *Wills—Estates—Remainders—Contingencies—Powers of Sale—Deeds and Conveyances.*—A testator devised lands to his two sons, J. L. and J. H., for life, and by codicil, added the name of the wife, upon the same conditions and limitations, to be equally divided, then to their children, and upon the contingency that should one of them die without leaving a child, then to the other son of the testator for life, and at his death to his children, and to revert to the testator's general heirs should the grandchildren die without issue; but a conveyance by the grandchildren would "be good" in the case of their death without children. Both J. L. and J. H., the two sons, being dead, the children of the latter and the grandchildren of the testator, together with their mother, would convey the purchaser a good fee-simple title, there being no possibility of future children of the marriage of J. H.; and that the clause in the will under which the conveyance was made would prevent the land going over under the prior clause of the will. *Jernigan v. Evans*, 87.

WILLS—*Continued.*

9. *Wills—Afterborn Children—Deeds and Conveyances—Purchasers—Statutes.*—A wife devised her lands to her husband, and afterwards children were born of the marriage. After the death of his wife the husband conveyed the lands in question to the defendant, and has since died. No provision having been made for the afterborn children, they entered suit for the lands against the purchaser: *Held*, they are entitled to recover under the provisions of Rev., 3145. *Flanner v. Flanner*, 160 N. C., cited as controlling. *Howe v. Hand*, 103.

10. *Wills—Caveat—Undue Influence—Suggestions to Make Will—Physicians.*—A suggestion by a physician to his patient to write a will, after telling him he would not live, is not evidence of undue influence to set aside the will made in consequence, when the mental condition of the testator was sufficient at the time, and he, without intimation from the physician or others, selected the beneficiaries and gave each of them the portion of his estate they were to take. *In re Lowe*, 140.

11. *Wills—Sale of Lands—Conversion—Equity—Personalty—Courtesy.*—When, under the direction in the will, the lands of the testator have been sold, the property becomes personalty, and not subject to the tenancy by the courtesy of the husband of a deceased beneficiary. *Ex parte Brogden*, 157.

12. *Wills—Devise—Sales—Named Beneficiaries—Equal Division—Per Capita—Equal Degree of Kin.*—A devise that the remainder of testator's property be sold and the proceeds equally divided between the named children of his "two sisters"; the children so named, without further light being shed upon this devise by other portions of the will, take *per capita*, the words, "my two sisters," being merely descriptive, and were this intent of the testator doubtful, the fact that the persons so designated were in equal degree of kin to the testator may be considered. *Ibid.*

13. *Wills—Power of Disposition.*—Where a devisee of a life estate, who also was given a general power in the will to dispose of it, has become, then, by descent, the owner of the reversionary interest, her right to alienate the property is an ordinary incident of her ownership, and is not restricted by the terms of the power, as the life estate and the reversion have become merged in her, thereby vesting in her the absolute ownership, regardless of the power. *Tillett v. Nixon*, 195.

14. *Same—Waiver.*—The devisee of a life estate in lands with a general power of disposition to take effect after the termination thereof, waives the right to exercise such power by her deed conveying her title thereto when it appears that she had acquired the reversion by descent. *Ibid.*

15. *Wills—Caveat—Devisavit Vel Non—Evidence—Competent in Part—Instructions.*—Evidence competent on the issue of the mental capacity of the testator to make the will in question will not be excluded because incompetent upon the issue of undue influence, when not asked to be confined by the propounders to its proper purposes. *In re Hinton*, 206.

16. *Wills—Caveat—Devisavit Vel Non—Mental Capacity—Undue Influence—Evidence.*—Evidence is sufficient to take the cases of *devisavit*

WILLS—*Continued.*

vel non to the jury upon the issues of mental capacity and undue influence upon the testator, in favor of the caveators, who are the daughter-in-law and her children, the grandchildren of the testator; that they were destitute at the death of their father, and one of the grandsons had appealed to the testator in his lifetime for help, who promised help in the future, but said he was then too poor and unable when he was a man of comparative wealth; that he had canceled a devise to them upon the face of the will, leaving them nothing, but all to the propounders, in good financial circumstances, and who were present at the trial and did not go upon the witness stand and deny the charge of the caveators of fraud and undue influence in procuring the will, etc. *Ibid.*

17. *Wills—Caveat—Instructions—Mental Capacity—Fraud.*—On the trial of the issues of *devisavit vel non* it is not reversible error for the judge to charge the jury, upon the evidence, that the testator must have had testamentary judgment, when considered with the charge as a whole, it appears by necessary implications he had instructed them accurately upon the question of "testamentary capacity" required by the principles of law applicable, and explained what he meant by the expression. *Ibid.*

18. *Wills—Caveat—Devisavit Vel Non—Nonsuit—Trials.*—The proceedings to caveat a will are *in rem* without regard to particular persons, and must proceed to judgment, and motions as of nonsuit, or requests for the direction of a verdict on the issues will be disallowed. *Ibid.*

19. *Wills—Caveat—Devisavit Vel Non—Cancellation of Item—Issues—Waiver.*—The caveators of the will waive their rights in an item thereof devising certain lands to them by submitting to its cancellation, and this renders the submission of an issue as to the cancellation unnecessary. *Ibid.*

20. *Wills—Caveat—Issues—Devisavit Vel Non—Verdict—Fraud.*—A will should be set aside when either the issue of mental capacity or of undue influence has been answered in favor of the caveators in proceedings of *devisavit vel non.* *Ibid.*

21. *Wills—Estates—Devise—Fee—Power of Sale—Remainders.*—A devise to a son in fee of two tracts of land, with power of sale and limitation, "but if he die without heirs possessing the land, or either tract," to the heirs of another of his sons, taken in connection with the will in this case construed as a whole: *Held*, a devise of the land with the power to convey a fee-simple title during the devisee's life, which, in the event of his not conveying either or both tracts, would carry the limitation over, as directed in the will, and the expression "without heirs possessing the land" referred to the ownership of the title of the first taker at the time of his death. *Carroll v. Mfg. Co.*, 366.

22. *Same—Children—Equal Division—Synonymous Terms.*—In construing the several devises in a will to ascertain whether or not it was the intent of the testator to divide his lands equally among his children, and to give to each the right to convey a fee, otherwise with limitation over: *Held*, under the will in this case, the terms, "if she died without heirs of her body, and owning the land," then over, and "to a son in fee if he die without heirs possessing the lands," etc., then

WILLS—*Continued.*

over does not indicate that the testator intended a different meaning by a difference in phraseology, and the terms are synonymous. *Ibid.*

23. *Wills—Interpretation—Fee—Powers—Restraint on Alienation—Estates—Executory Devise—Limitations.*—When, by proper interpretation, it may be seen by his will, construed as a whole, that the testator intended an equal distribution of his property among his children, a devise of his two certain tracts of land to his son, in fee, but if he die without heirs possessing the lands, or either tract, then to his brother: *Held,* the conveyance of the fee-simple title left nothing in the testator, to take effect by way of executory devise during the life of the first taker and the expression "but if he die without heirs possessed of said tracts of land then over" to the other son, was to free the devisee from any restraint on alienation, and he could sell and convey a good fee-simple title to either, or both of these tracts, failing which, at his death, the lands would go over to his brother. *Carroll v. Herring,* 369.

24. *Wills—Devise—Fee—Less Estate—Repugnancy.*—A devise of lands generally or indefinitely to a person with a power of disposition, or to him and his heirs and assigns forever, conveys a fee, and any limitation over or qualifying expression of less import is void for repugnancy, unless in the case of a contingent fee or substitution of one estate for another. *Ibid.*

25. *Wills—Interpretation—Particular Words—Presumption.*—Where it is apparent in the construction of a will, that a particular significance was attached by the testator to his use of a word or phrase, the same meaning will be presumed to be intended in all other instances of his use of the same word or phrase, nothing else appearing. *Ibid.*

26. *Wills—Interpretation—Technical Rules—Punctuation—Transposition of Words.*—Technical rules in cases of ambiguity will not prevail in the interpretation of a will over the evident intent of the testator, either expressly or by necessary implication, gathered from the language of the will, as a whole; and to effectuate this intent the court will, in proper instance, disregard punctuation, or transpose words or sentences. *Ibid.*

27. *Wills—Estates for Life—Limitations—Tenants in Common—Rents and Profits.*—A devise and bequest to testator's wife of all of my property, both personal and real, for life, excepting what I hereafter give, and at her death to "revert" to C. and his wife and their children, followed by a bequest to the wife of half of the bonds and money I may have at the time of my death, and one-half of the profits of my farm on which I live, and other farms rented out: *Held,* the intent of the testator was that his wife, for her life, should receive the full benefit of the rents and profits of the land, and at her death it was to go over to C. and his wife and children as tenants in common. *Chisman v. Chisman,* 379.

28. *Same.*—A devise and bequest to the wife of testator of all of his real and personal property for life except as thereafter disposed of in his will, with limitation over, followed by a bequest to her of one-half of his personalty and a devise of one-half of the rents and profits of his lands: *Held,* the devise of the lands in the first clause, included

WILLS—*Continued.*

the rents and profits for her life, which was not affected, or cut down, by the second clause, to one-half, but the second clause evidently referred to the rents and profits accruing during the year preceding the death of the testator. *Ibid.*

29. *Wills—Devise—Power of Sale—Words and Phrases—Synonymous Terms.*—Where the testator "advises" his executors to sell all of his houses to make an equal division among his children, excepting his home place, which he "wishes" a certain son "to own": *Held*, by the use of the word "advise," a discretionary power was given the executors to sell the houses, excepting the "home" place, which was to go to the son, under the terms employed, "wishes" him "to own," the intent of the testator being to use these terms, "advise" as a discretionary power to sell, and "wishes" the son "to own" as synonymous with the word devise. *Brown v. Brown*, 433.

30. *Wills—Interpretation—Intent—Equity—Election—Devise—Equal Distribution.*—A devise of the testator's "home" place to a son, expressing that there should be an equal division of all of his other lots among his children, and that the son so designated had been liberal in aiding him with money in "considerable" amounts: *Held*, the son may elect to cancel the indebtedness and take the fee to the "home" place under the will, it appearing that this construction would practically or more nearly carry out the testator's intent to equally divide his property among his children. *Ibid.*

31. *Wills—Interpretation—Intent.*—A will should be interpreted from the language in the instrument as a whole, to ascertain and enforce the intention of the testator, when not in violation of law; and in determining upon this intent each and every part thereof will be given significance, and apparent inconsistencies will be harmonized when it can reasonably be done by fair and reasonable interpretation, giving its language its natural and customary meaning unless it clearly appears that some other permissible meaning is intended. *Goode v. Hearne*, 475.

32. *Same—Ambiguity—Estates—Defeasible Fee—Early Vesting of Estates.* Where a defeasible fee in an estate is devised, and no definite time fixed for it to become absolute, the time of the testator's death will be adopted in the interpretation of the testator's intent as expressed in the will, unless it appears from the terms thereof that some intervening time is indicated between such death and that of the first taker; and in case of ambiguity, the courts are inclined to regard the first taker as the primary object of the testator's bounty, and will lean to the interpretation that tends to promote the early vesting of estates. *Ibid.*

33. *Same—Statutes.*—A devise in fee simple to the testator's two named children and her daughter-in-law of all of "my real estate," equally, and to the children of the daughter-in-law by her husband, the testator's son, the share of their mother's estate "in the event of her death"; and in a subsequent item a provision that the remainder of all other property, real and personal, shall be equally divided between these beneficiaries, and if the children of testator's daughter-in-law survive their mother, "they shall inherit her share of my property as provided in" the preceding item: *Held*, it was the intent

WILLS—*Continued.*

of the testator that the estate devised to the daughter-in-law should vest in her if living at the time of the death of testator, under the first item of the will, which is further shown by the expressions in the later clause, indicating that the grandchildren should inherit directly from the testator in the event their mother should predecease her. Rev., 1581. *Ibid.*

34. *Wills—Trusts—Powers of Sale—Deeds and Conveyances—Executors and Administrators—Qualifications—Pleadings—Dismissal of Action —Motions.*—It appeared in the allegations of the complaint that a testatrix devised her land in trust to the same person whom she named as executor under her will, giving the one so nominated the power to sell or dispose of her property in furtherance of certain trust powers declared. The will was duly probated and recorded, but the person so named not having formally qualified as executor, performed his duties as trustee in a manner free from criticism, and accordingly made conveyance of parts of the land to the defendants, the plaintiffs claiming this land as the heirs at law of the testatrix on the ground that the trustee, not having qualified under the will as executor, was without power or authority to act as trustee: *Held*, it was not essential that the person named as executor and trustee should have qualified as executor in order to perform the duties required of him as trustee, and upon the allegations of the complaint, the action was properly dismissed. *Murphy v. Reed*, 624.

35. *Wills—Devise—Estates—Per Capita—Intent.*—Nothing appearing in the will to the contrary, a devise to testator's wife of one-third of his lands for life, and at her death, "all of this property shall go to the heirs of N.," and to "the bodily heirs of J.," carries the land to the heirs of N.," and the "bodily heirs of J.," upon the termination of the life estate devised to the wife, *per capita* and not *per stirpes;* and this interpretation is especially applicable when construing the will as a whole, and in its connected parts, the language of the testator manifestly imports this intent. *Mitchell v. Parks*, 634.

36. *Wills—Withdrawal of Issues—Courts—Intimation of Opinion.*—When a caveat to a will has been filed it is not an intimation of opinion on the evidence for the trial judge to withdraw the issues of mental capacity and undue influence from the jury and leave only the general issue of *devisavit vel non*, when there was no legal evidence to sustain the issues withdrawn. *In re Morgan*, 666.

WIRES. See Negligence, 12.

WITNESS. See Courts, 7; Employer and Employee, 3; Evidence, 17; Appeal and Error, 39.

WORDS AND PHRASES. See Wills, 25, 26, 29; Deeds and Conveyances, 7.

WRITINGS. See Evidence, 2, 8.

WRONGFUL DEATH. See Negligence, 14.